From the Editor-in-Chief
Tim Iglesias ..................................................................................................................... v

From the Chair
Amy M. McClain ........................................................................................................... ix

From the Reading Room
The Fight for Fair Housing: Causes, Consequences and Future Implications of the 1968 Federal Fair Housing Act
Review by Tim Iglesias ..................................................................................................... 1

Digest of Recent Literature
Shanellah Verna, Adam Norlander, Alec Rubenstein, and Katherine C. Bailey .......... 19

Organization Profile
Lone Star Legal Aid: Responding to Legal Needs in the Face of a Disaster
Clarissa Ayala ................................................................................................................ 23

Fair Housing Act at 50
Leveraging the Besieged Assessment of Fair Housing Process to Create Common Ground Among Fair Housing Advocates and Community Developers
Thomas Silverstein and Diane Glauber ........................................................................ 33
An Evolving Fair Housing Movement: Forging New Partnerships and Agendas Across Policy Areas
Megan Haberle ............................................................................................................... 45
Threading the Needle of Fair Housing Law in a Gentrifying City with a Legacy of Discrimination
Tim Iglesias .................................................................................................................... 51
When Opportunity Knocks: Working with State Housing Agencies to Promote Desegregation Within the LIHTC Program
Kara Brodfuehrer and Renee Williams ........................................................................... 67
Dismantling the Narratives that Constrain Public Support for Fair Housing: The Urgent Need to Reframe the Public Conversation to Build Public Will
Tiffany A. Manuel, PhD ............................................................................................... 87
Opportunities and Challenges in the New Administration
  Tax Reform and Its Consequences for Affordable Rental Housing
  Michael Novogradac, Scot Keller, Peter Lawrence, and Mark Shelburne .......... 107

  Housing Finance Agencies: Opportunities and Challenges in 2018
  Carlie J. Boos ........................................................................................................ 129

  Achieving Housing Choice and Mobility in the Voucher Program:
  Recommendations for the Administration
  Deborah Thrope .................................................................................................... 145

  Strategies to Address Homelessness in the Trump Era: Lessons from
  the Reagan Years
  Maria Foscarinis .................................................................................................... 161

Article
  The Challenge of Housing Affordability in Oregon: Facts, Tools and
  Outcomes
  Paul A. Diller and Edward J. Sullivan ................................................................. 183
Affordable housing, fair housing, and community development are currently in the throes of deep uncertainty. This issue explores the problems and offers thoughtful, grounded suggestions for moving forward. In addition to our regular features and a comprehensive article on affordable housing in Oregon, this issue includes nine essays, five marking the 50th anniversary of the passage of the federal Fair Housing Act and four more on the theme of opportunities and challenges for affordable housing, fair housing, and community development in the new administration.

“From the Reading Room” features my review of a new important book on fair housing law, *The Fight for Fair Housing: Causes, Consequences and Future Implications of the 1968 Federal Fair Housing Act*, edited by Gregory Squires, a professor of sociology, public policy, and public administration at George Washington University. The book makes two major contributions: it advances the argument that fair housing law is valuable for everyone, not just members of protected classes; and it presents a very dynamic and comprehensive view of racial residential segregation.

Fair housing law and its complications are the common theme of five essays. In *Leveraging the Besieged Assessment of Fair Housing Process to Create Common Ground Among Fair Housing Advocates and Community Developers*, Diane Glauber and Thomas Silverstein, Co-Director and Associate Counsel, respectively, of the Fair Housing & Community Development Project of the Lawyers’ Committee for Civil Rights Under Law, demonstrate with specific examples that fair housing planning can facilitate meaningful collaboration between community developers and fair housing advocates both within and outside the zero-sum game of limited federal funding. In a similar vein, Megan Haberle, Director of Housing Policy at the Poverty & Race Research Action Council, offers hope and guidance in her essay, *An Evolving Fair Housing Movement: Forging New Partnerships and Agendas Across Policy Areas*. Recognizing the need to both defend hard-won gains at the federal level and to explore new opportunities at the state and local levels, Haberle encourages community developers, fair housing advocates, and policy makers to collaborate creatively across traditional issue areas, e.g., housing policy, educational policy, environmental justice, and infrastructure policy, to dismantle residential segregation.

*Tim Iglesias is Professor of Law at the University of San Francisco School of Law. He is co-author of the Legal Guide to Affordable Housing Development Law (ABA 2011) and numerous articles. He welcomes comments from readers at iglesias@usfca.edu.*
In Threading the Needle of Fair Housing Law in a Gentrifying City with a Legacy of Discrimination, I share the interesting story of a conflict between fair housing law and a local preference intended to stem further exodus of African Americans from San Francisco that erupted in the context of HUD’s review of an affirmative fair housing marketing plan for a new senior housing development. After a great deal of back and forth, San Francisco and HUD crafted a creative solution that might have utility for cities in similar situations.

Renee Williams and Kara Brodfuehrer, Staff Attorneys at the National Housing Law Project, contribute When Opportunity Knocks: Working with State Housing Finance Agencies to Promote Desegregation Within the LIHTC Program. This essay reflects on the challenge of implementing HUD’s balanced approach and examines how California is addressing the historic patterns of siting LIHTC units in segregated, high-poverty areas; how stakeholders had an impact in California’s new approach; and what factors housing agencies and stakeholders in other states who seek to use the LIHTC program as a means of affirmatively further fair housing should consider.

And, in Dismantling the Narratives That Constrain Public Support for Fair Housing: The Urgent Need to Reframe the Public Conversation to Build Public Will, Tiffany A. Manuel, Vice President for Knowledge, Impact, & Strategy at Enterprise Community Partners, Inc., first draws on contemporary public opinion research to analyze the limitations of common approaches to promote fair housing and affordable housing development and then offers concrete suggestions for reframing our messages to be more likely to engender support.

This issue continues the theme begun in Volume 26, Number 2 on the opportunities and challenges to affordable housing, fair housing, and community development under the current administration.

In their essay Tax Reform and Its Consequences for Affordable Rental Housing, Michael Novogradac, Scot Keller, Peter Lawrence, and Mark Shelburne, all from Novogradac & Company LLP, review the tax changes included in the final tax reform bill that are particularly relevant to the use of the LIHTC for the production and preservation of affordable rental housing.

Readers may associate state housing agencies primarily with drafting Qualified Allocation Plans and distributing tax credits. In her essay Housing Finance Agencies: Opportunities and Challenges in 2018, Carlie Boos, Program and Policy Manager at the Ohio Housing Finance Agency, carefully elucidates the many other roles and interests of state housing finance agencies and then details her organization’s agenda for 2018.

In Achieving Housing Choice and Mobility in the Voucher Program: Recommendations for the Administration, Deborah Thrope, Supervising Attorney at the National Housing Law Project, provides a wide-ranging set of policy recommendations to HUD to address voucher families’ key barriers to housing choice and mobility.

Finally, in Strategies to Address Homelessness in the Trump Era: Lessons from the Reagan Years, Maria Foscarinis, Founder and Executive Director
of the National Law Center on Homelessness & Poverty, draws upon her extensive and rich personal experience to give a historical perspective, reminding us that “change is possible even in the face of seemingly insurmountable odds.” She then evaluates the strengths and potential of the current movement to end homelessness.

Paul Diller, Professor of Law at Willamette University, and Edward Sullivan, a former Instructor in planning law at Willamette University, contribute a broad analysis of Oregon’s unique land use planning system and its impact on housing affordability in their article, *The Challenge of Housing Affordability in Oregon: Facts, Tools and Outcomes*. They place Oregon’s system in the national context, trace its evolution, and explore policy and legal tools for addressing the state’s current affordable housing crisis.

This issue’s organizational profile features Lone Star Legal Aid, a non-profit law firm located in Houston, Texas, that is the fourth largest free legal aid organization in the United States. LSLA’s Communications Director Clarissa Ayala shares the dramatic and amazing work that LSLA performed after Hurricane Harvey, in collaboration with Daniel & Beshara, P.C., and its ongoing assistance to survivors of that disaster.

In this issue’s Digest, four associates—Shanellah Verna of Ballard Spahr LLP, Adam Norlander of Klein Hornig LLP, and Alec Rubenstein and Katherine C. Bailey from Robinson & Cole LLP—summarize five important publications. The topics range from high-level analyses of housing problems and residential integration to detailed evaluations of the federal housing voucher program and an outcome-based contracting initiative called Pay for Success.

On behalf of past and present Journal editors and readers I want to thank Sharon Wilson-Geno, currently Executive Vice President, National Services and Chief Operating Officer of Volunteers of America, for her excellent service in writing the *Heard from HUD* column for the last several years. And, I want to welcome Cynthia Langelier Paine and Schuyler Armstrong, Special Counsel and associate, respectively, at Katten Muchin Rosenman LLP, who have generously offered to take on this important and challenging task.

I welcome feedback from readers. Please email me at iglesias@usfca.edu.
Community development, as an essential element of driving job creation, goes hand in hand with affordable housing. The ability to afford a decent and safe home in which to live depends on having access to the funds needed to pay for that home. As an organization, members of the Forum on Affordable Housing and Community Development Law need to be on guard for efforts that make it harder for low-income people to gain entry to affordable housing and secure jobs with livable wages.

As we know, the common industry standard for assessing whether one’s income is adequate to cover the cost of rent is if the rent comprises 30 percent or less of the occupant’s gross income. Some call into question the efficacy of this measurement, noting that it may be better tied to whether occupants have the means of saving sufficient funds to cover their overall housing expenses and debt obligations for a three to six month timeframe should they become unemployed.\(^1\) However, this 30 percent standard provides a uniform approach to determining rent affordability that can be applied across various affordable housing platforms. Based on this standard, we understand that the cost of housing is simply unaffordable for workers being paid minimum wage. A worker paid the federal minimum wage of $7.25 an hour earns an annual income of $15,080 based on a 40-hour work week with no time off for vacation, illness, or other needs. The average rent for a modest two-bedroom apartment would require an hourly wage of $21.21 when applying the 30 percent of gross income standard.\(^2\) Under current circumstances, low-income families would need to work a total of 94.5 hours a

---


For low-income households, the greater the percentage of gross income that must be dedicated to housing, the fewer the resources available to life’s essentials such as health care, food, clothing, and transportation. Housing costs also restrict the resources available for educational opportunities to improve one’s chances of finding more remunerative and more sustainable employment.

Federal policies and programs associated with mandatory rent payments and access to fair wage jobs can offer a great deal in supporting a low-income family’s growth and movement toward self-sufficiency. Placing reasonable expectations on the amount of income dedicated to rent and enhancing access to job training and quality jobs are key. Recent indications suggest that the current U.S. Department of Housing and Urban Development (HUD) administration is considering introducing legislation to raise the 30 percent of gross income threshold to 35 percent of gross income. It appears HUD may be considering a requirement that households pay the greater of 35 percent of gross income or $152.25 per month. Setting the minimum rent at $152.25 would be three times greater than the current minimum rent and would add a level of burden facing low-income families, negatively impacting efforts to achieve sustainability.

At the same time, the Department of Labor is considering certain actions that would have the effect of undermining the ability of workers to realize a livable wage. For example, the Labor Department released proposed regulations in December 2017 to unwind rules that prevent employers from collecting workers’ tips and allocating those tips for any purpose. Under the proposed regulations, employers could reallocate tips to pay wages for other employees that were previously paid from the employers’ revenues. The pay for employees who had relied on tips for a portion of their compensation could be reduced to the federal minimum wage.

Also, the general counsel for the National Labor Relations Board (NLRB) recently indicated he may pursue settlement of a case that the

---

3. Id.
6. Id.
NLRB has been pursuing over the last three years. If prosecuted to its end, the case could find that McDonald’s was a joint employer that illegally harassed and terminated franchisees’ employees involved with the “Fight for $15” effort that sought stronger wages. The NLRB’s case relies on McDonald’s hiring procedures and provision of training for franchisees concerning how to address the “Fight for $15” campaign in an effort to establish liability for McDonald’s, notwithstanding its primary role as franchisor, rather than direct employer. If settled, the joint employer determination would not be resolved and corporations may continue to rely on franchising to avoid responsibility for livable wages and other workers’ rights.

The potential actions by HUD, Labor Department, and the general counsel of the NLRB underscore the importance of the work undertaken by members of the ABA Forum on Affordable Housing and Community Development Law. Our work must continue to highlight the ongoing need for affordable housing resources made available at levels that provide a strong base from which families can achieve self-sufficiency, rather than requiring certain financial thresholds be met in order to access housing in the first instance. Those among us focused on community economic development activities must maintain focus and energy as well. Projects like those funded through the New Markets Tax Credit program create jobs with a community-oriented mindset focused on improving the health of the overall low-income community. With the advent of Qualified Opportunity Zones, we have a chance to explore and develop another tool for driving investment to low-income communities. Now is the time to push forward with vigor and determination. The work we do for our clients is essential to overcoming the long-standing challenges arising from scarce resources and the new struggles of our times.

9. Id.
10. Id.
11. Id.
From the Reading Room

Tim Iglesias

The Fight for Fair Housing: Causes, Consequences and Future Implications of the 1968 Federal Fair Housing Act Routledge 2018 Edited by Gregory D. Squires

The places where we spend our time affect the people we are and can become. These places have an impact on our sense of self, our sense of safety, the kind of work we get, the ways we interact with other people, even our ability to function as citizens in a democracy.

Tony Hiss, The Experience of Place (1990), p. xi.

On the occasion of the 50th anniversary of the passage of the federal Fair Housing Act (FHA), Gregory D. Squires, a professor of sociology, public policy, and public administration at George Washington University, has gathered a wide range of fair housing experts to produce an edited volume of 15 brief chapters reflecting on the state of fair housing in the United States and encouraging full enforcement so that the FHA’s goals of eliminating discrimination and promoting integrated patterns of living can be realized.

The authors of the chapters include practicing attorneys, public policy experts, social science academics, law professors, and a columnist. A Forward by legendary civil rights leader Wade Henderson and an inspiring Afterward by former Vice President and Senator Walter Mondale, co-author of the FHA, bookend the chapters. All of the chapters are well grounded in a historical perspective and accompanied by extensive citations. Overall, the arguments and writing style will be accessible to most readers.

The volume’s touchstone is a consistent, clear-eyed recognition of the importance of stable, decent, affordable, and well-located housing because of the demonstrated critical influence one’s zip code has on one’s access to a wide range of opportunities. The chapter topics include history, some legal aspects of the FHA, and experiences specific to certain protected
classes, but the main focus of the book is racial residential segregation. Most of the chapters address one or more aspects of segregation, including its historical causes (with a repeated emphasis on government actions and responsibility), its consequences and legacy, its nature, or strategies to address it.

The book makes two important contributions to fair housing literature. First, some chapters (especially chapters 10, 11, 13, and 15) begin to articulate an argument that effective implementation of fair housing law is not just good for members of protected classes but valuable for everyone because it can help markets work better, promote democracy, and expand opportunity for all. The second valuable contribution is that the chapters addressing racial residential segregation (especially chapters 12 through 15) present a very dynamic and comprehensive view of the nature of racial residential segregation, which is necessary for effective action to end it and mitigate its effects.

**Fair Housing Is Good for Everyone**

In Chapter 10, General Counsel of the National Fair Housing Alliance Morgan Williams and Professor Stacy Seicshnaydre explain how disparate impact liability promotes best practices in zoning, lending, and property insurance while it fosters fair housing. This point demonstrates that fair housing law helps the whole society by improving how markets function. In Chapter 11, Professor Raphael Bostic and PhD student Arthur Acolin frame the duty to affirmatively further fair housing as a carrot that can promote economic development and thereby align with policymakers’ other purposes. In Chapter 13, Myron Orfield and Will Stancil argue that preventing ongoing resegregation through fair housing planning is in “the clear self-interest of these communities,” but because they are not aware of this, “it is essential to educate the public about the problems and costs of suburban segregation, the benefits of fair housing, and the potential of fair housing enforcement to strengthen residential markets, increase access to credit, stabilize schools, and provide jobs and opportunities.” While major transformation will be required, “in a deliberately and stably integrated society, all places can prosper.” Finally, in Chapter 15, Professor George Lipsitz observes: “The unifying principle in fair housing law is not the identity of the injured but the fact of injury itself and the harm it enacts on the mobility and free interactions that a democratic society requires.” He supports his point using the Great Recession that was triggered by the mortgage foreclosure crisis. “It is not just that all members of society have a stake in a free and open commons, but also that the financial interests of the wealthy are directly linked to the fate of the poor.” Citing research by Daria Roithmayr, he notes, “[t]he predatory exploitation of the non-wealthy mortgage holders before 2008 created a national and global credit crisis for the rich as well as the poor.”

In contrast to the perception that fair housing secures special rights only for some (often disfavored) segments of the population, the framing
that fair housing is good for everyone is both legitimate and likely to at-
tract necessary support from members of the public and decision-makers
who are open and not implacably hostile to fair housing. While it is true,
as Lipsitz observes, “this line of argument has always been a part of the
project of fair housing law,” it seems particularly relevant and necessary
to emphasize now.¹ Yet, this framing needs more elaboration and evi-
dence to be persuasive to people who are currently on some continuum
of being uninterested and indifferent to moderately resistant. Importantly,
this approach is not a cure all: there are probably limits to the demon-
strable benefit to all of fair housing, for example, because in any given
community at any given time opportunity will be limited and distributed.
However, the promise of this approach certainly warrants exploration and
further development.

The Complex Nature of Racial Residential Segregation

Traditionally, racial residential segregation is defined by various statisti-
cal measures. For example, Squires describes the dissimilarity index,
“which signifies the distribution of two groups across a geographic area
varying from 0, indicating total integration, to 1, indicating complete segre-
gation.” These measures demonstrate the existence of residential settlement
patterns that then are named as constituting residential segregation. On this
view, the legacy of racial residential segregation generally represents the fact
that people of color are clustered and stuck in often disadvantaged commu-
nities separated from and thus deprived of opportunities for better educa-
tion, jobs, and health that are available in other communities. For some,
this is the endpoint of their understanding of residential segregation. How-
ever, this presentation and treatment of racial residential segregation tends
to reify it as a static, almost merely physical, condition. It is as if segregation
could be cured once and for all merely by the moving a certain percentage of
members of each race into neighborhoods that would reflect a more bal-
lanced proportion of racial groups. Certain phrasing, such as “Geography
of Opportunity” or “Moving to Opportunity,” can subtly support this over-
simplification, as if “opportunity” was merely an objective condition that ex-
sts in some communities and not in others. Similarly, while Henderson’s
metaphor—that fair housing is “the antidote for the poison of segregation
in America”—is true, it also implies a static conception of segregation that
can be cured by an injection. Unfortunately, the reality of racial residential
segregation is not so simple.

¹. This insight was beautifully articulated by the Reverend Martin Luther King
Jr. in his Letter from Birmingham jail: “In a real sense all life is inter-related. All men
are caught in an inescapable network of mutuality, tied in a single garment of des-
tiny. Whatever affects one directly, affects all indirectly. I can never be what I ought
to be until you are what you ought to be, and you can never be what you ought to
be until I am what I ought to be. . . . This is the inter-related structure of reality.”
Identifying all the dynamics of racial residential segregation and unpacking fully the legacy of racial residential segregation is beyond the scope of this review. As Lipsitz writes: “Discrimination is systemic and structural, impersonal and institutional, collective, cumulative and continuing.” But I will sample some that the book offers.

Segregation has consequences. Professor Thomas Sugrue (and others) detail the now familiar litany of consequences of extended racial residential segregation for people of color, including “racially homogenous public institutions that are geographically defined, most importantly school districts,” the effects that racially coded neighborhoods or cities have on property values and real estate investment and purchase decisions, limitations on access to employment opportunities, isolation from decent health care, food deserts, vulnerability to predatory financial institutions, racial concentration of poverty, and “devastating consequences for wealth accumulation by minorities.”

Segregation is self-reinforcing and self-replicating. As Sugrue writes: “Racial separation has become a self-fulfilling prophecy. Whites do not live near minorities. Their residential distance fosters misinformation and mistrust. It leads to a perpetuation of racial stereotypes that then become a basis and justification for racial segregation.” Professors Douglas Massey and Jacob Rugh point out: “The growing interplay between race and class in the residential space of Metropolitan America has created divergent social worlds for affluent whites and Asians on the one hand and poor blacks and Hispanics on the other. . . . At present segregation is created and reproduced more by structured patterns of selective residential mobility along the lines of race and class than by overt or intentional discrimination.” In a sense we are all in some deep ways products of persistent racial residential segregation. We co-create our environments and communities as they form us;2 Or as Lipsitz puts it: “It is not that housing discrimination sadly takes place in a society also marred by racism and inequality, but rather that unfair housing is the engine that drives racial subordination and economic stratification.”

Segregation is unacknowledged. Sugrue elucidates that while segregation was largely a product of government decisions and therefore was not inevitable, it is broadly perceived as natural, as a matter of free choice in the market and even desirable. Drawing on the research of Professor Patrick Sharkey, Sam Fulwood III offers one of several articulations of how and why segregation and its consequences are likely to be invisible, ignored, misunderstood, or denied: “Once poor and black Americans became permanently isolated in segregated communities locked in poverty with limited access to the levers of power or means for upward mobility,

2. Lipsitz quotes Charles Mills: “[y]ou are what you are in part because you originate from a certain kind of space, and that space has those properties in part because it is inhabited by creatures like you.” [278] Mills 1997: 42
political elites easily blamed them for their own victimhood, ignoring the institutional forces that were critical to implementing and sustaining their limitations.” And Lipsitz explains: “. . . [P]eople who live in well-off communities wall themselves off from the negative consequences of poverty and evade their obligations to combat it. They develop a self-centered, defensive localism and hostile privatism grounded in hoarding amenities and opportunities and exporting hazards and nuisances elsewhere. They come to believe that people who have problems are problems. They become inured to the suffering of others and fearful of contact with people who are not like themselves.”

Because of these dynamics, merely disrupting segregation (to use the currently popular framing for social change) by rearranging where some people live will be ineffective because it ignores the profound economic and social aspects of segregation that make segregation self-reinforcing and self-replicating, increasing the likelihood of re-segregation.

Gentrification provides an elucidating example. Gentrification represents the relocation of whites from suburbs to poor and primarily minority communities and often the movement of some minority households to previously mostly white suburbs. On a static statistical basis, these moves make a net improvement in both communities toward better racial balance. But this view of gentrification as solving segregation would be illusory and naïve. The movement by people of color out of the city is likely to be involuntary displacement to possibly hostile neighborhoods or to already segregated neighborhoods with fewer opportunities than the city they left. And, as Professor John Powell predicted more than 15 years ago: “These neighborhoods are not in transition to become mixed income, multiracial communities; instead they are in transition to become middle- and upper-middle-class communities.”

In Chapter 13, Orfield and Stancil dig deep into neighborhood transitions and begin with some good news: “[a] plurality of Americans in American metropolitan regions now live in racially diverse, integrated suburbs.” This prevalence of statistically more integrated neighborhoods is likely more than many readers would assume, but it is not a cause for rejoicing that “the beloved community” is achieved. Rather, the chapter hastens to explain that in most regions, these patterns of integration are not stable; they have not emerged “as the product of coordinated policy, but as a consequence of expanding segregation.” The sobering truth is that “segregation remains the primary organizing principle of the American city.” The authors counsel that the focus our attention must be not on the outdated dichotomy of city versus suburb. “In place of monolithically white suburbs, demographic change, suburbanization, and continuing segregation has created a continuum of community types: central cities, diverse suburbs, predominantly non-white suburbs, predominantly white suburbs, and exurbs.” They stress “America’s integrated places must be protected and nurtured by proactive fair housing policy,” which requires paying close attention to the growth, decline, stagnation, and transition of
various types of communities. Therefore, maintaining and sustaining inte-
grated suburbs, the focus of Chapter 13, is as important as initiating inte-
grated patterns of living in a particular geographic area where they had
been lacking.

The book’s analysis of the nature of segregation warrants deeper atten-
tion. It demands a high level of sophistication of fair housing advocates to
understand the phenomenon for themselves and to explain it to others.
Part of this challenge is identifying an appropriate image or metaphor
that captures the multiple dynamics of discrimination. In Chapter 15, Lip-
sitz employs an ecological metaphor, The Poisoned Fish and the Polluted
River, in which discrimination has polluted a river upstream but most fair
housing work is being conducted downstream, attending to the injuries of
victims of housing discrimination instead of cleaning up the ongoing pol-
lution occurring upstream. Whether this ecological metaphor encom-
passes all of the multi-dimensional, complex elements should be subject
to additional consideration, but we need a rich image that commands suf-
ficient attention so someone will have the interest, and frankly the pa-
tience, to take it all in.3 Given that need, this analysis would have been
a fruitful starting point for the book.

The book’s analysis also complicates the task of identifying solutions
that will be effective, because in addition to anticipating and preventing
or mitigating deliberate backlash, solutions must account for the inherent
dynamics of segregation that will tend towards re-segregation. Whether
and how strategies should explicitly take race into account is a difficult
issue within fair housing law, and one not addressed in the book. Propos-
ing effective solutions also demands that fair housing advocates articulate
a compelling vision of residential integration. For all of the volume’s em-
phasis on the problem of segregation and the need for residential integra-
tion, none of the authors explicitly or clearly defines “integration.” A care-
ful reader will discern that they do not share a single view.4

3. For an alternative ecological metaphor of racism, see Camara Phyllis Jones,
Levels of Racism: a Theoretic Framework and a Gardener’s Tale, 90(8) AM. J. PUB. HEALTH
1212–15 (Aug. 2000) (proposing an understanding of racism at three levels (institu-
tional, personally mediated, and internalized) and offering an allegory about a gar-
dener with two flower boxes, rich and poor soil, and red and pink flowers), https://

4. I have argued that there are at least two competing conceptions of integration
that animate the progressive community, and that it would be useful to hash out an
agreement on a preferred vision. Briefly, one concept, dubbed the “traditional in-
tegration model,” concerns the nature or quality of a community. It focuses on the
complexion of a community as a geographical unit and the social relationships
among members of different income groups or racial groups within it. This concept
asks: Who lives there and how do they relate to each other? The second concept,
“the individual access to the opportunity structure model,” focuses on how the
physical location of a household relates to the opportunity structure of a commu-
The overall effect of acknowledging the dynamism and complexity of segregation presented by the book can be sobering, perplexing, and even depressing. Still, from this reviewer’s perspective, if we are serious about this work, we must engage it with the intellectual depth and vigor that it demands.

**A Lack of Overarching Structure**

In contrast to the two most recent nationally popular books on housing written by single authors, *Evicted* by Matthew Desmond and *The Color of Law* by Richard Rothstein, this book is an edited volume of essays. Because many of the authors are not attorneys, they bring valuable and interesting insights from their own fields, primarily the social sciences. Unfortunately, the overall effectiveness of the book is limited because it is somewhat disjointed. Every chapter expresses some version of the thesis “some important gains have been made, but much more remains to be done.” However, there is no overall analysis that connects the chapters, pulling the manifold strands together to make the book cohesive and therefore more impactful. Relatedly, the volume demonstrates the importance of collaboration among attorneys, social scientists, and fair housing advocates, but it does not model this interaction because the chapters are siloed. Only Chapter 10 cross-references to other chapters. Consequently, it is not clear whether there is one “fight for fair housing” that the reader is being invited into, and, if so, what it is. It appears, by dint of the sheer number of pages dedicated to it, that the primary fight for fair housing is overcoming racial residential segregation, but the book never intones this as its overriding theme.

As a result of the lack of deliberate focus, the coverage of fair housing issues is not comprehensive. Even if comprehensiveness would not have been possible, the book would have benefited from including a basic primer on the substance and mechanics of the Fair Housing Act, explaining the protected classes, defining prohibited acts, explaining the types discriminatory legal claims, and explaining the various ways in which fair housing claims can be brought and enforced. While some of this information is included, it is scattered throughout the book. Many important and controversial contemporary issues, such as disability rights (including service animals and support animals), the scope of sex discrimination, source of income discrimination, and harassment, receive only limited and occa-
sional attention. Most surprisingly, there is no mention of implicit bias and both the challenges and opportunities that this important issue offers to fair housing. Still, there is much to appreciate in this book.

While the book lacks an overarching structure, Chapter 1 provides an introduction, and the rest of the chapters can be roughly organized into four groups: the historical chapters (Chapters 2 and 3), chapters on protected classes (Chapters 5, 7, and 8), chapters focusing on a particular aspect or application of fair housing law (Chapters 6, 9–11), and chapters primarily on systemic discrimination and residential segregation (Chapters 4, 12–15).

In Chapter 1, “Fair Housing Yesterday, Today, and Tomorrow,” Squires rightly paints a sober but hopeful picture of the problems facing fair housing law, especially how the surging inequalities of income, wealth, and place have changed the context in which fair housing battles play out, created new challenges, and reinforced some traditional ones.

The Historical Chapters

The historical chapters are useful and interesting. In Chapter 2, “From Jim Crow to Fair Housing,” Sugrue begins with the helpful reminder that racial separation in housing was neither natural nor inevitable in the United States, but rather “the consequence of America’s long and troubled history of racial violence and exclusion.” He then offers a very readable account of the proliferation of systematic residential racial segregation, including familiar elements of the story, such as governmental endorsement of redlining; active participation by the housing industry; intentional discriminatory organizing efforts (primarily by white homeowners organizations); and the long-suffering responses to segregation, highlighting the roles of civil rights activism. Along with covering major events, he includes some interesting tidbits, such as the campaign to mail pens to President Kennedy, who had promised to eliminate housing discrimination in federally subsidized housing developments “with the stroke of a pen.” Unfortunately, his history ends sometime in the 1990s, so the last 20 years are not reviewed.

In Chapter 3, “The Legislative Battle for the Fair Housing Act (1966 to 1968),” after describing the political and social context of the legislative debates, Professor Rigel Oliveri carefully tells the story of prior unsuccessful efforts in 1966 and 1967 to enact a national fair housing law. She aptly summarizes the primary arguments against such a law (that regulating private transactions between individuals exceeded Congress’s authority under the Commerce Clause and was better left to the states and that it represented unwarranted intrusion into the property rights of ordinary citizens who had the right to choose their housing and also their neighbors) and in favor (that the legislation was consistent with the Commerce Clause because of the economic effect the cumulative and economic effect of housing transactions, and that it was necessary to provide equal access to housing as a matter of human dignity and as a method to lift the black
population out of poverty). She then digs into the details of the legislative procedural twists and turns, negotiations, and compromises that preceded the passage of the FHA in 1968. In the meantime, she reveals the role that housing discrimination against black veterans of the Vietnam War might have played in enabling passage.

In Oliveri’s account, the legislative success appears to have been the result of the combination of the Kerner Commission report, Senator Dirkerson’s reluctant support (but at the price of an amendment weakening enforcement), deal making and arm twisting (especially President Johnson’s last minute deal to secure the vote of Senator E.L. Bartlett (D-AK)), and, critically, the assassination of Dr. Martin Luther King, Jr.

The 1968 FHA covered only race, color, religion, and national origin. This chapter briefly catalogues the later expansions of FHA’s coverage to include prohibitions against discrimination based on sex in 1974 and familial status and disability in 1988.

**Chapters on Protected Classes**

These chapters are illuminating. In Chapter 5, “More Than Just Race: Proliferation of Protected Groups and the Increasing Influence of the Act,” civil rights litigators Michael Allen and Jamie Crook explore the FHA’s coverage and application to religion, sex, familial status, and disability. Their brief discussion of religious discrimination includes attention to discrimination against Muslims. The examination of sex discrimination describes the historical development of these claims from initially focused on women’s right to own or rent housing to encompass sexual harassment, discrimination against survivors of domestic violence, and attempts to expand the coverage to claims based on sex/gender stereotyping affecting sexual orientation and gender identity. The familial status discrimination section considers its links to racial discrimination, including residential occupancy standards, and to evolving definitions of family. On some measures disability discrimination constitutes the largest proportion of FHA claims. Accordingly, this chapter provides a useful brief overview of disability claims in four contexts: by local governments in zoning and land-use disputes; by lenders and insurers; by a variety of housing providers; and by builders and developers, including regarding accessibility.

The chapter correctly presents the extension of FHA coverage as “demonstrating both the affordable housing act’s adaptability as well as the evolving forms of invidious housing discrimination that persist in our society.” Missing is the recognition that this continuous expansion of the FHA’s coverage creates an important, unintended consequence for the fair housing movement: the addition of each new protected class or application to a new situation effectively moves the goalposts, rendering any comprehensive evaluation of the success of the FHA near impossible.

All of the book’s chapters are national in scope, except Chapter 7, “The Rocky Road Home: Latino Immigration and Fair Housing in California,” by sociologist Jesus Hernandez. This chapter explores California’s long depen-
dence on Latino labor and the specific forms of housing discrimination suffered by that community, including anti-immigrant housing policies, predatory lending, gentrification, and the exposure of Latinos to hazardous environmental conditions. This chapter mixes technical information about pollution affecting Latinos’ housing opportunities with brief, colorful stories and a call for HUD to implement its 2012–2015 Environmental Justice Strategy and Affirmatively Furthering Fair Housing rule.

Finally, in Chapter 8, “From the ‘Perpetual Foreigner’ to the ‘Model Minority’ to the New Transnational Elite: the Residential Segregation of Asian Americans,” Professor Frank Wu explores the unique, multidimensional and complex evolution of housing issues faced by Asian Americans through the succession of stereotypes through which they have been viewed. The chapter incorporates detailed historical elements and geographical distinctions, along with immigration law, intermarriage statistics, and other areas of law and policy. Professor Wu provides a welcome disaggregation of data about distinct Asian ethnicities, for example, distinguishing Chinese, and first and second generation Japanese, and directly addresses potentially controversial issues. He muses about the contradictions and ambivalence inherent in the multiple social perceptions of Asian Americans, including the phenomenon of the “ethno-burb” (a community that is ethnic but affluent). Recognizing the documented self-segregation by some Asian communities, he raises the uncomfortable question of whether some members of classes protected by the FHA may embrace different conceptions of integration than others. While less directly about fair housing law’s application to Asian Americans, this chapter nonetheless makes an important contribution.

Chapters on a Particular Aspect or Application of Fair Housing Law

These chapters span a wide range of issues. In Chapter 6, “The Fair Housing Act: A Tool for Expanding Access to Quality Credit,” Executive Vice President of the National Fair Housing Alliance Lisa Rice brings into laser focus how “the U.S. dual-credit market entrenched by the proliferation of segregation has contributed to the country’s racial wealth gap and provided the means by which people of color and other underserved groups have experienced systemic discriminatory treatment when accessing credit.” She expertly walks the reader through a variety of topics, tracing the history of government support for home ownership (with its consistent favoring of whites); a detailed explanation of how redlining works; the tragic story of the Freedman’s Bank; and the key roles played by restrictive deed restrictions, underwriting and real estate valuation practices, the secondary mortgage market, and government in creating and sustaining our “financial apartheid.” She demonstrates how past discriminatory financial products and practices, including the harmful use of land contracts, reverse redlining, and subprime loans, have reappeared. The chapter balances a high-level national institutional analysis with the daily
life role of payday loans and check cashing businesses. She reveals the perverse phenomenon of how the positive credit behavior of low-income consumers in the non-traditional side of the system is invisible because of the bifurcation, but their negative credit behavior is visible in the traditional side of the system, trapping them in the inferior market. Her critique is accompanied by a thoughtful analysis of how fair housing law can help, including an impressive list of the types of discriminatory behavior covered by the FHA, examples of new practices and programs that some lenders have adopted to extend credit fairly, and specific recommendations to dismantle the dual credit market and broaden credit access, for example, by incorporating non-traditional credit information (such as rental payment data) into lenders’ financial decisions.

Civil rights attorneys John P. Relman and Sasha Samberg-Champion offer in Chapter 9, “At the Intersection of Criminal Justice and Fair Housing,” a timely and useful explication of why criminal justice is an important, cutting edge arena for the application of fair housing law. Specifically, the chapter demonstrates how the confluence of the historical disparity of incarceration of people of color and the difficulty that released prisoners have in getting housing, combined with the proven importance of stable housing as “the lynchpin that holds the reintegration process together,” constitutes a systemic structural form of discrimination and exclusion. The chapter then explores the use of disparate impact litigation to challenge housing bans based on criminal history and local “crime free” programs that often include “chronic nuisance” ordinances. Citing recent HUD guidance and a current litigation they are pursuing in New York, the authors take aim at total and categorical bans that use criminal history information to deny access to housing opportunities. They call for more nuanced and individualized screening of applicants’ criminal history, including the consideration of mitigating information.

The chapter also addresses “crime free” programs that typically require landlords to check the criminal history of prospective tenants and “chronic nuisance” ordinances that encourage or require landlords to take adverse action (often eviction) when tenants violate extremely broad definitions of nuisance, such as calling the police three times during a single month, even if the calls are made by victims of domestic violence. They explain that these practices are disproportionately applied to and affect people of color, women, and persons with disabilities, thus potentially violating the FHA. The authors point out that while public safety is the proffered justification of these laws, they may actually undercut public safety by deterring legitimate police calls.

Chapter 10, “The Legacy and the Promise of Disparate Impact,” is one of the few chapters that analyze a specific fair housing legal doctrine in detail. Williams and Seischnaydre expertly explain the disparate impact standard of housing discrimination as a method of proof relying on evidence of discriminatory effects without requiring evidence of discriminatory intent. They point out the wide application of this doctrine to a vari-
ety of housing providers’ decisions, underwriting practices, insurance markets, and land use development. After briefly reviewing the doctrine’s legal history, the chapter briefly describes the 2013 HUD Disparate Impact Final Rule and tells the story of the U.S. Supreme Court’s recognition of the disparate impact rule in its 2015 *Inclusive Communities Project (ICP)* opinion.\(^6\) The Court upheld the disparate impact standard based on a textual analysis of the FHA statute as informed by the history and purpose of the FHA and Congress’s later amendments to the FHA in 1988. In light of confusion about the relationship between *ICP* and HUD’s Final Rule, the chapter helpfully explains the Court’s application of the doctrine and its discussion of the limits and safeguards of disparate impact as consistent with HUD’s rule and existing disparate impact jurisprudence. The last part of the chapter offers insightful litigation advice on using disparate impact, including challenging underwriting practices that use only traditional credit criteria.

Finally, in Chapter 11, “Affirmatively Furthering Fair Housing: The Mandate to End Segregation,” Bostic and Acolin explain the element of the FHA that requires certain governmental entities to affirmatively further fair housing as a necessary and important complement to the more generally recognized enforcement of fair housing law against discreet discriminatory acts and policies and as particularly important in furthering the goal of ending segregation because of how it can “reduce disparities in access to opportunity.” The authors define affirmatively furthering fair housing as “taking steps to eliminate or reduce the existing disparities in income, housing, and other areas, or to increase access to opportunity with the goal of reducing disparities in income, housing, and other areas.”

Taking a step back, the chapter explains in detail the initial flawed regulatory implementation of the duty, which required an Analysis of Impediments. The authors then explain how the new HUD regulation is both improved and full of promise. The chapter describes the new Assessment of Fair Housing (AFH) tool as a planning and outcome-oriented action tool grounded in widely available data and “community performance metrics” with a regional focus. They provide a clear explanation of what the six elements of an AFH means and requires. While the chapter’s articulation of the promise of the new regulation is persuasive, HUD’s recent action delaying implementation of the rule makes it unclear whether the promises will be realized, especially since the authors state: “The regulation’s success will depend in large degree on how well HUD plays its part.”

Chapters Primarily on Systemic Discrimination and Residential Segregation

These chapters are important and substantive, albeit uncoordinated. Chapter 4, “The Costs of Segregation and the Benefits of the Fair Housing Act,” by columnist Sam Fulwood III is misnamed. While it does reference substantial social research, it does not provide an organized or complete account of its announced topics. Rather, in a sense, it partially introduces the book’s major theme of residential segregation. Focusing primarily on segregation burdening African Americans, it compares U.S. segregation to South Africa’s apartheid system because the comparison “effectively captures the problematic link between public policies that discriminate in permitting citizens unfettered housing options and structural social inequality.” The author explains housing segregation as a keystone supporting racial and economic discrimination in the United States and argues that “federal support for equitable housing is a necessary and needed protection to ensure a host of other public and private social benefits that are taken for granted by populations unburdened with restrictions on where they may live.”

Chapters 4, 11, 13, and 14 all discuss the debate over mobility versus place-based strategies to counter the effects of residential segregation. In Chapter 12, “Opportunity Communities: Overcoming the Debate Over Mobility Versus Place-based Strategies,” Professor John A. Powell and Assistant Director at the Haas Institute for a Fair and Inclusive Society Stephen Menendian make this debate the sole subject of their chapter. They aim to “cut the Gordian knot” of the longstanding debate by proposing a solution. First, they define the problem by examining patterns and trends of racial and economic segregation, re-segregation, and gentrification and the implications of those on fair housing and community development. Next, citing empirical studies, they analyze the benefits and limits of the numerous mobility and place-based strategies in solving those problems. Then they present a third strategy called “opportunity-based housing” as a synthesis of the best of both strategies. Professor Powell first articulated this approach and its accompanying implementation methodology, “opportunity mapping,” in 2002. The authors announce the use of their opportunity mapping strategy in the settlement of the important federal case Thompson v. HUD,7 in the work of other organizations, and most significantly in HUD’s Affirmatively Furthering Fair Housing tools.

As presented, opportunity-based housing appears to offer a principled solution to the debate. The key to the proposed solution is an agreement on what constitutes opportunity and access to it. But ah, there’s the rub.

Opportunity mapping is replete with complex and controversial interpretive decisions. The authors do not cite any empirical validation of opportunity-based housing as meeting its articulated goals. Therefore, the debate is likely to continue, at least in some quarters. Notably, the authors recognize that in practice implementation of the opportunity-based housing approach requires the same political will, public education, and outreach that the other strategies rely on, and is still subject to the stringent limitation of resources that undergirds the debate.

Chapter 13, “Fair Housing and Stable Suburban Integration,” by Orfield and Stancil offers an important corrective to common assumptions regarding the demographic situation of cities and suburbs. The authors replace the outdated dichotomy of city and suburb with a new, more detailed and dynamic taxonomy of American suburban living patterns: central cities, diverse suburbs, predominantly non-white suburbs, predominantly white suburbs, and exurbs. After defining each type of community, including its political and socio-economic characteristics, the authors trace the racial transitions that have occurred in American suburbs in the first decade of the 21st century. The authors call on fair housing advocates to recognize these trends and to incorporate them into their efforts to end discrimination and to promote sustainable integration. They propose a framework for integration that would build on HUD’s Affirmatively Furthering Fair Housing rule, modified to incorporate another dimension, the “Stable Metropolitan Regional Integration” (SMRI) standards. They note that the principles underlying these SMRI standards are already articulated in HUD’s Site and Neighborhood standards for public housing. They provide a list of distinct strategies appropriate to each kind of community, including for Racially Mixed Communities, the creation of “integration boards with racially inclusive membership of local officials and important community stakeholders” with the authority to “require local real estate and banking entities to cooperate by appearing before them and responding to reasonable requests for data.” They worry that HUD’s rule delegates too much discretion to local jurisdictions.

This chapter offers another data-driven alternative to the opportunity housing approach presented in Chapter 12. The opportunity housing model focuses on access to opportunity while this model focuses on stabilizing integrated suburbs with targeted fair housing planning based upon the nature and dynamics of the various kinds of suburbs and the community types within them. Some interaction between these two chapters would have been interesting and likely productive.

Chapter 14, “The Intersections of Race and Class: Zoning, Affordable Housing, and Segregation in U.S. Metropolitan Areas,” by Massey and Rugh is a technical chapter that could appear in a journal of empirical sociology. Starting from the premise that “in the post-industrial American society segregation and the concentrated poverty it produces have emerged as the critical nexus for the production and reproduction of socioeconomic disadvantage over the life course and across generations,” the authors
argue that efforts to promote residential desegregation “need to be central to any broader program of poverty reduction.” They provide an empirical demonstration that restrictive zoning regulations in suburbs function to reproduce and expand segregation. To combat this problem, they propose improving the voucher program, increasing affordable housing development, adopting inclusionary zoning programs, and effectively implementing the Affirmatively Furthering Fair Housing rule.

Finally, in Chapter 15, “Living Downstream: The Fair Housing Act at Fifty,” the most inspiring chapter in the volume, Lipsitz develops The Poisoned Fish and the Polluted River metaphor (described above) to critique the tort model of injury that informs the popular imagination about the FHA as wholly inadequate. He describes the horrific killing of Michael Brown in Ferguson, Missouri, by Officer Darren Wilson as “at its core a confrontation shaped by racialized and unequal places.” Then he takes the reader on a deep and expansive dive into the history of St. Louis, analyzing a wide array of data, including the legal cases on housing, education, and policing. He masterfully uses this history to explore the layers and interconnectedness of discriminatory policies to suggest that the killing in Ferguson is an example of what is likely to happen when pervasive and sustained housing discrimination is allowed to fester. While recognizing individual housing discrimination cases as both necessary and honorable work, he challenges fair housing attorneys to bring litigation that aims to fix the problem at its source—going upstream to clean up the river. This requires an approach that sees fair housing injuries in their full context and complexity as the “tip of an iceberg,” visible manifestations of a complex and fully linked system of racial discrimination. Such an approach also requires remedies that “address the costs of discrimination to society at large, not just by providing repair and reparation to individuals, but also by creating new democratic practices, processes, institutions, and opportunities.” He identifies a few lawsuits that exemplify this broader vision of addressing “collective injury” with “collective relief,” including Kennedy v. City of Zanesville, Westchester County, and recent cases in which cities have sued banks for injuries caused by discriminatory lending. Moreover, he encourages reconceiving fair housing from the tort model of injury as akin to antitrust law or hate crime law in which injuries to individuals are also considered to be crimes against the market and against the entire public sphere. He recognizes that pursuing this


10. For a summary of two of these cases, see http://www.relmanlaw.com/civil-rights-litigation/cases/baltimore-wells-fargo.php (last visited Jan. 20, 2018).
vision requires not just strategic litigation but also full implementation of the Affirmatively Furthering Fair Housing rule and legislation coordinated with effective social movement mobilization. He suggests a law, similar to the Home Mortgage Disclosure Act in the lending arena, that requires the property insurance industry to make its activities in minority communities publicly available. And he lifts up the work of numerous inspiring grassroots groups, including the Los Angeles Community Action Network, Causa Justa (Oakland, California), and Project Row Houses (Houston, Texas). He concludes with a hopeful twist on the river metaphor imagining how the river could become a source of great power for transformation by generating energy and new resources that will benefit everyone.

In a rousing Afterward, Mondale, one of the co-authors of the FHA, retells the story of its passage, calling on HUD to implement its Affirmatively Furthering Fair Housing rule and to use disparate impact litigation as provided in the ICP case. He criticizes a “color blind approach” to fair housing and advocates a broad view of the FHA as a tool for restoring justice to entire communities. He issues an urgent and expansive call to action proclaiming: “Everybody can play a role in building an integrated society.”

**Conclusion**

This book is primarily a call to action, aimed at reinvigorating those already committed to fair housing and encouraging others to join “the fight for fair housing.” Like fair housing itself, the book has many fine accomplishments, but much important work is yet to be done. Ideally, this book would articulate a clear, shared, coherent vision as well as an agenda and strategies to conduct that struggle. On this standard, the book is a missed opportunity. Still, it includes a number of excellent essays and other quite good ones that will educate and inspire many readers.

While it is obviously appropriate to mark the 50th anniversary of the enactment of the FHA, the timing of the book is complicated by the results of the 2016 election, which were known to the authors before finalizing their contributions. To date, the Trump administration and Secretary Ben Carson appear to be unenthusiastic or perhaps hostile to vigorous enforcement of fair housing law, as evidenced by their attempt to suspend the Small Area Fair Market Rent program\(^\text{11}\) and their decision to delay im-

---

plementation of the Affirmatively Furthering Fair Housing Rule. This is particularly ominous because so many of the authors place heavy reliance on HUD’s role in using disparate impact litigation and the Affirmatively Furthering Fair Housing Rule as essential to future progress.

Yet perhaps this is only be expected after 50 years of struggle. Quoting Dr. Martin Luther King Jr.’s close confidant Vincent Harding, Lipsitz wisely reminds us that the fair housing movement’s work to date has transformed the problem: “You move into a struggle with certain kinds of visions and ideas and hopes that transform the situation, and then you can no longer go on with the same kind of visions . . . because you have created a new situation yourself.”
Data Brief: How Do Small Area Fair Market Rents Affect the Location and Number of Units Affordable to Voucher Holders?

NYU Furman Center (January 5, 2018)

With the goal of providing housing choice voucher holders greater choice outside of neighborhoods with relatively low rents, the U.S. Department of Housing and Urban Development (HUD) published a final rule in November 2016 requiring the use of Small Area Fair Market Rents (FMRs) in 24 metropolitan areas. By setting FMRs on a smaller area basis (using ZIP codes) rather than a single standard at the metropolitan area, the regulation would allow voucher holders to access neighborhoods with higher rents by increasing the payment standards in those areas. Less than a year after the promulgation of the final regulation, however, HUD announced a two-year delay in its implementation, citing an interim report on a demonstration program that found that, while voucher holders were able to access areas with higher rents, there was a 3.4 percent decline in the overall number of units available to voucher holders. In this article, the NYU Furman Center shares its analysis as to whether the 24 metropolitan areas subject to regulation can expect a similar decline.

The analysis takes the reader through a brief explanation of the theory behind the Small Area FMR as a means of reducing concentration of voucher holders, describes the Small Area FMR Demonstration that HUD relied on in delaying implementation, and explains HUD’s initial reasoning for choosing the 24 metropolitan areas it did and how they contrast with those in the demonstration. The analysis then looks at the data for the 24 metropolitan areas and runs a test similar to that done for the demonstration report. The test finds that in the 24 areas that were to be covered by the Small Area FMR regulation, its implementation would actually increase the number of units affordable to voucher holders by 9 percent overall. Out of the 24 areas, 20 would see an increase in the number of affordable units, while four would see slight declines. The report concludes that the effects of implementation of Small Area FMRs are market specific and notes that the contrasting findings are not surprising given HUD had identified the 24 areas specifically due to their likelihood to expand choice for voucher holders.

Contributors: Shanellah Verna, Ballard Spahr LLP; Alec Rubenstein, Robinson & Cole LLP; Katherine C. Bailey, Robinson & Cole LLP; and Adam Norlander, Klein Hornig LLP
Urban Institute
Trends in Housing Problems and Federal Housing Assistance
G. Thomas Kingsley (October 2017)

Approximately ten years ago, the Urban Institute evaluated the nation’s housing challenges and the evolution of subsidized housing. This article provides an update to that evaluation, reviewing major federal housing assistance programs as well as the continued challenges faced in today’s affordable housing market. In its assessment, the article notes the various demographic changes that have taken place over the past decade, as evidenced by an increasing number of renters with higher incomes, increased housing assistance for the elderly and disabled as compared to families with children, and an increase in housing choice voucher recipients as compared to individuals utilizing project-based assistance or living in public housing. The article also observes that the primary housing concerns across the county include a significant widening in the housing assistance gap and an increase in the number of households with serious housing needs. Furthermore, it notes that challenges relating to affordability now are more common than concerns regarding physical and structural deficiencies in housing. As a final takeaway, the author concludes that disproportionate housing assistance in central cities can continue to reinforce concentrated poverty in inner-city neighborhoods and examines how policy issues such as congressional budget allocations and declining corporate tax rates will affect federal housing assistance in the future.

Safety Net? The Utility of Vouchers When a Place-Based Rental Subsidy Ends

Vincent J. Reina and Ben J. Winter, HUD/UPenn (May 10, 2016)

This study analyzes the effectiveness of vouchers as a “safety net,” when provided to tenants of project-based Section 8 properties upon termination of the project-based subsidy. It examines how household demand, market supply, and household characteristics affect whether the voucher is used and whether the household moves from the formerly subsidized property. The authors constructed a dataset of 65,000 households residing in project-based Section 8 subsidized housing at the time the subsidy was terminated and, using statistical models, analyzed variables such as the number of dependents, race, source of income, and poverty rate of the census tract of the subsidized property to examine voucher usage. The study found that fewer than 50 percent of households in the sample used the voucher and that those households with the highest and lowest demand for the subsidy (i.e., those households to which the voucher gave the greatest and the least subsidy), those over the age of 62, male-headed households, and those living in a property where HUD terminated the subsidy, were the least likely to use the voucher. The authors concluded that the utility of vouchers as a safety net tool varies. It provides an oppor-
tunity for some households to improve their welfare by moving to lower-poverty census tracts, but is least effective as a safety net for households where the head of the household is black or over the age of 62.

**Pay for Success: Opportunities and Challenges in Housing and Economic Development**

*Omar Carrillo, Harvard’s Joint Center for Housing Studies and NeighborWorks America (August 10, 2017)*

Pay for Success (PFS) is an outcome-based contracting initiative where a public entity contracts with a nonprofit or private service provider, having to pay that service provider only if it achieves the agreed-upon results. Investors provide the upfront capital to the service provider but only recoup their costs (and receive potential profit) if the project achieves its predetermined goals. The PFS model, which offers many benefits, has garnered increasing interest and attention in recent years, particularly because it shifts the focus of the service providers from “inputs to outputs”—and looks at measurable results.

In this article, Carrillo lays out the fundamentals of the design, structure, and process of a PFS project and describes the benefits and challenges of applying this model to different areas in the public sector. Carrillo goes on to describe and review the inner workings of a few PFS projects in the housing and community development arena. While early results do show some promise, Carrillo warns that he is not yet sure the benefits outweigh the costs, which include substantial transaction costs and resistance to funding untested or risky innovations.

**Patterns and Trends of Residential Integration in the United States Since 2000**

*Jonathan Spader and Shannon Rieger, Harvard Joint Center for Housing Studies (September 2017)*

While there is a significant body of research on patterns of residential segregation in the United States, there is less evidence showing patterns of residential integration. This research brief aims to address that gap. Using the most recent data available at the census tract level, it focuses on the residential integration of communities across the United States since 2000, looking at the incidence and attributes of neighborhoods with substantial integration.

Using two widely used definitions of integration and data from the 2000 Census, 2006–2010 American Community Survey 5-year estimates and the 2011–2015 American Community Survey 5-year estimates, Spader and Rieger examine such questions as the racial/ethnic composition of integrated and non-integrated neighborhoods, the extent of residential integration over time, the characteristic differences of newly integrated neighborhoods compared to neighborhoods that have seen a steady pattern of integration for an extended period of time, and the geographic locations of
neighborhoods that have experienced changes in integration since 2000. As the data in this report show, there is still a significant racial and economic divide among many communities across the United States, and despite increased integration between 2000 and 2011–2015, as the authors candidly state, these integrated neighborhoods “remain the exception rather than the rule.”
Organizational Profile

Lone Star Legal Aid: Responding to Legal Needs in the Face of a Disaster

Clarissa Ayala

Houston, Texas is called by many names, including Bayou City, Swamp City, and Swamp Lot. Present-day downtown Houston is located where “early European settlers to the region found a swampy wilderness that had to be drained before it could be developed.” Nevertheless, the city on a swamp continues to grow at an exponential rate. These are among many factors that have led to significant challenges for Houston. It is overflowing with tenants searching for affordable rentals. Poor and minority neighborhoods have suffered the most from the environmental and health effects of Houston’s expanding industrial sector. Houston’s rapid growth has eliminated water absorbing vegetation and has failed to incorporate necessary infrastructure changes—making flooding events worse. When floodwaters rise in and around Houston, so do public health and affordable housing concerns. Lone Star Legal Aid provides assistance to meet the immediate legal needs of survivors of a disaster, whether natural or man-made. One of the greatest needs is decent, safe, and affordable housing.

Lone Star Legal Aid

Houston is home to the headquarters of Lone Star Legal Aid (LSLA), a nonprofit law firm that is the fourth largest free legal aid organization in the United States. LSLA has a rich and deeply respected history of advocacy on behalf of low-income and underserved populations. It was established in 2002 by a merger designed to capitalize on the resources of three existing legal aid entities: East Texas Legal Services, a largely rural legal aid program that included the East Texas Fair Housing Center; the pri-


Clarissa Ayala (cayala@lonestarlegal.org) is Communications Director of Lone Star Legal Aid in Houston.
marily urban Gulf Coast Legal Foundation; and a portion of Legal Aid of Central Texas. Its mission is to protect and advance the civil legal rights of the millions of Texans living in poverty by providing free advocacy, legal representation, and community education that ensures equal access to justice.

LSLA serves 72 counties in Texas and four in Arkansas, an area that covers one-third of the State of Texas, including almost 60,000 square miles from Texarkana to the Louisiana-Texas Gulf Coast state line and down to Matagorda Bay, and four counties in southwest Arkansas, which covers an additional 2,500 square miles. In addition to its Houston headquarters, LSLA has 12 offices throughout east, southeast, and northeast Texas in the Piney Woods region, near the Gulf Coast, and in Central Texas Hill Country. From these offices, LSLA provides client-centered legal advocacy. Historically, the firm has had successes that affect not only the client represented, but also groups of low-income people on community, state, and national levels when the firm’s actions have resulted in systemic policy and procedural changes, such as public housing desegregation and health care access for children. Legal Services Corporation, Texas Access to Justice Foundation, and multiple grants generously fund LSLA.

Based on recent Census data for the LSLA service area, there are almost 2 million people at 125 percent of federal poverty guidelines eligible for LSLA’s services. In Texas, there is only one legal aid attorney for approximately every 17,000 people in LSLA’s service area with income at or below 125 percent of the federal poverty limit. LSLA focuses its resources on maintaining, enhancing, and protecting income and economic stability; preserving housing; improving outcomes for children; establishing and sustaining family safety and stability, health, and well-being; and assisting populations with special vulnerabilities, such as those who have disabilities, or are elderly, homeless, or have limited English language skills. LSLA also has targeted units, supported by grants, for specific populations, such as the military, veterans, and their dependents; low-income taxpayers; crime victims; survivors of sexual assault; and now, Hurricane Harvey survivors.

**Water and Fire**

Hurricane Harvey is estimated to have dumped 27 trillion gallons of water on Texas and Louisiana over just six days in August 2017. Other deadly storms like Hurricane Katrina and Hurricane Irene had a maximum of 17 inches, with Superstorm Sandy generating approximately 7 inches,

---


paling in comparison to Harvey’s 51 inches. Tens of thousands of Texans, renters and homeowners alike, were forced to evacuate their homes, leaving their life’s possessions behind. Homeowners and renters are now facing a marathon recovery process, dealing with insurance companies, the Federal Emergency Management Agency (FEMA), and the Small Business Administration (SBA). FEMA and SBA are the only options for homeowners and renters without insurance. As of June 30, 2017, only 246,000 flood insurance policies were active for residential homes and businesses in Harris County, an area with 1.7 million housing units that includes the City of Houston. Many renters, from Houston down to Richmond and east to Port Arthur, are finding themselves in limbo: some are being asked to move so that their landlords can make repairs, and some want to move because their landlords have not made any repairs, leaving them living in unsafe conditions. Whatever the case may be, the rental housing market is slim, competitive, and overpriced—an unfortunate situation when so many families are displaced.

In the aftermath of Hurricane Harvey’s flooding rain, there was an explosion and fire at LSLA’s Houston headquarters that rendered it unusable. Undaunted, LSLA employees worked in shelters and FEMA disaster recovery centers (DRCs) throughout the LSLA affected service area. Despite being dislocated from its headquarters at a key time, LSLA initiated its standard disaster response: preparing documents, flyers, and intake sheets to deliver information and advice to disaster survivors; preparing a staffing schedule for shelters; and establishing a presence at Red Cross mega-shelters. Without an office to return to, shelters, DRCs, coffee shops, and internet cafes became LSLA’s impromptu offices. As soon as its leaders could secure space, LSLA’s Houston office moved into temporary offices, now occupying one leased space and four donated spaces.

Disaster materials were already printed and ready in kits that miraculously escaped the fire. But more were needed given the scope of Harvey’s damage. Since LSLA had no equipment to multiply materials in the Houston area, Baker Botts L.L.P. immediately pledged the firm’s Houston print shop to print tens of thousands of flyers in English, Spanish, and Vietnamese.

In addition to LSLA’s presence at local shelters and DRCs, it has hosted pop-up clinics to reach the large number of disaster survivors in neighborhoods and areas not easily accessible to a DRC. Pop-up clinics are a great

---


way to meet and assist survivors where they are. For example, pop-up clinics enabled LSLA to reach mobile home communities in Fort Bend and Montgomery County in desperate need of assistance. Families in these rural areas were stuck, their vehicles and homes were flooded, and they had fallen off the power grid. With no power to charge their mobile devices or vehicles to seek out help, they felt forgotten. LSLA employees and volunteers found these neighborhoods and organized pop-up clinics. Most of LSLA’s pop-up clinics are also done with partner organizations that offer other forms of disaster assistance. For example, through Twitter posts, Team Rubicon noticed the disaster aid being provided by LSLA and quickly made contact to team up and target areas in need of help. Team Rubicon is a group of veterans providing disaster relief to those affected by natural disasters. At the clinics, residents are able to apply for FEMA aid and move away from unsafe conditions and into FEMA Transitional Shelter Assistance hotels while they figure out where to go next.

**Post-Hurricane Challenges**

People living in the areas affected by the storm may face a long recovery and rebuilding process. Shoddy construction or mechanic work can lead to problems arising years later and economic loss can lead to layoffs and disaster-related financial hardship even for those whose homes remained intact. Legal aid can benefit residents before and after a natural disaster with issues such as personal finance, insurance, real estate, and unemployment, as well as applications for government relief, which can be difficult to navigate. Disaster-related legal issues involve areas such as bankruptcy, contract and contractor problems, landlord/tenant issues, environmental and public health issues, wills, insurance disputes, and FEMA appeals. Some examples of LSLA’s work in affordable housing and public health in the wake of Hurricane Harvey are described below.

**FEMA Claim Volume, Denials, and Appeals**

According to an update published by the National Low-Income Housing Coalition on December 4, 2017, there are still as many as 44,551 pending FEMA applications. LSLA provides advice about how to apply for benefits and, as noted below, how to appeal a denial. LSLA has never experienced the volume seen with Hurricane Harvey. In effort to allow more time, the deadline to apply for FEMA benefits was extended to November 30, 2017, and transitional shelter assistance was extended to April 2, 2018, for those still unable to locate affordable housing.

FEMA has denied large numbers of claims on the grounds that the claimant is not the owner of the home. These denials are due to FEMA’s failure to understand and recognize the state’s unique homeownership

---

laws. In the State of Texas, if you die without a will, the state draws one up for you—dividing up your property dependent on the heirs. FEMA’s rules require a registrant or disaster survivor to prove ownership by having his name on documents such as a Deed or Official Record for the home, Mortgage Payment Book or other mortgage documents, Real Property Insurance Policy, Property Tax Receipts or Tax Bill, and/or a Property Title or Mobile Home Certificate of Title. Many families in Texas live in inherited property that has not gone through a formal probate procedure, meaning their names are not referenced on the approved/required documents and they are being denied assistance. LSLA is accepting all of these types of cases, which can almost always be successfully appealed, with FEMA benefits obtained for the claimant. The role of legal aid is essential as claimants are not likely to secure the benefits they are entitled to without an attorney.

**D-SNAP Line Conditions**

Applicants for the Disaster Supplemental Nutritional Assistance Program (D-SNAP) joined mile-long lines and stood for over five hours waiting in the Texas heat to apply. D-SNAP funds do not expire and remain available unless untouched for over a year. To be eligible for this assistance, applicants must live in a disaster declared county, have experienced a loss of income or destruction to their home, must not already be recipients of regular SNAP benefits, and meet income limits. With the lines and heat so unbearable, one elderly applicant never made it into the building, going into cardiac arrest and dying before having a chance to apply. Many other applicants suffered heat strokes and some were transported to hospitals. LSLA wrote a letter to Governor Abbot and Texas Department of Health and Human Services requesting that elderly and disabled applicants be accommodated and allowed to apply outside of the in-person, mile-long line situation. Unfortunately, there were no further extensions to the application deadline.

**Water Quality and Superfund Site**

In 2011, an armored cap was constructed over the impoundments at the San Jacinto River Waste Pits, a Superfund site in Baytown, Texas, that previously disposed of pulp and paper mill waste in the mid-1960s. Since its rediscovery in 2005, numerous environmental agencies have attempted to negotiate with the federal Environmental Protection Agency (EPA) for clean up at the site in an effort to prevent any further public health damage to nearby residents. In coordination with the Texas Health and Environmental Alliance, LSLA helped to educate area residents about their rights to participate in the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) process to persuade the EPA to choose one alternative solution for the Waste Pits over another. LSLA, representing several residents of Highlands and Baytown, submitted comments to the EPA. The comments offered the following suggestions: lowering the preliminary remediation goal to less than 200 ng/kg because it
would require the full removal of contaminated waste materials above a lower, more protective level; hiring an independent and objective third party to monitor all removal activities; and for the EPA to view with skepticism information put forward by groups advocating for the permanent cap as a viable alternative given the lack of transparency on the part of such groups. On October 11, 2017, after acknowledging that Hurricane Harvey’s flooding released the highest levels of dioxin ever measured at the site, the EPA finally issued a press release announcing that dioxin-contaminated material will be removed from the San Jacinto River. Although LSLA attorneys are happy with the decision, they will remain involved throughout the process to ensure the plan is what is best for the residents in the area.

**Debris Management Site**

Residents of a low-income minority neighborhood in Port Arthur, Texas, reached out to LSLA after the storm because a storm debris management site (DMS) was set up across the street from their homes. These residents thought they had avoided the issues with flooding and mold that so many residents in nearby neighborhoods and counties had experienced. That luck soon faded when they saw—and smelled—mold infested debris arriving in loaded dump trucks. LSLA attorneys wrote letters and met with officials from the city and the Texas Commission on Environmental Quality demanding that existing EPA rules concerning how DMS locations should be located away from residential areas be followed and testing be conducted. Shortly thereafter, the DMS was closed, avoiding any need for litigation and allowing the residents to breathe again.

**Landlord Tenant Issues and Shortage of Affordable Housing Options**

Hurricane Harvey devoured countless homes in LSLA’s service area, leaving many homeless and grasping for housing that is more than substandard. The cost of housing in the affected areas has skyrocketed, making it difficult to find a decent place to live at an affordable price. The disaster-declared counties need more affordable housing opportunities. Renters are facing a multitude of issues that include 5-day notices to vacate, failure to return security deposits, and self-help evictions. A standard Texas Apartment Association lease contains language in its section regarding rights and responsibilities after a natural disaster or other catastrophic events, specifically stating that if a housing unit has been found to be unusable for residential purposes, a lease can be terminated by giving a 5-day written notice. Although legal, residents often need much more time to move. While self-help evictions are illegal in Texas, landlords will still take measures into their own hands and try to force tenants out by locking them out of their apartments, turning off their utilities, ordering them to leave, and even removing their belongings. Other residents are facing eviction due to non-payment of rent—rent they refused to pay due to the conditions of their flooded residences. LSLA attorneys
have been successful at assisting renters who face these fact patterns, most of whom prevail in seeking retroactive rent reductions or even a release from their lease obligations.

LSLA represents over thirty senior citizens who received a 5-day notice to vacate at their high-rise senior living facility, even though only the first floor of the property flooded and apartments suffered minimal damage. There are no apartments on the first floor as the building, which in its prior life was a Holiday Inn hotel; at that time, the first floor housed only the check-in desk, laundry facilities, a restaurant, and pool area. The building is now owned by the Houston Housing Authority (HHA) and is a public, senior housing tax-credit development that provides affordable housing to low-income seniors. Although the HHA promised to move the tenants to other developments, they were worried about where they would go in a city where so many families were already displaced. Moreover, the tenants of this property are reported to have an informal support network; they help one another. This network will dissipate if they are forced to move. LSLA was tipped off to this situation via social media by a friend of a tenant living at the property. The friend stated that an entire apartment complex of senior citizens was being thrown out of their apartments. The next day, LSLA attorneys arranged a pop-up clinic nearby and left flyers at the property. Tenants showed up, wanting to know their rights, and signed up for intakes shortly after hearing LSLA’s Director of Litigation inform them of their rights. LSLA filed a temporary restraining order against the Houston Housing Authority, which was granted and has now become a temporary injunction that will last until trial, which is set for March of 2018.

The cities of Beaumont and Port Arthur were the settings for Harvey’s devastating encore; they were hit with an estimated 26 inches of rain within 24 hours. Large numbers of Port Arthur residents were relocated to Dallas and other cities during the height of the storm. While at shelters, these residents began hearing rumors from other evacuees about evictions being filed or “notices to vacate” being issued back home. LSLA filed for temporary restraining orders (TROs), which were granted, on behalf of three residents of Port Arthur in an effort to halt their landlords from entering their homes and disposing of everything in them. Because of the TROs, these clients were able to return to their homes and salvage what they could of their belongings.

With so many individuals and families displaced in its service area, LSLA and Daniel & Beshara, P.C.9 called on HUD to help alleviate the suffering imposed by Hurricane Harvey and the severe housing shortage for low-income Texans. Together, they identified a number of waivers and modifications that would significantly improve housing availability for persons who were affected by Hurricane Harvey. An increase in the number

---

of affordable housing units in the devastated area would significantly affect the lives of thousands of people. “We are moving beyond the news of the moment and are now in a struggle to recreate a working home. We are simply asking for the opportunity to secure the basic rights of a shelter, a safe, habitable, and secure base that will enable people to go out in their community of work, school, and culture with dignity and confidence . . . a place to belong to,” says Helen Malveaux, an attorney with LSLA who specializes in fair and affordable housing.

Affordable housing barriers in the region existed before—but were exacerbated by Hurricane Harvey. For example, there are rules that restrict the movement of housing voucher holders; there is not enough funding to provide the assistance required to help family voucher holders find appropriate housing; fair market rent payments in the affected areas need to be increased to a 150 percent payment standard, allowing voucher families a reasonable selection of modest, decent, safe, and sanitary housing in communities of opportunity; there are restrictions that prevent voucher holders from moving to appropriate housing in other areas; and there are required lease provisions that private landlords claim make it too expensive for them to rent to voucher holders.

LSLA and Daniel & Beshara, P.C. sent a letter to the U.S. Secretary of Housing and Urban Development on October 27, 2017, proposing waivers and administrative modifications. They specifically asked HUD to remove the current restrictions on the ability of voucher families to move. The restriction, if left standing, will force many voucher families to remain in dangerous, unhealthy, and unsafe units and neighborhood conditions. They also requested that HUD allow the housing authorities to cover the increased cost of administrative fees; allow the housing authorities to pay for the increased cost of inspections, paperwork processing, and quicker tenant screening; provide financial assistance to encourage and convince landlords to accept vouchers and help tenants obtain much-needed housing by providing incentive payments and payments of security deposits;

10. A public housing authority may set its payment standard amounts from 90 percent to 110 percent of the published FMRs and may set them higher or lower with HUD approval. The level at which the payment standard amount is set directly affects the amount of subsidy a family will receive and the amount of rent paid by program participants. HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK, DEPT OF HOUSING AND URBAN DEVELOPMENT, https://www.hud.gov/sites/documents/DOC_11751.pdf.

and require housing search assistance counseling to find available hous-
ing and negotiate with landlords.

Although present before the storm, the geographic disconnect between communities of low-income and minority residents and communities of high opportunity will become an even greater handicap to social and eco-
nomic advancement. “The letter requests HUD to take several actions to improve the chances for voucher families to obtain adequate and afford-
able housing in decent and safe neighborhoods. Increasing the rents that can be paid is critical to keeping the shortage of adequate housing from sending voucher families to substandard housing and neighborhoods. Expanding the areas in which families can use their vouchers will prevent overcrowding and the attendant high rents for low quality that occur when vouchers are confined to limited areas. HUD must take these actions or Harvey affected voucher families will continue to suffer the effects of the hurricane for a long time,” says housing lawyer Michael Daniel of Daniel & Beshara, P.C.

All Systems Up

Due to the fire at its headquarters, LSLA’s computer and telephone sys-
tems went down. LSLA employees immediately switched over to secondary communication methods, using personal cellphones and personal email ac-
counts to coordinate meetings and DRC or shelter schedules. Meanwhile, its IT department worked around the clock to secure servers from the building’s data center, calculate the damage, and begin the process of restoring all services. Within one week, with the support of the Vinson & Elkins, LLP12 IT department, a redundant site was up and running, allowing access to LSLA’s case management system, shared drive, and internal email.

While systems were down, LSLA’s website, which was previously housed on an internal server, was inaccessible to both LSLA and the public. This meant that the hurricane survivors could not access LSLA’s resources on di-
saster recovery. Luckily, LSLA had a new site already in the works. Within three days of the disaster, LSLA launched a new website a month ahead of schedule. The launch, originally planned for October 1, was accelerated in order to provide an improved platform from which to disseminate informa-
tion, especially disaster recovery information. LSLA’s social media accounts and website blog had a tremendous increase in traffic in the aftermath of Hurricane Harvey as these mediums were and continue to be used to an-
nounce available benefits, shelter and DRC openings, and press about disas-
ter recovery.

Volunteers and Community Collaborations

Another integral part of LSLA’s disaster response is the training of vol-
unteers. This enables many more survivors to receive assistance than could

be served by LSLA alone. LSLA has collaborated with several organizations and entities to further its disaster recovery efforts. It has partnered with the City of Houston to provide “Tenant’s Legal Rights” clinics at affected apartment complexes as well as staffing a permanent legal aid help desk at the City’s Tidwell Multi-Service Center; worked together with Pepperdine’s Disaster Relief clinic to refer survivors with FEMA claims to the law school’s clinic; and joined with the Galveston County Bar Association, Asian American Bar Association, Mexican American Bar Association, Houston Lawyers Association, Houston Bar Association, and Houston Volunteer Lawyers to provide Disaster Legal Services training to volunteer attorneys who will then accept disaster related cases for pro bono representation. LSLA has trained over 285 law students and over 825 attorneys to deliver disaster legal information and advice. Texas Bar CLE credit was provided for attorneys who attended the training and it has been loaded into the SBOT CLE portal for attorneys to view at their convenience.

In an effort to ensure they are fully equipped, LSLA created a web page portal available exclusively to pro bono attorneys, which provides them with access to training materials and templates for FEMA appeals. This allows attorneys with no background in disaster law to easily and seamlessly represent disaster survivors.

Conclusion

LSLA is working with Texas Low Income Housing Information Service and Rice University’s Kinder Institute for Urban Research to identify and exchange data that can be used to develop maps that accurately and precisely depict the low income neighborhoods whose populations were most impacted by flooding. This will allow LSLA to target low-income populations and service individuals and families in need of assistance through outreach clinics and other efforts to deliver disaster legal services.

In the immediate aftermath of a major disaster and for the years that follow, as the definition of a disaster-related legal issue evolves, legal aid lawyers will play an important role in the delivery of disaster legal services to survivors who cannot afford a lawyer.
The duty to affirmatively further fair housing, commonly known by its acronym AFFH, has the potential to serve as one of the strongest weapons in the arsenal of both community developers and fair housing advocates to address structural barriers to full and equal participation in U.S. society for people of color, persons with disabilities, and others protected from discrimination by the Fair Housing Act (FHA). Over its history, the duty has typically been observed in the breach, but, while AFFH is currently under attack, more has been done to give meaning to the obligation in the past decade than in any span over the course of the half-century life of the FHA. This essay explores the potential of fair housing planning that utilizes recently developed tools and relies on robust community engagement to build common ground between community developers and fair housing advocates. In doing so, this essay explores the history of the duty to AFFH, the tensions that have often divided community developers and fair housing advocates, the ways in which recent fair housing planning processes have built common ground, and the prospects for replicating those successes going forward.

I. One Step Forward, Two Steps Back: The Long Road to the 2015 Affirmatively Furthering Fair Housing Rule

In passing the FHA in 1968, Congress had two overarching purposes. First and most straightforwardly, Congress intended to outlaw housing
discrimination against members of protected classes and to end the formal dual housing market for African Americans, in particular. Second, the legislative body wished to begin the process of dismantling patterns of residential racial segregation and concentrated disinvestment that were created, in significant part, through deliberate governmental action at the local, state, and federal levels. Toward this end, the FHA places an obligation on the Secretary of the U.S. Department of Housing and Urban Development (HUD),\(^2\) as well as on all other federal agencies that administer housing and community development programs,\(^3\) to AFFH.

Until recently, HUD’s efforts to comply with the duty to AFFH, as well as to ensure compliance by its grantees and by other federal agencies such as the Departments of the Treasury, had been sporadic and largely ineffectual. In the years immediately following the passage of the FHA, HUD Secretary George Romney launched his Open Communities initiative, which strove to condition the receipt of federal funds by predominantly white suburbs on willingness to accept affordable housing that would foster residential racial integration.\(^4\) President Richard Nixon unceremoniously pulled the plug on the program before it could bear fruit.\(^5\) Despite an early circuit court decision holding that the duty to AFFH applied to HUD grantees as well as to the department itself\(^6\) and clarification from Congress on that point,\(^7\) HUD failed to develop a regulation concerning grantee AFFH compliance until 1995.\(^8\) That rule created the Analysis of Impediments to Fair Housing Choice (AI) process for state and local government recipients of Community Development Block Grant (CDBG), HOME Investment Partnerships Program (HOME), Emergency Solutions Grant (ESG), and Housing Opportunities for Persons with AIDS (HOPWA) funds. From the start, the vagueness of the regulation, a lack of clear guidance from HUD, and a deficit of political will for enforcement undermined the effectiveness of the AI process.\(^9\) The rule was also incomplete in its coverage; HUD did not require public housing authorities to conduct AIs.\(^10\)

2. 42 U.S.C. § 3608(e)(5).
5. Id.
stepped into the void left by HUD, shining a spotlight on brazen grantee non-compliance through False Claims Act litigation that challenged Westchester County’s AFFH certification.\(^{11}\) By 2010, when the Government Accountability Office (GAO) published a report detailing the failures of the AI process, the conclusion that HUD needed to revisit its regulatory approach to grantee compliance was irrefutable.\(^{12}\)

There is, of course, a vast difference between a consensus about the need for regulatory reform and a consensus about the specific details of regulatory reform. Proposed changes ranged from modest steps flowing from GAO report recommendations, such as to mandate that grantees actually submit their AIs to HUD for approval, to paradigm shifts that would refocus the obligation on objective metrics for the reduction of segregation and enforcement, including by private parties, in the event of grantee non-compliance.\(^{13}\) Ultimately, HUD opted to hew more closely to the limited vision of regulatory reform by primarily addressing the GAO’s concerns without implementing fair housing advocates’ more ambitious recommendations. The hallmarks of the Affirmatively Furthering Fair Housing rule, which HUD finalized in 2015, include: (1) the retention of a planning process, now called the Assessment of Fair Housing (AFH), as the central vehicle for AFFH; (2) a requirement that grantees submit their AFHs to HUD for review and either acceptance or non-acceptance; (3) a mandatory timeline for when grantees must submit their AFHs to HUD; (4) an expansion in the coverage of the planning obligation to include public housing authorities; (5) a set format with required sections for the AFH document; and (6) the integration of the AFH into programmatic planning processes that grantees use to determine how they will spend federal funds.\(^{14}\) The first local governments to submit AFHs to HUD under the new rule did so in October 2016.\(^{15}\)


Although HUD, under Secretary Ben Carson, purported to suspend the obligation of local governments to complete and submit AFHs until after October 31, 2020, through a notice that appeared in the Federal Register on January 5, 2018, the resources that HUD created through the development of the AFFH rule still have the potential to advance efforts by community developers and fair housing advocates to promote win-win policies. In the notice, HUD asserts that the obligation of local governments reverts to the requirement to conduct an AI while also recommending that grantees avail themselves of the AFH assessment tool and the AFFH Data and Mapping Tool in the AI process. Multiple major cities have already announced their intention to conduct AFHs despite the notice. The HUD notice is a major setback and will result in significant backsliding in some communities, particularly with regard to the obligation to follow up fair housing planning with effective action. A broad range of affordable housing, fair housing, and civil rights stakeholders have met the notice with a robust advocacy response. Moving forward will require both vigorously fighting the suspension and actively engaging in the AFH process where it proceeds.

II. Can Every Community Be a Community of Opportunity?

AFFH and the Debate over Place-Based and Mobility Strategies

One hotly contentious issue in the AFFH rulemaking process was the approach that HUD was going to take to address the tension between strategies for meeting the needs of members of protected classes, in general, and racial and ethnic minorities, in particular, by promoting mobility to predominantly white areas or by reinvesting in low-income communities of color. There was concern in the community development sector that HUD would place primary emphasis on mobility strategies that directly

17. Id. at 685.
target patterns of segregation. This was natural because promoting integration had been a primary focus of AFFH efforts dating back to Secretary Romney’s thwarted Open Communities initiative. All of the major litigation concerning AFFH over the decades attacked barriers to integration, not impediments to community revitalization. At the same time, fair housing advocates worried that the greater lobbying clout of community development groups and the power of HUD’s offices of Public and Indian Housing (PIH) and Community Planning and Development (CPD) in comparison to the office of Fair Housing and Equal Opportunity (FH EO) would result in a rule that diluted the traditional focus on integration in AFFH efforts. To resolve this conflict, HUD adamantly insisted that AFFH requires a “balanced approach” that seeks to increase access to opportunity for members of protected classes both by fostering mobility and through community revitalization.

The tenor of the debate over what exactly is an appropriate balance between desegregation and revitalization goals for, say, the expenditure of HOME funds in a particular community is a fraught question today. Congress has slashed funding for HOME repeatedly over the course of several years, and there is significant support in Congress for eliminating the program altogether. Other HUD block grant programs, such as CDBG, have also been on the chopping block, although the threat of elimination is less dire. Affordable housing developers that have concentrated their

---


activities in low-income communities of color naturally feel more protective of federal funds if the prospect of creating a bigger pie of federal resources to pay for development in high-opportunity areas (which tends to be more expensive) appears unlikely. Meanwhile, if fair housing advocates are left with inclusionary zoning and other strategies that do not involve actual subsidy, efforts to build affordable housing in high opportunity areas are less likely to reach very low- and extremely low-income households, who may be more likely to be people of color than are low-income and moderate-income households in many regions. Effective intervention to promote integration through affordable housing development will always require some subsidy because the market alone will not produce sufficient decent affordable units for low-income households. In this context, every debate over what a balanced approach actually means, from the national scale to the hyperlocal, can seem like a zero sum game. Although the short-term prospects for increased appropriations are grim, increasing the size of the federal pie is perhaps the single most effective step that any entity could take to harmonize integration and revitalization goals.

Unfortunately, though often for good reason, disputes over the definition of balance outside of the AFH have tended to spill over into litigation and acrimonious lobbying fights instead of reaching resolution through collaborative planning processes. In the context of public housing redevelopment, community developers and fair housing advocates fought over every word when hashing out the propriety and extent of on-site replacement of public housing.26 Provisions in Qualified Allocation Plans for the Low Income Housing Tax Credit (LIHTC) program that affect the siting of developments have been similarly contentious.27 Public housing authorities have chafed at FHEO’s fair housing review of proposed conversions of public housing units under the Rental Assistance Demonstration program because FHEO has at times insisted on the off-site replacement of

26. See, e.g., Gautreaux v. Chicago Hous. Auth., 2013 WL 556771, at *4 (N.D. Ill. 2013) (denying motion to assign lawsuit challenging the Chicago Housing Authority’s decision to redevelop the Cabrini-Green site with anything less than 100 percent public housing units as a related case to a long-running public housing desegregation case); ANITA SINGHA ET AL., WE CALL THESE PROJECTS HOME: SOLVING THE HOUSING CRISIS FROM THE GROUND UP (May 2010).

a portion of the units.28 These fights, all of which involved a defined quantity of federal assistance, are the baggage that community developers and fair housing advocates often bring to the table at the outset of the AFH process.

III. Finding Common Ground Through the AFH Process

The core values at stake in debates about the relative emphasis on mobility and place-based strategies are important and merit continued discussion, but the fair housing planning process prescribed by HUD’s AFFH rule is not up to the task of creating harmony where discord has persisted for decades.29 To try to leverage the AFH process to achieve that end would be to preordain failure and miss a major opportunity to create the conditions in which future consensus-building efforts could find greater success. But the AFH process can lift up policy interventions that are outside of the zero sum sphere of decisions about the use of federal funds. For example, inclusionary zoning, prohibiting source of income discrimination, and reductions in zoning barriers in high opportunity areas can all promote integration without redirecting resources for the development of additional subsidized units away from low-income communities of color.30 Fair hous-

---

28. Sunia Zaterman et al., Dear Colleagues, RAD COLLABORATIVE (Dec. 9, 2016), available at: https://static1.squarespace.com/static/5693b0579cad61a0a1cda98/t/585aef1415d5db6a4ca11627/1482354456165/Final+Comments+on+RAD+Fair+Housing-Relocation+Notice+12-16.pdf (last visited Jan. 24, 2018) (commenting on HUD notice concerning civil rights requirements for the Rental Assistance Demonstration program on behalf of public housing agencies).

29. Under the AFFH rule, states, insular areas, and local governments that receive funding through the Community Development Block Grant, HOME Investment Partnerships, Emergency Solutions Grant, and Housing Opportunities for Persons with AIDS programs, as well as public housing authorities, are required to submit AFHs to HUD in order to be eligible for funding. 24 C.F.R. § 5.154(b). In AFHs, program participants must analyze fair housing issues in their jurisdiction and in their region, identify the factors that contribute to those fair housing issues, and set goals for overcoming the effects of those contributing factors. 24 C.F.R. § 5.154(d). After the submission of an AFH to HUD, program participants must incorporate strategies and actions to achieve the goals specified in the AFH in their Consolidated Plan or Public Housing Agency Plan. 24 C.F.R. § 5.154(d)(5). The process of conducting an AFH is informed by data analysis and robust community participation. 24 C.F.R § 5.154(d).

30. At the same time, there are ways in which these policies could, in an indirect way, reduce affordable housing development in low-income communities of color. Under inclusionary zoning, the decision as to whether to have an in-lieu fee option and the parameters for the use of fee proceeds can implicate affordable housing development in low-income communities of color. Banning source of income discrimination, which increases Housing Choice Voucher holders’ access to high opportunity areas, can affect the underwriting of LIHTC developments in low-income communities of color by reducing demand for units. Eliminating exclusionary zoning removes one of the obstacles that often makes developments in low-income communities of
ing advocates are also typically eager to support interventions, including those involving federal funds, that facilitate the revitalization of low-income communities of color through non-housing means, such as workforce development and environmental remediation. Lastly, community developers and fair housing advocates can collaborate around strategies for increasing the pie of total resources, such as commercial linkage fees and document recording fees, to pay for affordable housing as long as advocates and policymakers frame the need for such programs in terms of the impact of affordable housing resource scarcity on members of protected classes. Merely focusing on the need for affordable housing without connecting that need to protected class status conflates the concepts of fair housing and affordable housing and is inconsistent with sound fair housing planning.31

Conflicts of interest and competition are inherent in the AFH process. Organizations and constituents who receive HUD and local funding are usually key participants in the community engagement process. There may be pressure to silence criticism due to real or perceived threats of funding cuts. In addition, these organizations are often competing against each other for limited resources and may promote their own activities over others based on funding rather than community needs. For example, fair housing organizations are usually strong advocates for fair housing testing and nonprofit housing developers often promote predevelopment funding strategies. This competition plays out during the prioritization of goals and strategies that lead to a reallocation of funding during the Consolidated Plan process.32

The AFH process can also be a platform for reaching consensus around win-win strategies. This is only possible in jurisdictions that welcome meaningful input from a wide array of stakeholders and limit undue political influence. One of the most striking examples of a win-win strategy is found in New Orleans, the first major jurisdiction to submit an AFH. Ellen Lee, Director of Housing Policy and Community Development, invited stakeholders to come together to help draft the AFH. The drafting process was more time-consuming than it would have been with the bare minimum level of community participation required by the AFFH rule. Yet, it resulted in the inclusion of a number of progressive goals color more competitive than developments in high opportunity areas for LIHTC awards.


32. 24 C.F.R. §§ 91.1-91.600 (requiring states, insular areas, and local governments that receive funds through the Community Development Block Grant, HOME Investment Partnerships Program, Emergency Solutions Grant, and Housing Opportunities for Persons with AIDS programs to prepare and submit Consolidated Plans that analyze housing conditions within grantees’ jurisdictions, identify needs, and propose strategies and actions for meeting those needs).
and strategies that genuinely reflected the community’s priorities to increase housing choice in high opportunity areas without undermining ongoing revitalization and anti-displacement efforts. Over the past several years, city officials worked closely with fair housing advocates and community developers to pilot a mandatory inclusionary zoning program in a few high opportunity and rapidly gentrifying areas of New Orleans. The development of a mandatory inclusionary zoning ordinance became one of the most important AFH strategies. This is an example of the power of collaboration that leads to lasting change.

Los Angeles had a more complex community engagement process because of its immense size and the enormous number of stakeholders. Community engagement was solicited though public meetings in each City Council district, focus groups conducted jointly with Los Angeles County (which was also going through the AFH process), meetings with the Resident Advisory Council for the Housing Authority of the City of Los Angeles, stakeholder meetings, meetings with city agencies and commissions, public hearings, and the formation of a Fair Housing Collaborative. The contribution of the Alliance for Californians for Community Empowerment (ACCE), a community organizing group with a strong commitment to fighting displacement, and the Housing Rights Center (HRC), a fair housing organization, with assistance from the Grounded Solutions Network, was a unique aspect of the AFH process. ACCE and HRC convened a series of well-attended meetings with hundreds of service providers, advocates, and residents to identify fair housing issues and contributing factors and to develop a list of goals and strategies designed to overcome those barriers. These meetings, which were attending by city and housing authority staff, provided valuable insight into the struggles residents of low-income communities of color face and resulted in the incorporation of dozens of goals and strategies that are win-wins for fair housing advocates and community developers, including source of income discrimination protections. After holding these sessions, ACCE and HRC submitted written comments to the draft AFH on behalf of 42 community-based organizations.

Philadelphia’s community engagement process coalesced later than intended as a result of an unrealistic ten-week schedule that was later extended by another thirty days. The city had convened several focus groups at the beginning of the community engagement process but meetings focused on educating the community about the AFH process instead of serving as an opportunity for stakeholders to provide meaningful feedback. By the time key


34. CITY OF LOS ANGELES & HOUSING AUTHORITY FOR THE CITY OF LOS ANGELES, ASSESSMENT OF FAIR HOUSING PLAN 409 (Nov. 6, 2017).
partners were fully engaged, the city had drafted many of its goals and strategies. As a result, the goals and strategies were not optimally tailored to the challenges facing protected class members. Recognizing this misstep, the city returned to the community participation process in order to strengthen the AFH. Stakeholders were divided into the following three groups to review and prioritize the draft goals and strategies: (1) Preservation of Existing Housing and Development of New Housing; (2) Fair Housing—Outreach, Training, Enforcement, and Legal Strategies; and (3) Place-Based Strategies and Quality of Life/Access to Opportunities. One strategy that emerged illustrates the power of data to create common ground: the proposal to use a Displacement Risk Ratio to identify areas to prioritize the preservation of existing affordable housing in order to prevent resegregation. Fair housing advocates and community developers often agree in principle about the need to preserve affordable housing in gentrifying areas, but struggle to come to consensus about which areas are actually undergoing gentrification. Through its emphasis on robust community participation, data, and policy analysis, the AFH process has the potential to be a platform for resolving that harder question.

That the AFH process can create common ground when fair housing advocates and community developers focus on win-win strategies that increase the total pie and protect tenants’ rights does not mean that more contentious issues should be ignored. Local governments continue to play a critical role in the siting of affordable housing. As long as state qualified allocation plans for the LIHTC program reward the leveraging of resources, the geographic distribution of HOME funds will have significant implications for patterns of residential racial segregation. Building trust among fair housing advocates and community developers by starting with win-win policies in the AFH process, however, can help ensure that discussions about decisions with a zero sum dimension are grounded in data, mutual respect, and the balanced approach promoted by HUD. In the best-case scenario, collaborative discussions through the AFH process could even transform the perception of policies that have some zero sum dimensions into win-wins. One example is Small Area Fair Market Rents for the Housing Choice Voucher Program, which were included as a strategy in the Philadelphia AFH. Although individual affordable housing developers with properties in neighborhoods with rents significantly below the area median may be hurt by the adoption of Small Area Fair Market Rents, data suggests that Small Area Fair Market Rents may increase the total pie of Housing Choice Vouchers by reducing the cost of

35. CITY OF PHILADELPHIA & PHILADELPHIA HOUSING AUTHORITY, ASSESSMENT OF FAIR HOUSING 320 (Dec. 23, 2016).
36. Id. at 319.
each voucher while increasing the range of housing options available to voucher holders.

IV. Will This Opportunity Withstand the Current Threat?

It is clear that the AFFH rule and the AFH process are under attack by the political leadership of HUD and the Trump administration. In this perilous moment, the future of the rule and the process depends in no small part on the actions of local governments to make use of the AFH process as part of their efforts to comply with the duty to AFFH. Municipalities that are committed to fair housing can facilitate the long-term success of the rule and the process if there is a steady stream of examples of best practices for effective fair housing planning, informed by robust community engagement and intensive data analysis. Fair housing advocates and community developers also have a valuable role to play in that process, both through active engagement in jurisdictions that choose to go forward with AFHs and through the promulgation of best practices, particularly for implementing goals and strategies to address fair housing issues and contributing factors. If that occurs, less progressive jurisdictions will not be starting from square one if and when HUD restores the requirement to submit an AFH. As key stakeholders, fair housing advocates and community developers are well positioned not only to use the AFH process as a platform for advancing win-win strategies, but also to push their communities to move forward with the AFH process and not revert to business as usual under the failed AI regime.


An Evolving Fair Housing Movement: Forging New Partnerships and Agendas Across Policy Areas

Megan Haberle

The fiftieth anniversary of the federal Fair Housing Act (FHA) this year presents an opportunity for celebration and reflection during a tumultuous political time. The civil rights community has occasion to take stock of our progress as a nation over the past fifty years; our continuing need for action to achieve the FHA’s aims; and how evolving demographics, political and community dynamics, and jurisprudence may demand new strategies and narratives. Since the anniversary occurs during a conservative administration, it also marks a time of dual focus for national housing policy advocates. We are currently resting a great deal of hope on a model of progressive federalism, in which new partnerships and policy templates will be forged on state and local stages. At the same time, at the federal level, we face the important need to defend past gains and to keep alive our ability for future advancement.

The nation’s affordable housing crisis is also growing more acute, and federal budget cuts will deepen the insecurity and lack of opportunity this presents to vulnerable Americans, and disproportionately to people of color. Facing this time of greater scarcity and immediate need, how can civil rights advocates continue to advance the “long game” of overcoming structural discrimination? And in a time of federal retrenchment on civil rights, what are the prospects for the national role?

Addressing those questions—how to keep pushing on segregation and structural discrimination and how (eventually) still to use federal power to that end—demands renewed self-examination and strategizing over the opportunities that the current era presents, especially for forging new partnerships and agendas. Fair housing has long faced a collective action challenge. Open housing choice and integration were core demands achieved by the Civil Rights Movement, but the mechanics of their implementation have been difficult to make politically salient. Organizing groups often focus on neighborhood improvements and place-based advocacy, while most exclusionary communities lack a dynamic base to mobilize in support of integration (despite the benefits that increased diversity could bring).

At the same time, fair housing groups often draw upon elements of a community lawyering model (in which legal practice is driven by community concerns and in synergy with community voice and empowerment)

Megan Haberle (mhaberle@prrac.org) is Director of Housing Policy with the Poverty & Race Research Action Council. The author thanks Philip Tegeler and the editors for their helpful comments.
and advocate for housing choice in tandem with other goals, such as tenant protections, equitable disaster recovery, or fair infrastructure spending. Fair housing advocates are believers in place-based improvements, as well as in desegregation and open housing choice. And support for fair housing advocacy platforms can often be advanced by doing this work in tandem. Yet capacity limitations, resource scarcity, and specialization in response to policy silos have all tended to raise practical impediments to the scope of such efforts to engage in broader, issue-crossing work.

In 2018, the pressures and challenges posed by the Trump administration have opened and energized the lines of collaboration among progressive advocates. This means that fair housing, affordable housing, community development, and civil rights groups working on related issues (such as environmental justice and education policy) have new opportunities to break out of our separate tracks and do more to advance joint agendas. This work can build on the momentum that was seeded during the Obama administration on interagency coordination: bridging the artificial boundaries between housing and school policy,1 land use, infrastructure, and other policies that intertwine with residential segregation. Just as they have long reflected other aspects of structural discrimination, these related systems are shaped by segregation, and also reinforce it, in ways that current program administration and design have failed to respond to.2 Present-day civil rights movement-building encompasses and is mutually strengthened by attention to the detail work of these policy structures, as well as how they connect to the larger problem of segregation.

Even under a reactionary federal administration, there is hope for progress in addressing segregation and inequality. The “blue laboratories” of progressive localities and states are testing grounds for new policies in a range of fields, including housing. These explorations, important in their own right, also provide models for other jurisdictions and potentially will be a foundation for eventual federal action. The improved alignment of housing policy with related fields is one area ripe for pioneering. Such coordination can advance both fair housing and community development goals, especially if policymakers commit to concerted, in-depth policy redesigns on a scope commensurate with the causes and consequences of residential segregation.

The potential for such alignment has been largely untapped. For instance, despite the pragmatic reality that residential and educational segregation are mutually reinforcing, and one cannot effectively be addressed without the other, the potential for such connections remains widely un-

2. Id.
developed. This is attributable, in part, to deeply rooted mechanisms such as funding structures, state and local agency administration, and federal and state choice architectures and incentives, as well as the limitations of legal liability theories and remedies. Similarly, the advocacy worlds of environmental justice, fair housing policy, and infrastructure policy tend to operate in separate spheres that reflect separate policy silos, funding frameworks, and available causes of action. In a given locality, the government agency that sites affordable housing may be different from, and unaccustomed to collaborating with, the governmental departments that administer other critical development and land use policies, such as commercial redevelopment and zoning.

This local administrative insularity is reinforced by federal funding streams and oversight structures. The structures of federalism (both formal and informal) operate differently for different fields, which can make it practically difficult to create meaningful points of alignment without strong new regulation or incentives. Policy alignment is made challenging, moreover, by federal incentive structures and program designs that continue to reinforce segregation and largely operate in separate regulatory spheres. Federal housing programs, for instance, only minimally account for access to educational and other opportunities, despite the compelling intergenerational benefits that would accrue from closer coordination. HUD and EPA lack a system for taking appropriate responsive action when affordable housing residents are exposed to environmental hazards.

Yet increased recognition of the benefits of interagency coordination, at every level of government, has created the political will to make changes

3. Id.
5. See, e.g., Peter Kye, Equity Considerations in Climate Adaptation Plans: A Call for Advocacy (PRRAC, Oct. 2017) (noting that federal, state, and local climate change planning often “fail(s) to adequately consider connections to related areas, such as affordable and subsidized housing policy”), available at http://prrac.org/pdf/PolicyBriefClimateAdaptations2017.pdf.
and has led to positive steps and models. For example, Seattle’s Office of Civil Rights leads a citywide Race and Social Justice Initiative, which works across municipal offices to identify concrete steps to address institutional racism.8 Within the federal government, the Obama administration formulated a number of promising inter-agency programs and collaborative guidance. These included, notably, the Affirmative Furthering Fair Housing regulation, requiring HUD program participants to assess how segregation impacts “access to opportunity” (that is, schools, environmental health, and other factors), to identify underlying causes, and to set goals to address them. The Obama administration also issued a joint letter from HUD, the Department of Education, and the Department of Transportation urging local agencies to take joint action to affirmatively further fair housing:

Our agencies are calling on local education, transportation, and housing leaders to work together on issues at the intersection of our respective missions in helping to guarantee full access of opportunity across the country. Our goals are to identify impediments to accessing opportunity; to coordinate efforts to address these issues and to provide broad-reaching benefits; and to ensure that every child and family is provided with transportation, housing, and education tools that promote economic mobility. The new process in which communities are engaging under the Affirmatively Furthering Fair Housing rule (AFFH rule) from HUD provides an opportunity for cross-agency collaboration and strong community involvement. We urge you to take full advantage of the community participation process of the AFFH rule, so that regional planning promotes economic mobility and equal access to the many benefits provided by affordable housing, great schools, and reliable transportation.9

Creative policymakers and advocates have continuing opportunities to build upon this momentum.

In addition to interagency initiatives that help to dismantle segregation, fair housing advocates and policymakers can promote collaborations that sustain and support integration. As one set of recommendations (for federal policy, but applicable elsewhere) noted:

Especially as we become an increasingly diverse society, it is important that HUD help integrated neighborhoods to flourish. Multifaceted approaches to sustaining integration should be an important consideration in furthering fair housing. An examination of cities in various regions of the United States found that stable, diverse communities typically exhibit common features, including the co-existence of multiple ethnic groups, attractive infrastructure (such as high-quality housing stock), the availability of affordable

housing, and relationships with banks and real estate agents. Governmental forces can help nurture such communities, by ensuring access to financial support (such as loans for housing maintenance and business incubation), fostering diversity through antidiscrimination laws, public education measures, and other means.

Additionally, efforts to integrate individuals should be sensitive to their needs. In terms of countering prejudice, integration has the strongest impact when it results in “meaningful contact,” that is, when “members of different groups have equal status, common goals, are in a cooperative or interdependent setting, and have support from authorities.” To the extent possible, HUD and its grantees should coordinate their work with that of other agencies to facilitate integration, for example, with language instruction programs; inclusive [educational] tracks; and by providing funding to inter-ethnic community organizations.10

Housing discrimination, program designs that entrench segregative patterns, and exclusionary zoning are significant problems that create lasting harm across generations. These issues require direct and specialized interventions. However, as the fair housing movement continues to grapple with segregation, we can benefit from efforts to broaden our advocacy work to encompass related fields. Other policies have a reciprocal effect on segregation.11 In addition, by working in partnership with advocates who focus on environmental justice, education, infrastructure equity, and other issues, many fair housing advocates are laying an important foundation for mutual support and for joint agendas that promote housing choice as well as other aspects of social equity.

11. See, e.g., Tegeler & Hilton, supra note 1.
Threading the Needle of Fair Housing Law in a Gentrifying City with a Legacy of Discrimination

Tim Iglesias

Introduction

This essay tells the story of an extended and complex conflict between San Francisco and HUD and the creative solution that emerged from their negotiations. The conflict concerned the application of a community preference to a proposed senior housing development that would be located in a traditional African American neighborhood in San Francisco and its potential violation of federal fair housing law. After a brief background discussion of some of the policy and legal issues raised by community preferences, the essay tells the story of the conflict and its resolution. The essay concludes with reflections on the potential value of the solution to other similarly situated cities in the context of ongoing gentrification and displacement.

Background

To understand the subject of this essay, it is necessary to appreciate three background conflicts and the conditions created by them.

1. This essay was compiled based upon three sources: interviews with numerous participants in the events described, documents provided by those participants to the author, and some independent research by the author. The persons interviewed for this essay were Don Falk, Executive Director of the Tenderloin Neighborhood Development Corporation; Sophie Hayward, formerly at the San Francisco Mayor’s Office of Housing, now a principal at Urban Praxis; Evan Gross, formally a Deputy City Attorney for the City and County of San Francisco, now a partner at Gubb & Barshay; Kate Hartley, Director at the San Francisco Mayor’s Office of Housing and Community Development; and Gustavo Velasquez, formerly the Assistant Secretary for Fair Housing and Equal Opportunity at HUD, now Director, Washington-Area Research Initiative, at the Urban Institute.

2. The Urban Displacement Project (http://www.urbandisplacement.org/) has produced excellent brief video introductions to gentrification (https://www.youtube.com/watch?v=V0zAvlmzDFc) and displacement (https://www.youtube.com/watch?v=Zb4xATPMILc).

Tim Iglesias (iglesias@usfca.edu) is Professor of Law at the University of San Francisco School of Law and editor-in-chief of the Journal of Affordable Housing & Community Development Law.
Government-Sponsored Segregation and the Chronic Affordable Housing Crisis in San Francisco

Federal fair housing law (FHA), which promotes “integrated ways of living,” prohibits discrimination against members of protected classes and prohibits segregation. However, like many cities during the 1950s and the 1960s, San Francisco actively discriminated against members of protected classes in its use and implementation of government programs, including redevelopment. Richard Rothstein’s book *The Color of Law* documents this 80-year history of state-sanctioned segregation across the United States of which San Francisco’s practices are a part. The effects of this past discrimination are reflected in current patterns of racial segregation in San Francisco, including communities of concentrated low-income African Americans in neighborhoods such as the Western addition and Bay View-Hunters Point.

While San Francisco as a whole is racially diverse, it has significant clustering of particular racial groups in neighborhoods. The demand for housing in San Francisco has regularly and substantially exceeded supply, especially in recent economic booms. In part because of the presence of many wealthy households in the San Francisco Bay Area, housing prices have skyrocketed and gentrification has resulted. Over the last several decades, San Francisco has enacted many programs to address its housing problems, including promoting local housing bonds, improved redevelopment programs, affordable housing development through an inclusionary zoning ordinance, and many other programs. Yet, the demand for affordable housing in San Francisco is enormous. A recent lottery for 26 units of affordable family housing in one of San Francisco’s neighborhoods brought in 1,900 applications. During the administration of recently deceased Mayor Edwin Lee, San Francisco established “a goal of constructing and rehabilitating at least 30,000 new units of housing by 2020 with at least


one third permanently affordable to low and moderate-income households and with over 50% accessible to middle-class San Franciscans.8

Community Preferences and Fair Housing Law

“Community preferences” are rules that grant preferences for new affordable housing units to current residents who meet certain criteria. There has been a long history of conflict between cities adopting community preferences and the requirements of the FHA because such preferences can discriminate against members of protected classes and perpetuate segregation. Typically, cities, particularly suburbs, adopt community preferences, which have the effect, and possibly the intent, of excluding persons protected by the FHA.9 In some cases, city-wide preferences, such as requirements that applicants live or work in the city, may not violate the FHA.10 However, if the current population is predominately white, preferences based upon smaller geographic units, e.g., neighborhoods or districts, are more likely to violate the FHA.

Mobility Strategies and Place-Based Strategies

Establishing community preferences in cities experiencing gentrification and displacement is complicated by another long-standing controversy between some community and affordable housing advocates on the one hand, and some fair housing advocates, on the other hand, regarding the location of new affordable housing developments. Displacement due to gentrification can become a form of re-segregation. Often the tenants being involuntarily displaced are members of protected classes who will not find any viable housing opportunities in the city from which they are being displaced and who may be forced to move to other cities, often segregated suburbs with few employment, social services, and other opportunities.11 Under

8. Id.
10. See Letter from Gustavo Velasquez, Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Dep’t of Housing & Urban Development, to Olson Lee, Director, San Francisco Mayor’s Office of Housing and Community Development, at 1 (Aug. 3, 2015) (on file with author). Community preferences, e.g., favoring teachers or other occupations, have also been used to promote affordable housing funding measures, in part to increase the likelihood of voter approval.
this view, displacement raises fair housing issues and a city’s response to
displacement is subject to fair housing analysis. Depending upon local con-
ditions, funding availability, and other factors, affordable housing and com-
munity development advocates may either want to develop affordable
housing and preserve affordable housing in communities that have suffered
past discrimination and are currently experiencing displacement or to de-
velop affordable housing in suburban “high opportunity” areas. Fair hous-
ing advocates often focus on the use of fair housing law to overcome historic
resistance to affordable housing development in suburbs and question siting
new affordable housing in neighborhoods with high concentrations of pov-
erty or people of color. This conflict pits the value of providing persons pro-
tected under the federal Fair Housing Act with new housing opportunities
in “high opportunity” neighborhoods (mobility strategies) against efforts to
use affordable housing developments as investments to rebuild and revital-
ize disadvantaged communities (place-based strategies).12

In principle, many, if not most, groups agree to the both/and concept—
that some new affordable housing ought to be located both in disadvan-
taged communities and in high opportunity neighborhoods.13 Unfortunately,
given the very limited subsidy available for affordable housing de-
velopment, the agreement in principle does not necessarily assist in resolving
the conflict for any particular proposed development, so the location for each
new proposal can be controversial. Because of the limited availability of af-
fordable housing, this conflict can become a zero-sum game fought among
progressives over what amounts to crumbs, in effect, pitting equally worthy
and entitled groups against each other.14

12. See Sandra M. Moore, Ferguson: Undoing the Damage of the Past—Creating
Community Wealth, 25 J. AFFORDABLE HOUS. & CMTY. DEV. L. 297 (2017); john powell
& Stephen Menendian, Opportunity Communities: Overcoming the Debate Over Mobil-
ity Versus Place-Based Strategies, in THE FIGHT FOR FAIR HOUSING: CAUSES, CONSE-
QUENCES, AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 207–27
(Gregory D. Squires ed., 2018).

13. See, e.g., Diane Yentel, Ending America’s “Architecture of Segregation” Requires
enterprisecommunity.org/blog/2015/09/contributed-segregated-communities
(last visited Jan. 18, 2018); Elizabeth K. Julian, Fair Housing and Community

14. This issue has created multiple conflicts between community affordable
housing advocates and fair housing advocates that are beyond the scope of this
brief essay. These conflicts include whether state housing agency funding qualifi-
cations skew the location of affordable housing developments, and whether afford-
able housing developers make their best efforts to site affordable housing in high
opportunity communities given their incentives to use lower-cost land and to
avoid difficult, expensive conflicts with local opponents in obtaining local govern-
mental approvals.
The Willie B. Kennedy Apartments Story

The 2015 Neighborhood Preference Ordinance

Intense gentrification pressures on the African American community in San Francisco since around 1999 led advocates for the community to approach city leaders to develop new programs to protect the fast diminishing African American population in San Francisco.

At this time, San Francisco had already adopted two preferences for allocating new affordable housing units, in part in response to various displacement pressures. In 2008, San Francisco enacted Ordinance 232-08, which created the San Francisco Redevelopment Agency’s Property Owner and Occupant Preference Program under which the city issues “Residential Certificates of Preference.” Holders of such certificates get a preference in occupying units or receiving assistance under all city affordable housing programs. Members of households in certain neighborhoods that were displaced by the federally funded urban renewal projects in the 1960s were eligible for this preference. A second preference was available to tenants who are evicted for a certain reason. Under a state law called the Ellis Act, owners of housing subject to San Francisco’s Rent Stabilization Ordinance may evict tenants on a no-fault basis if they intend to take the unit off the rental market. In response to large numbers of these kinds of evictions, San Francisco enacted an ordinance creating a second preference (the “Displaced Tenant” preference) for households displaced due to these types of Ellis Act evictions.

These existing preferences were perceived as insufficient and ineffective to prevent further gentrification in the current context. Advocates were aware of a community preference that had been adopted in New York City, which provided a 50 percent preference for current residents in certain neighborhoods. They petitioned the San Francisco leadership to do something similar, i.e., establish a preference for residents of certain neighborhoods.


16. Id. This preference was an already existing San Francisco Redevelopment Agency (SFRA) preference that was implemented by SFRA for years. In 2008, the City and County of San Francisco (a separate legal entity from SFRA) adopted the policy so that it would also apply to City/County-funded programs.


19. The NYC community preference has been challenged as violating the federal Fair Housing Act and NYC’s human rights law by perpetuating racial segregation and intentionally discriminating against and causing a disparate impact among racial minorities. See Winfield v. City of New York, No. 15CV5236-LTS-DCF, 2016 WL 6208564, at *2 (S.D.N.Y. Oct. 24, 2016) (describing NYC’s “Community Preference Policy” and denying motion to dismiss).
neighborhoods in San Francisco over other neighborhoods. Advocates for the Latino community in the Mission District of San Francisco supported a comparable preference for their community, which also had been subject to intense gentrification. The city leadership tasked staff with responding to these concerns.

In November 2015, under the leadership of several Supervisors, especially Supervisor London Breed,\(^{20}\) staff produced a proposed ordinance called the Preference in City Affordable Housing Programs.\(^{21}\) The original proposed ordinance had three components: (1) maintaining the Certificate of Preference program; (2) adding five additional categories to the existing Displaced Tenant preference;\(^{22}\) and (3) creating a new neighborhood resident preference to existing residents in each of the eleven supervisory districts at initial occupancy for 25 percent of new affordable housing units proposed in the neighborhood of their primary residence.\(^{23}\) Grounded in an awareness of past legal problems with community preferences, the newly proposed neighborhood resident preference component was based upon careful legal and statistical analysis and designed from the beginning to avoid running afoul of fair housing law by causing a discriminatory impact.

During the political process prior to its enactment on December 1, 2015, the proposed ordinance was revised in several respects. The component of the proposal suggesting five additional categories to the existing Displaced Tenant preference was dropped for possible consideration in a future ordinance. One new category of Displaced Tenant was added: tenants who are evicted due to an owner exercising its right under the San Francisco Rent Stabilization Ordinance for the owner or relative to move into the unit.\(^{24}\) The neighborhood preference was increased to apply to 40 percent of new affordable housing units. The definition of “neighborhood” was expanded to include residents living a half mile from the supervisorial district in which the new affordable units would be located. The final

\(^{20}\) Supervisor London Breed, who grew up living in public housing located across the street from the Kennedy Apartments, was a strong champion of the neighborhood preference at issue.

\(^{21}\) Proposed Ordinance 204-15, File No. 150622.

\(^{22}\) The additional categories were: (1) tenants evicted under any of the no-fault provisions of the San Francisco Rent Stabilization Ordinance; (2) tenants evicted due to fire or other natural disaster; (3) tenants evicted due to the expiration of affordability restrictions in certain developments; (4) tenants evicted from affordable units created by San Francisco’s Inclusionary Affordable Housing Program in which the unit is transitioning from a rental unit to an ownership unit; and (5) tenants evicted due to the loss of a residential unit through a residential demolition or a merger.

\(^{23}\) Supervisorial districts are the geographic units that elect representatives for San Francisco’s Board of Supervisors. See http://sfbos.org/ and http://sfbos.org/supervisor-cohen-district-information (last visited Jan. 31, 2018).

\(^{24}\) San Francisco Rent Stabilization Ordinance Section 37.9(a)(8).
ordinance provided a first preference to Certificate of Preference holders, a second preference to tenants evicted under the selected no-fault provisions of the Ellis Act, and a third preference called the Neighborhood Resident Housing Preference (NRHP) for residents in a neighborhood where the affordable housing is located.25

The Willie B. Kennedy Apartments Proposal and the Western Addition

The proposal for the Willie B. Kennedy Apartments26 was a 98-unit development of studios and one-bedroom units for low-income seniors, including formerly homeless seniors, to be funded in part by the HUD 202 program. The apartment complex would be located in a neighborhood called the Western Addition. The developer, Tenderloin Neighborhood Development Corporation (TNDC), is a longstanding well-respected nonprofit affordable housing development organization.

San Francisco’s leaders described the Western Addition neighborhood as follows:

Once a thriving, predominantly African-American community the Western Addition neighborhood underwent large-scale displacement in the 1960s as a result of “urban renewal.” Nonetheless, the neighborhood is one of only two remaining in San Francisco that is home to an established African American community. In a City facing the highest housing costs in the country, displacement pressures are particularly acute in the Western Addition. Between 2009 and 2014 in Supervisorial District 5—which includes the Western Addition—households earning 50 percent to 100 percent of area median income (AMI) shrank by almost 13 percent, while the number of households earning greater than 200 percent of AMI grew by almost 35 percent.27

The Kennedy project was the first proposed development to be subject to the new NRHP because it was receiving funding from the San Francisco Mayor’s Office of Housing and Community Development. As a HUD 202 project, it was subject to regulations in HUD’s Multifamily Occupancy Handbook requiring it to produce and submit an Affirmatively Furthering Fair Housing Marketing Plan (AFHMP).28 In its regulations implementing the Fair Housing Act, HUD requires that certain proposed affordable housing developments produce an AFHMP. These plans are intended to ensure that people who are eligible to apply for affordable housing units

25. See Lottery Preference Programs, supra note 15.
26. The apartments are named in honor of Willie B. Kennedy, an African American woman and former longtime member of the San Francisco Board of Supervisors who championed minority- and women-owned businesses and disadvantaged neighborhoods, including Bayview-Hunters Point.
27. Lee Letter, supra note 4, at 1.
are informed and enabled to apply. Under HUD’s regulation, the TNDC would submit the AFHMP to San Francisco, which would then submit it to HUD for review. In other words, the Kennedy Apartments’ marketing plan needed to conform to the requirements of San Francisco’s NRHP as well as HUD regulations and fair housing law.

The Conflict Between San Francisco and HUD

While the number of units at stake may seem small, the conflict surrounding the application of the NRHP to them was huge and very time-consuming for those involved because of the important conflicting principles and legal complexity.

TNDC was responsible for making the AFHMP, submitting it to San Francisco, and then implementing the approved plan. On May 12, 2015, TNDC submitted the required marketing plan to San Francisco, which was subsequently delivered to HUD. After its initial review, HUD expressed its intent to reject the marketing plan based on the likely discriminatory effect of the preference in a July 29th conference call between representatives of HUD and San Francisco. San Francisco representatives

29. Unfortunately, the formalistic nature of the fair marketing requirements do not take into account the possibility that some groups who are eligible for affordable housing may be better organized than other groups and so enable their members to submit a disproportionate amount of applications for the limited number of units. In this situation, if there is a simple lottery to select among the eligible applicants, this organizing advantage of one group could have the effect that its members will occupy a significantly larger number of units than their community represents statistically in the city.

30. Because HUD’s 202 program and other capital subsidy programs, such as Section 811, have now been terminated, and low income housing tax credit developments are not required to submit affirmative fair housing marketing plans, this development is likely to be the last federally subsidized housing in San Francisco that would be subject to the NRHP unless the federal government enacts a new affordable housing program. Other programs funded by the California Department of Housing and Community Development (HCD) have similar requirements that could be violated by the NRHP. For this reason, San Francisco is not currently subjecting state-funded housing developments to this ordinance. However, it is compiling data as if it were applying the preference and studying the potential disparate discriminatory impact. According to its data, the NRHP would not cause unlawful disparate impact if it were applied to the HCD funded developments. Based upon this data, San Francisco is considering requesting that HCD accept the preference.

31. In fact, the developer submitted two alternative marketing plans to San Francisco: one plan complied with the NRHP and the other assumed that the NRHP would not be applied to the project. The developer did this to avoid losing financial assistance for the development. Because HUD can sometimes take several months to review a marketing plan, there was a risk that the development would lose some of its critical funding if the marketing plan compliant with NRHP was rejected and then it had to submit another plan and wait for HUD to review it.
defended the NRHP in part by describing it as a “pilot program” based on specific demographic and economic data for the neighborhood in which the development would be located, and that the program was designed to protect low-income households from displacement without creating a disparate impact upon any particular group. Even though HUD was sympathetic to San Francisco’s plight and its intentions—to preserve the possibility of low-income people of color staying in a community where they wanted to stay in the face of strong market forces—it determined that it could not approve the application of the preference to the Kennedy Apartments.

This determination was formally expressed in an August 3rd letter stating that HUD could not approve the NRHP as applied to the Kennedy Apartments in supervisorial District 5 because “it could limit equal access to housing and perpetuate segregation inconsistent with the Civil Rights related program requirement of the HUD multifamily occupancy handbook.” The letter also stated that the preference may also violate the FHA. The letter required that, prior to finalizing tenant selection, San Francisco and TNDC would be required show that the preference will not have a disparate impact on members of a protected class. At the time, a somewhat similar community preference in New York City was embroiled in litigation. One of HUD’s concerns was that approving the San Francisco neighborhood preference would be perceived as a precedent for other communities to create such preferences.

On August 5th, San Francisco requested that HUD reconsider its decision. More discussions between HUD and SF ensued. On August 25th, the San Francisco City Attorney’s Office sent a letter to HUD requesting that it reverse or revise its August 3rd decision. The letter explained: “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.” The City Attorney’s let-

32. Lee Letter, supra note 4, at 1.
34. Id.
35. Id.
36. Lee Letter, supra note 4, at 1.
38. Id.
ter also stated, “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.”

The letter also defended the application of the NRHP as consistent with the goals of the FHA. The letter explained: “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.”

Further, the letter argued that the city’s statistical analysis “had demonstrated that for the most part the plan is not likely to result in disparate impact” and even if there may be a risk of disparate impact that the city had presented several public policy rationales for the Neighborhood Preference that would serve as legitimate non-discriminatory reasons for such disparate impact. The policies included (1) “affordable housing is a scarce resource with limited availability in San Francisco;” (2) “the city has a compelling need to provide relief for overcrowding and rent burdened households in these neighborhoods;” and (3) “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.”

Finally, the letter cited the city’s General Plan policy priorities as having long emphasized “retaining neighborhood character, the cultural and economic diversity of its neighborhoods, and enhancement of the affordable housing supply.”

San Francisco conducted extensive additional exchanges with HUD toward the goal of identifying an acceptable neighborhood preference, including a high-level meeting in Washington, D.C., which included representatives from the offices of Senator Dianne Feinstein and Representative Nancy Pelosi, Supervisor London Breed, and Director of the San Francisco

39. Id.
40. Id. at 2.
41. Id.
42. Id.
43. Id.
44. Id.
45. Id.
46. Id.
Mayor’s Office of Housing and Community Development Olson Lee. On September 9, 2015, San Francisco requested that HUD consider an alternative neighborhood preference based on displacement. This alternative was based on an analysis from an empirical study produced by the Urban Displacement Project (http://www.urbandisplacement.org). Working with researchers at Urban Displacement Project, San Francisco officials found there were about 40 census districts spread over the city, i.e., in the Western Addition, Bayview, Russian Hill, the Mission, and South of Market neighborhoods, which had suffered the most displacement and were the most vulnerable to displacement due to advanced gentrification in the city. The alternative preference provided that 40 percent of the Kennedy Apartments units would be set aside for applicants from those districts. To be eligible for the preference, an applicant household needed to include at least one member who could provide documentation demonstrating that, at the time the application was submitted, the applicant’s primary residence was located in one of the census tracts listed in the Anti-Displacement Census Tract document prepared by the San Francisco Mayor’s Office of Housing and Community Development. Importantly, this alternative was much more specifically directed to addressing displacement than the initial NRHP, which would have applied the preference to any resident living in the relevant supervisorial district whether or not he or she had been displaced or was vulnerable to displacement.

Finally, in its September 21, 2015, letter HUD reaffirmed its prior decision rejecting the initial NRHP preference but, relying on the statistical analysis provided by San Francisco, accepted the alternative preference based on displacement. Assistant Secretary for Fair Housing and Equal Opportunity Gustavo Velasquez wrote: “HUD can support an ‘anti-displacement’ preference for 40 percent of the units, where residents from throughout the city are eligible for the preferences and where race is not considered in the selection process.”

49. HUD’s September 21, 2015 letter noted that, according to San Francisco’s own data, “eligible households in supervisorial District 5 are 46% white 18% black 29% Asian and 4% Hispanic compared to the cities eligible households who are 42% white 7% black 37% Asian and 9% Hispanic.” Letter from Gustavo Velasquez, Assistant Secretary for Fair Housing and Equal Opportunity, to Edwin Lee, Mayor of San Francisco Mayor, at 1 (Sept. 21, 2015) (on file with author).
50. Id.
Implementation of the approved preference demanded extraordinary effort by TNDC’s staff, including entering data for every single application, because the results would be closely scrutinized to confirm compliance with HUD’s Multifamily Occupancy Handbook and fair housing law. However, the ultimate result was a great success: of the 6,000 applicants more than 60 percent were from the identified displacement districts and those applicants were offered units in the Kennedy Apartments. About half of the ultimate residents were from the Western Addition. Of these about 35 percent were African American. And almost 22 percent of the ultimate residents were African American.

San Francisco continues to apply its NRHP to affordable housing proposals not regulated by HUD or California’s Housing and Community Development Department. To date, the NRHP has not been challenged and no projects in which the NRHP has been implemented have had discriminatory impact. However, it is possible, given the demographics of San Francisco, that the application of the ordinance may create a disparate impact in the future and form the basis for a legal challenge to the NRHP.

Reflection

TNDC, San Francisco, and HUD shared mutual goals, including equity, displacement prevention, and the creation of new housing opportunities for vulnerable populations. However, the apparent clash between the NRHP, HUD regulations, and the FHA created what appeared to be an irresolvable conflict. Eventually, a new innovative and successful compromise based on displacement data emerged out of this conflict. Some participants in the events think a community preference grounded in displacement data could be an important contribution—and perhaps even offer a national model with relatively broad application—to addressing displacement within the limits of fair housing in cities with histories of segregation that face intense gentrification pressures. Such a policy aims to use a community preference—a frequently exclusionary and discriminatory policy—for a progressive purpose: to enable people of color who had been pushed out of the city by both prior governmental discrimination and market forces to stay. The remainder of this essay explores this potential.

First, some caveats. Certainly, there are a number of well-known policies and programs that cities can adopt to address gentrification, preserve affordable housing, and promote continued diversity in their jurisdictions.51 Such a policy would not alone suffice to address gentrification and related problems. Of course, the root of the problem is an insufficient amount of affordable housing. Getting into affordable housing in cities

like San Francisco is like winning the lottery. Some of these issues would be less difficult if there were much more affordable housing. As it is, who wins and who loses now is a much bigger deal than it should be. In the current situation, there is no substitute for aggressive marketing to reach all members of protected classes so that a diversity of people are represented in the applicant pool.

Second, what would be sufficient conditions? This strategy has not yet been the focus of sufficient debate and dialogue between community and affordable housing advocates and fair housing advocates to be certain about its value. For now, it is only a particular solution applied in a specific case. Fair housing advocates are likely to want to address displacement issues through the community engagement and planning process required by the Affirmative Furthering Fair Housing Final Rule.52

There would need to be tested and agreed upon analytical methods and relevant data sets to apply the policy to other jurisdictions. Perhaps there is the opportunity to create and apply data-driven methods to design and evaluate such community preferences in a uniform manner that could be another tool in the anti-gentrification toolkit. The Urban Displacement Project appears to provide a promising analysis and methodology that could ground a displacement strategy that could comply with fair housing law.

Currently, the Urban Displacement Project is a collaboration among researchers in three regions: San Francisco Bay Area, Southern California, and Portland, Oregon. Assuming expanded funding, the geographic scope of the data could certainly be extended to include other areas. The methodology and analysis are currently used and tested to make them more robust. And it would need to have a legal validation. HUD’s approval of this compromise did not establish a principle or a policy of any kind. Ideally, a fully vetted debate between all the parties could work out how this compromise might be a model that could be incorporated into some guidance or a policy by HUD. To date, HUD has not given any indication that it would approve such a policy or provide guidance that would endorse its use beyond the Kennedy Apartments.

Still, there are lingering questions about this solution. The specification of the unit of analysis for a geographic unit as well as the percentage of housing units that would be subject to such a preference is likely to continue to be a difficult issue. Generally, the smaller the geographic unit and

the higher the percentage the more likely that such a community preference would cause discriminatory impact. And while there are many potential geographic units that could be employed within a jurisdiction, there is no consensus regarding what constitutes a relevant “neighborhood." This is in part due to the fact that while there may be formal definitions of geographic units for purposes of electoral districts or planning purposes, in practice, a “neighborhood” or “community” is largely inherently a subjective concept. Community activists in areas threatened by gentrification are likely to prefer a very high percentage—even 100%—to be applied to their favored geographical unit; however, such a high percentage is unlikely to pass muster with fair housing law. As a consequence, such a community preference would seem to pit the residents of one neighborhood benefited by the preference against residents from other neighborhoods.

Then there are the big questions. Most fair housing advocates want fair housing to be colorblind. But, given the legacy of the reprehensible government-sanctioned discrimination and its consequences for certain communities, governments are facing a predicament with possibly no good choices. The participants in the events described above offered three distinct perspectives; some participants felt conflicted and were drawn to more than one perspective.

Some felt that this solution, as discussed above, could hold significant potential for replication in numerous cities that are similarly situated to San Francisco, i.e., those with a history of discriminatory actions by government causing segregation, current high housing prices, and substantial gentrification pressures. A second perspective was more radical. While it may seem antithetical from a fair housing perspective, some would go further than a data-driven displacement-based neighborhood preference. They would argue that simply matching the percentages of African Americans currently remaining is not good enough. What we should try to do is to restore the level of African Americans households that existed around 1970, prior to the government-sponsored discrimination, which would require being disproportionate in favor of groups whose populations were devastated. Building on the Supreme Court’s recently endorsement of the FHA’s goal of integration and employing the frame of affirmative action, reparations, or restorative justice, they would like a city to adopt an ordinance that explicitly favors residents of color, and then, if challenged, defend the program against a claim of intentional discrimination by strongly asserting its purposes as legally acceptable.53 They want fair housing to

53. See, e.g., Walter F. Mondale, Afterword, Ending Segregation: The Fair Housing Act’s Unfinished Business, in THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES AND FUTURE IMPLICATIONS OF THE 1968 FEDERAL FAIR HOUSING ACT 293 (Gregory D. Squires ed., 2018) (“As the events of 1968 have receded from memory, the full scope of the FHA has been lost on some modern interlocutors. A particularly narrow conception of race-blindness has sometimes taken hold—the idea that any policy that per-
take into account both historical and current context that incorporate the legacy of prior discrimination. They note that redevelopment agencies and HUD itself have endorsed preferences in tenant selection, including favoring persons with disabilities in some senior housing developments. Finally, others are simply tired of the debates and just want to do their work. They may have even (privately) effectively given up on the traditional notion of racial integration.54

Whatever the potential scope of application of a data-driven displacement preference, the debate over how best to address intense gentrification in cities with histories of segregation and high housing costs will likely continue.

ceives race, no matter its substance, is per se racially discriminatory. Some of those operating with this simplified view have attempted to invert the Fair Housing Act, arguing that proactive attempts to build integration, because they at times must necessarily acknowledge race, themselves can constitute a form of racial discrimination and are thus forbidden by the act.”); J. William Callison, Inclusive Communities: Geographic Desegregation, Urban Revitalization, and Disparate Impact Under the Fair Housing Act, 25 J. AFFORDABLE HOUSING & CMTY. DEV. L. 421 (2017).

When Opportunity Knocks:
Working with State Housing Agencies to Promote Desegregation
Within the LIHTC Program

Kara Brodfuehrer and Renee Williams

In June 2015, housing advocates across the country breathed a sigh of relief when the U.S. Supreme Court issued its decision in Texas Department of Housing and Community Affairs v. Inclusive Communities Project.¹ Justice Kennedy, writing for the majority in a 5–4 decision, affirmed that disparate impact claims are cognizable under the Fair Housing Act (FHA).² Many attorneys will, rightly, remember this case as a landmark civil rights decision. However, the facts underlying Inclusive Communities also highlight an important issue regarding the future of affordable housing in the United States: the concentration of Low-Income Housing Tax Credit (LIHTC) units primarily within low-income communities of color and how to thoughtfully address this concentration.

While this issue has been discussed by some for years,³ developments such as the Inclusive Communities litigation, as well as the U.S. Department of Housing and Urban Development’s (HUD) issuance of its Affirmatively Furthering Fair Housing regulation,⁴ have resulted in broader reflections about the extent to which federal, state, and local actors have fallen short in making affordable housing available to members of low-income communities of color in a way that also promotes access to a range of opportunities, such as high-performing schools and well-paying jobs. And, even when the objective is clear (i.e., ensuring that affordable housing increases access to opportunities), the “how” requires balancing investment in and preservation of existing affordable housing stock within existing low-income communities, as well as an expansion of affordable housing options outside of high-poverty areas. Such reflections have, in turn, given rise to questions about how federal, state, and local government actors can chart a path forward in a way that both acknowledges and remedies past shortcomings while also looking to future investment and policy de-

¹. 135 S. Ct. 2507 (2015).
². Id.
³. See e.g., notes 23–25, infra.

Kara Brodfuehrer (kbrodfuehrer@nhlp.org) and Renee Williams (rwilliams@nhlp.org) are staff attorneys with the National Housing Law Project in San Francisco.
cisions. This essay explores these considerations within the context of the LIHTC program and outlines ways that various stakeholders have begun thinking about charting that path forward.

I. The Low-Income Housing Tax Credit Program

The LIHTC program is now the largest source of new affordable housing in the United States. Between 1987 and 2015, this program created more than 45,000 projects consisting of 2.97 million housing units. According to HUD, the LIHTC program created, on average, more than 1,460 projects containing 110,000 new units each year from 1995 to 2015. In contrast, due to deep budget cuts, many of the federal housing programs are struggling. Between 2010 and 2016, the country’s public housing budget decreased by $1.6 billion and the Section 8 Housing Choice Voucher program budget decreased by $228 million.

Unlike traditional federal housing subsidies, the LIHTC program provides incentives in the form of tax credits authorized by the Internal Revenue Code to build affordable housing. The program authorizes state agencies administering the LIHTC program, often called “state housing agencies” or “Housing Agencies,” to allocate approximately $8 billion in federal income tax credits per year. The Housing Agencies allocate these credits to developers that use them to raise capital for the “acquisition, rehabilitation, or new construction” of affordable units. As a condition to receiving the credits, the properties agree to maintain the units at certain levels of affordability targeted at tenants whose incomes are at or below


6. Low-Income Housing Tax Credits, supra note 5.


9. Id. at 2-3.


11. Low-Income Housing Tax Credits, supra note 5. HUD has published a list of Housing Agencies and links to their respective websites, available at https://lihtc.huduser.gov/agency_list.htm.

12. Id.
50 percent or 60 percent of the area median income\textsuperscript{13} for at least 30 years.\textsuperscript{14} To award new credits, Housing Agencies have extensive application processes involving a Qualified Allocation Plan (QAP).\textsuperscript{15} The QAP sets forth criteria for judging development proposals, which Housing Agencies use to determine which projects will be eligible to generate tax credits.\textsuperscript{16} Housing Agencies award points to applicants for attributes of their proposed development that incentivize particular goals of the agency, such as agreeing to a longer period of affordability\textsuperscript{17} or locating projects close to certain amenities.\textsuperscript{18}

\textbf{A. The Duty to Affirmatively Furthering Fair Housing and the LIHTC Program}

The LIHTC program must be administered in a manner that affirmatively furthers the aims of the FHA.\textsuperscript{19} This mandate is known as the “duty to affirmatively further fair housing,” which describes an obligation that includes taking proactive steps to dismantle patterns of housing segregation within programs and activities administered by the federal gov-

\textsuperscript{13}. Some Housing Agencies require or incentivize even deeper levels of affordability.
\textsuperscript{14}. 26 U.S.C. § 42(h)(6)(D).
\textsuperscript{15}. See 26 U.S.C. § 42(m)(1)(B)(i) (defining “qualified allocation plan” as including, \textit{inter alia}, any plan that “sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions”).
\textsuperscript{16}. Tax credits are either 9 percent (which are very competitive and provide about 70 percent of the funding for a project) or 4 percent (which are less competitive and provide about 30 percent of the funding for a project). 26 U.S.C. § 42 (b). This essay focuses on the allocation of the 9 percent credits.
\textsuperscript{17}. \textit{What Happens to Low-Income Housing Tax Credit Properties at Year 15 and Beyond?}, at 7, HUD OFFICE OF POLICY DEVELOPMENT & RESEARCH, https://www.huduser.gov/portal//publications/pdf/what_happens_lihtc_v2.pdf (last revised Aug. 2012) (noting that, as of 2001, forty-one states either required or gave preference to projects agreeing to longer affordability requirements that range from forty to sixty years, or even in perpetuity).
\textsuperscript{18}. See generally \textit{Effect of QAP Incentives on the Location of LIHTC Properties} (2015), HUD OFFICE OF POLICY DEV. & RESEARCH, https://www.novoco.com/sites/default/files/atoms/files/pdr_qap_incentive_location_lihtc_properties_050615.pdf (noting that states, including Arizona, California, Colorado, Connecticut, Georgia, Massachusetts, Maryland, North Carolina, and Texas, provide additional application points for projects near certain amenities).
\textsuperscript{19}. See generally 42 U.S.C. § 3608(d) (“All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.”).
The obligation to affirmatively further fair housing has its origins in the original text of the FHA. Specifically, the FHA imposes this obligation on “[a]ll executive departments and agencies” to “administer their programs and activities relating to housing and urban development” in a manner that affirmatively furthers fair housing. The U.S. Department of the Treasury includes the Internal Revenue Service (IRS), which oversees the LIHTC program at the federal level. Accordingly, the Treasury Department and IRS are obligated to administer the LIHTC program in a manner that affirmatively furthers fair housing. Additionally, as recipients of federal housing funds such as Community Development Block Grants, states must certify that they will affirmatively further fair housing. State Housing Agencies, therefore, have a key role to play in advancing desegregation goals with respect to affordable housing across the United States. Taken together, this means both federal and state actors.

20. As discussed infra, in 2015, HUD finalized a regulation requiring certain HUD grantees to use a planning process to evaluate the extent to which the grantees are affirmatively furthering fair housing. See generally AFFH Rule, supra note 4. The AFFH Rule preamble notes that the FHA “itself does not define the precise scope of the affirmatively furthering fair housing obligation for HUD’s program participants.” AFFH Rule, 80 Fed. Reg. at 42,274. In fact, the FHA does not define the precise scope of the obligation to affirmatively further fair housing for any government department or agency within its text. Accordingly, it is instructive to refer to what HUD has written about the duty to affirmatively further fair housing. The AFFH Rule preamble states, “Courts have found that the purpose of the affirmatively furthering fair housing mandate is to ensure that recipients of Federal housing and urban development funds do more than simply not discriminate: It obligates them to take meaningful actions to address segregation and related barriers for those protected by the Act, particularly as reflected in racially or ethnically concentrated areas of poverty [footnote].” Id. at 42,282 (citing several cases, including N.A.A.C.P. Boston Chapter v. Sec’y of Hous. & Urb. Dev., 817 F.2d 149 (1st Cir. 1987), Otero v. N.Y. City Hous. Auth., 484 F.2d 1122 (2d Cir. 1973); Shannon v. HUD, 436 F.2d 809 (3d Cir. 1970)). The AFFH Rule defines “affirmatively furthering fair housing” to mean “taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics.” 24 C.F.R. § 5.152 (definition of “Affirmatively furthering fair housing”). The definition continues, “Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws.” Id.

21. 42 U.S.C. § 3608(d) (emphasis added); see also 42 U.S.C. § 3608(e)(5) (obligation of the HUD Secretary to affirmatively further fair housing).

22. See 42 U.S.C. § 5304(b)(2) (requiring that states, as well as local governments, receiving Community Development Block Grant funds certify that they will affirmatively further fair housing).
have obligations to affirmatively further fair housing in the LIHTC program. However, at the federal or state\textsuperscript{23} levels, the duty to affirmatively further fair housing has, historically, not been a focus of LIHTC oversight or administration.\textsuperscript{24} As discussed later in this essay, the relationship between the location of LIHTC units and the ability of families living in those units to access low-poverty, well-resourced neighborhoods has increasingly become a point of interest, focus, and action.

B. Historic Lack of IRS Oversight Regarding Approval of Tax-Credit Properties

Despite the enormity of the LIHTC program, the IRS has provided very little guidance and oversight with respect to program administration, including the obligation to affirmatively further fair housing.\textsuperscript{25} One of the requirements imposed on Housing Agencies is the requirement to create a Qualified Allocation Plan (QAP) to set priorities and criteria for how the agency will award the credits to incentivize developers to meet the affordable housing needs of their particular state.\textsuperscript{26} QAPs generally are revised annually when states receive a new allocation of credits.\textsuperscript{27} Among the limited requirements outlined in the Code for the content of the QAP, the Code requires Housing Agencies to prioritize funding the following: “(I) projects serving the lowest income tenants, (II) projects obligated to serve qualified tenants for the longest periods, and (III) projects which are located in qual-

\begin{itemize}
  \item \textsuperscript{23} Jill Khadduri, Larry Buron & Carissa Climaco, \textit{Are States Using the Low Income Housing Tax Credit to Enable Families with Children to Live in Low Poverty and Racially Integrated Neighborhoods?}, at 22 (2006) [hereinafter State LIHTC Report], http://prrac.org/pdf/LIHTC_report_2006.pdf (“Providing less racially isolated housing opportunities, per se, does not appear to be a priority for states as they administer the LIHTC program.”).
  \item \textsuperscript{24} Id. at 1–2 (“Because it is a tax credit and not a program funded by appropriations and administered by the US Department of Housing and Urban Development (HUD), the Low Income Housing Tax Credit has received less attention than other federal housing programs as a policy tool for expanding choice and promoting racial and economic integration . . . but it has the potential to do so.”).
  \item \textsuperscript{25} Id. at 3 (noting, in report prepared for the Poverty & Race Research Action Council and the National Fair Housing Alliance, the lack of “federal performance standards” for the LIHTC program generally, and that “[w]hether the LIHTC is used for family housing and whether that family housing is in low poverty or low minority areas depends on a combination of state policy priorities and the business and social objectives of the developers of LIHTC housing[]” (id.). In 2016, the IRS did issue a revenue ruling that referenced the AFFH duty in the context of discussing local approval. This discussion is included, infra.
  \item \textsuperscript{26} 26 U.S.C. § 42(m)(1)(B).
  \item \textsuperscript{27} Ed Gramlich, \textit{Low Income Housing Tax Credits, in National Low Income Housing Coalition, Advocates’ Guide 2017: A Primer on Federal Affordable Housing & Community Development Programs, 5-30, 5-33, available at: http://nlihc.org/sites/default/files/2017_Adamates-Guide.pdf.
ified census tracts[28] . . . and the development of which contributes to a concerted community revitalization plan."[29] The Code also enumerates selection criteria that must be included in the QAP, such as the location of the project, project characteristics ("including whether the project includes the use of existing housing as part of a community revitalization plan"), whether the project accommodates tenant populations of families with children or special-needs populations, and the wait lists for public housing.30

Housing Agencies have significant autonomy and power to determine how to allocate their credits. Such autonomy at the state level historically has contributed to the concentration of LIHTC units being sited in high-poverty, racially and ethnically segregated areas.31 The Inclusive Communities case also illustrates this problem. The Inclusive Communities Project (ICP) is a Texas-based non-profit that works with low-income families to access expanded housing options in higher opportunity areas.32 LIHTC proj-

28. A “qualified census tract” is defined as “any census tract which is designated by the Secretary of Housing and Urban Development and, for the most recent year for which census data are available on household income in such tract, either in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income for such year or which has a poverty rate of at least 25 percent.” 26 U.S.C. § 42(d)(5)(B)(ii)(I).

29. The IRS has not issued guidance as to what constitutes a “concerted community revitalization plan.”

30. 26 U.S.C. § 42(m)(1)(C) (stating that the “selection criteria set forth in a qualified allocation plan must include” the following: “(i) project location, (ii) housing needs characteristics, (iii) project characteristics, including whether the project includes the use of existing housing as part of a community revitalization plan, (iv) sponsor characteristics, (v) tenant populations with special housing needs, (vi) public housing waiting lists, (vii) tenant populations of individuals with children, (viii) projects intended for eventual tenant ownership, (ix) the energy efficiency of the project, and (x) the historic nature of the project”).

31. See State LIHTC Report, supra note 23, at 7, 22 (noting, at 7, that “the proportion of family units in low poverty neighborhoods (less than 10 percent poor) varies markedly among states and among large metropolitan areas,” but also noting, at 22, that “only a few states place more than half their LIHTC family housing in census tracts with minority population rates less than half the rate for the [+250,000 population] metropolitan area.”).

32. Inclusive Communities Project, https://www.inclusivecommunities.net/ (accessed Jan. 7, 2018) (“The Inclusive Communities Project (ICP) is a not-for-profit organization that works for the creation and maintenance of thriving racially and economically inclusive communities, expansion of fair and affordable housing opportunities for low-income families, and redress for policies and practices that perpetuate the harmful effects of discrimination and segregation. ICP envisions an America where equality is created and sustained in community through access to good schools, affordable housing, safe neighborhoods, and economic opportunity. ICP wants to be a resource to those who share that vision by providing information about where those opportunities exist in the North Texas area, where they don’t, and why. We will work with individuals and families seeking to secure the benefits
ects within the City of Dallas were concentrated in inner city, African American neighborhoods. Specifically, ICP found that from 1999 to 2008, the Texas Department of Housing and Community Affairs—the state’s Housing Agency—approved the development of 37.4 percent of non-elderly LIHTC units proposed to be built in majority-white areas, while approving the development of almost 50 percent of non-elderly LIHTC units proposed to be built in areas with residents who were nearly exclusively people of color.33 Furthermore, ICP’s analysis also showed that an overwhelming majority of LIHTC units in Dallas (92 percent) were located in majority-minority neighborhoods.34 ICP interpreted this as violating the FHA and brought suit—the suit that eventually would result in the affirmation of disparate impact theory under the FHA.

The same year that ICP prevailed at the Supreme Court, the organization filed another lawsuit—this time against the Treasury Department and the U.S. Office of the Comptroller of the Currency. This more recent lawsuit asserts, inter alia, that the defendants fail to meet their duty to affirmatively further fair housing by: (1) “continuing to approve investments in Dallas area LIHTC units located in racially segregated minority areas marked by conditions of slum, blight, and distress”; (2) “refusing to take any action to consider the effect of either the allocation of the LIHTCs or the approval of the investment in LIHTC projects on the racial and socio-economic composition of the surrounding area”; and (3) “refusing to adopt any affirmatively further[ing] fair housing standards relating to improving integrated living patterns, overcoming historic patterns of segregation, and reducing racial and ethnic concentrations of poverty in the LIHTC program.”35

C. Recent Regulatory Developments at the Federal and State Levels

Examining and addressing the concentration of LIHTC units in segregated, high-poverty areas is an issue that has gained increased prominence and attention. The issuance of the AFFH Rule by HUD renewed a broader
conversation about how federal, state, and local governments could both acknowledge and address their respective roles in perpetuating housing segregation through their policies. In fact, the Obama Administration even included in its Fiscal Year 2017 budget documents a proposal—ultimately unsuccessful—that would have added an affirmatively furthering fair housing preference to the QAP process. Several developments on the federal and state levels provide helpful context to better understand the current (and future) relationship between fair housing objectives and the LIHTC program.

The first such development was the issuance of the AFFH Rule by HUD in 2015. Even though HUD does not oversee the LIHTC program, the discussion surrounding the development of the AFFH Rule is instructive. Readers of this essay are well aware of the longstanding differences in opinion between fair housing advocates seeking to improve mobility options for low-income communities of color to access higher-resource, integrated neighborhoods and advocates for low-income communities who seek reinvestment in historically under-resourced neighborhoods. While

---


37. AFFH Rule, supra note 4. It is important to note that, in January 2018, HUD issued a notice that would delay the submission deadlines for the Assessment of Fair Housing planning document until after October 2020 for local governments. See generally Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 683 (Jan. 5, 2018). For various reasons, other HUD funding recipients (such as states and public housing agencies) are also subject to a delayed requirement to complete their Assessments of Fair Housing. However, this essay focuses on the principles outlined in the Obama Administration AFFH Rule and how those principles can be relevant to the LIHTC program. Accordingly, the delay in implementation of the AFFH Rule does not obviate the discussion in this essay.

38. See e.g., Stacy Berger, Fair Housing and Community Developers Can Work Together, Shelterforce (Oct. 15, 2015), https://shelterforce.org/2015/10/15/fair-housing_and_community_developers_ican_i_work_together/ (noting that “[i]n much of the country, there is an apparent chasm between the community development sector and fair housing advocates,” adding that the “divide has been the subject of numerous recent articles and op-eds, which have generated a wide range of reactions—from some who feel that these articles rightfully bring to light long-running tensions to others who believe the articles are unfairly characterizing either side or unduly exacerbating those same tensions”); Sheila Crowley & Danilo Pelletiere, Housing Dilemma: The Preservation vs. Mobility Debate, 2–4 (2012),
this discussion has spanned decades, HUD’s development and issuance of its AFFH Rule brought this issue to the fore. Commenters expressed concerns that HUD’s proposed version of the AFFH Rule issued in 2013 would effectively foreclose the investment of much-needed resources in communities with racial and ethnic concentrations of poverty. In response to these concerns, HUD made changes to the final AFFH Rule that reflects the agency’s support for a “balanced approach” to federal investments. Changes to the final rule included revising the “Purpose” section to include references to the kinds of activities that may affirmatively further fair housing:

A [HUD] program participant’s strategies and actions must affirmatively further fair housing and may include various activities, such as developing affordable housing, and removing barriers to the development of such housing, in areas of high opportunity; strategically enhancing access to opportunity, including through: Targeted investment in neighborhood revitalization or stabilization; preservation or rehabilitation of existing affordable housing; promoting greater housing choice within or outside of areas of concentrated poverty and greater access to areas of high opportunity; and improving community assets such as quality schools, employment, and transportation.

In doing so, HUD sought to clarify that both place-based strategies and mobility-focused approaches can be consistent with the obligation to affirmatively further fair housing. While this approach makes sense and is essential for ensuring that no communities are categorically excluded from investment, utilizing a balanced approach is easier said than done. Communities and neighborhoods have distinct needs, and residents of a

---

39. See AFFH Rule, 80 Fed. Reg. at 42,278 (“A substantial number of commenters who expressed support for the rule stated that the proposed rule did not provide a balanced approach to investment of Federal resources. Commenters stated that the proposed rule appeared to solely emphasize mobility as the means to affirmatively further fair housing and, by such emphasis, the rule devalued the strategy of making investments in neighborhoods with racially/ethnically concentrated areas of poverty (RCAPs/ECAPs). They stated that the proposed rule could be read to prohibit the use of resources in neighborhoods with such concentrations.”).

40. Id. at 42,279 (“To help clarify these issues, in this final rule HUD revises the purpose section (§ 5.150) and the definition of ‘affirmatively furthering fair housing’ (§ 5.152) to clarify that HUD supports a balanced approach to affirmatively furthering fair housing. In this final rule, HUD has added a new provision describing potential actions or strategies a program participant may take, which is inclusive of both place-based solutions and options to preserve existing affordable housing. Strategies can include increasing mobility for members of protected classes to provide greater access to opportunity.”).

41. 24 C.F.R § 5.150.

42. AFFH Rule, 80 Fed. Reg. at 42,279 (noting that “place-based and mobility strategies need not be mutually exclusive”).
particular neighborhood or a particular housing development may want different housing options or amenities. In turn, these needs may require different solutions—whether mobility-focused strategies, place-based strategies, or some combination of both. The HUD Assessment of Fair Housing process—a fair housing planning framework established by the AFFH Rule—aims to acknowledge this by envisioning a robust community participation process, as well as the use of locally available data and information as a supplement to HUD-provided data. In turn, community participation can inform the goals outlined in the final AFH and influence investment decisions in subsequent planning processes, such as the Consolidated Plan. HUD’s work in formulating and implementing its AFFH Rule can be instructive for Housing Agencies in examining ways that they can affirmatively further fair housing within the LIHTC program, while remaining attuned to the needs of residents.

A second relevant development was the issuance of IRS Notice 2016-77, which states, “[p]lacing LIHTC projects in qualified census tracts risks exacerbating concentrations of poverty.” These qualified census tracts by definition have relatively high rates of poverty. The notice also acknowledges that “[i]n some cases,” Housing Agencies have given a preference to projects located in qualified census tracts “without regard to whether these projects contribute to a concerted community revitalization plan.” In other words, Housing Agencies have accorded a preference to projects where the state agency failed to determine if the LIHTC projects being funded were part of an overall plan to invest in aspects of a high-poverty neighborhood beyond affordable housing (e.g., non-housing infrastructure, such as improved sidewalks or transit access). While the notice references the fact that the Treasury Department and IRS have not issued guidance that defines the term “concerted community revitalization plan,” it advises that the preference for projects located in qualified census tracts “fails to apply unless, not later than the allocation, a plan exists that contains more components than the LIHTC project itself.” Furthermore, the notice expressed the possibility of clarifying the qualified census tract preference in further guidance; however, with the change in administration, it is unclear whether such guidance will be issued.

The National Council of State Housing Agencies (NCSHA), a national organization of state housing finance agencies, also recently addressed the
location of LIHTC properties. NCSHA releases yearly recommendations for the administration of the LIHTC program, which are closely followed by many Housing Agencies. In 2017, NCSHA adopted a new recommendation to encourage LIHTC developments in high-opportunity areas, urging Housing Agencies to “develop QAP and/or other program policy documents to facilitate the siting of new affordable housing in diverse locations, including low-distress, low-poverty areas that provide residents with access to various amenities.”

The recommendation recognizes that “[r]esearch shows that locating Housing Credit developments in areas that allow for access to employment, quality schools, transportation options, health care facilities, and other necessary services and amenities, can correlate with stronger long-term life outcomes for assisted households.” Importantly, the recommendation also notes that “affordable housing also can be a critical catalyst in bringing new opportunities to distressed areas, impacting not only those households who are tenants in that affordable housing, but also households in the surrounding community.”

Furthermore, NCSHA states that research has found that LIHTC investment in “distressed areas” can “attract a more racially and income diverse population.” This focus on opportunity areas demonstrates one mechanism in which Housing Agencies can begin to make LIHTC investments outside concentrated areas of poverty.

Some Housing Agencies have been utilizing the QAP process to address concerns that the siting of LIHTC properties may perpetuate historic patterns of segregation. For example, the 2017 Texas QAP awards additional points to properties that are located in “opportunity” low-poverty areas that have a poverty rate at or below 20 percent. In Massachusetts, the 2017 QAP mandates that each new LIHTC project fit into one of four categories, which includes a category for “opportunity locations” that “provide access to opportunities, including, but not limited to, jobs, transportation, education, and public amenities . . . as defined by publicly available data.” This focus on opportunity areas demonstrates one mechanism in which Housing Agencies can begin to make LIHTC investments outside concentrated areas of poverty.

---


50. Id. at 13.

51. Id.

52. Id.

53. Id.


While substantial autonomy on the part of Housing Agencies to administer the LIHTC program at the state level has contributed to the concentration of LIHTC properties in high-poverty, segregated areas, such autonomy can also provide a path forward to reversing these trends, while also ensuring that areas of historic disinvestment are not categorically excluded from needed future investments. Past experience has demonstrated that Housing Agencies’ broad discretion can present an opportunity to advance civil rights objectives in the tax credit program. For example, effective advocacy has resulted in some Housing Agencies requiring or incentivizing deeper affordability and use restrictions, creating set asides for special needs populations, and taking measures to ensure properties are complying with the good cause for eviction mandate.

The remainder of this essay examines how California is trying address the historic patterns of siting LIHTC units, how stakeholders had an impact in that process, and what factors Housing Agencies and stakeholders in other states that seek to use the LIHTC program as a means of affirmatively further fair housing should consider. The California example illustrates the importance of ensuring that efforts to advance fair housing aims do not exclude development in low-income communities, which are still in need of investment.

II. California’s Approach: A Case Study

The California LIHTC program is the largest in the nation with over $88 million tax credits allocated in 2015 and $92 million allocated in 2016. California is home to both a diverse population and geographic landscape. The state boasts several large metropolitan areas, over 480 cities, and a significant amount of rural land. Where someone lives within the state can dras-

56. See also note 24, supra (identifying LIHTC program’s potential).
57. See note 17, supra.
58. IRS Revenue Ruling 2004-82 (July 30, 2004) (evictions from LIHTC properties are prohibited absent good cause); California Resident Notification and Lease Rider, Cal. Tax Credit Allocation Comm., http://www.treasurer.ca.gov/ctcac/compliance/eviction_docs.pdf (California requires a lease rider and notice to notify tenants that they cannot be evicted without good cause); State LIHTC Program Descriptions, Novogradac & Company LLP, https://www.novoco.com/resource-centers/affordable-housing-tax-credits/application-allocation/state-lihtc-program-descriptions (States, including New York, California and Vermont, have set-asides for special needs populations.).
60. Id.
tically impact that person’s ability to access certain opportunities (e.g., high-performing schools, jobs), and that person’s exposure to negative factors (e.g., poor environmental quality, lack of infrastructure). Development of new LIHTC units for low-income families within California has been concentrated in high-poverty, racially/ethnically segregated areas. Although the highest-resource areas of the state comprise 40 percent of the state’s census tracts, only 17 percent of new LIHTC units were placed in these areas. In fact, between 2003 and 2015, a majority (62 percent) of all new LIHTC construction was located in the lowest-resource areas of the state.

In 2016, the California Tax Credit Allocation Committee (CTCAC)—California’s Housing Agency—announced plans to amend its regulations governing the QAP to address the over-concentration of LIHTC units in lower-income and more ethnically and racially concentrated neighborhoods. CTCAC proposed new regulations that would effectively bar any new construction of LIHTC units in the lowest-opportunity areas of the state. The regulations utilized the University of California, Davis Regional Opportunity Index to determine whether a proposed project was located in a low- or high-opportunity area.

---

61. Memorandum from Mark Stivers, Executive Director, California Tax Credit Allocation Committee to TCAC Stakeholders, 1 (Aug. 8, 2017) (on file with authors) (“While affordable housing developments can and sometimes do offer opportunities for low-income families with children to access lower poverty, higher resource neighborhoods, recent analyses have shown that low-income housing tax credit new construction projects targeted to families continue to be sited disproportionately in lower-income and more ethnically and racially concentrated neighborhoods in California. These neighborhoods often overlap with indices of lesser economic opportunity, less access to high quality education, and higher exposure to environmental pollution.”) (emphasis added).


63. This number only represents 9 percent tax credit units.

64. CTCAC Proposed 2017 Regulations, supra note 62, at 7. “Resource areas” are defined by CTCAC’s “opportunity maps” methodology, which will be discussed in detail below.

65. See generally Cal. Tax Credit Allocation Comm.: Proposed 2016 Regulation Changes with Initial Statement of Reasons (last revised Sept. 15, 2016) (on file with authors).

CTCAC’s proposal to drastically change existing regulations proved incredibly controversial among developers and affordable housing advocates. Opponents of CTCAC’s proposal argued that the Opportunity Index, which examined opportunity on a statewide level, was not an appropriate tool to measure the regional variations within the state. For example, the state’s rural areas include a disproportionate number of the lowest resource areas and would therefore be excluded from the siting of new units under CTCAC’s proposal. Others criticized the proposal for not considering the political realities of developing in higher opportunity areas, such as NIMBY-ism with respect to affordable housing. Furthermore, in order to be competitive in California’s 9 percent LIHTC application process, a project must show “soft money” in the form of a contribution of land or financial support from a local government entity. Such soft money is very difficult to secure in those high-opportunity areas where constituents are opposed to affordable housing, making it unlikely that tax credits would be allocated to projects in those high-opportunity areas. Given the widespread criticism, CTCAC decided not to adopt its proposed changes to the regulations.

CTCAC remained committed to using its regulations to address segregation in the LIHTC program. The agency, in partnership with the California Department of Housing and Community Development (HCD), began working with a team of independent organizations and research centers to develop a new mapping tool. This new tool would identify “which areas . . . offer low-income children and adults the best chance at economic advancement, high educational attainment, and good physical and mental health.”

To account for the regional variations in the state, the tool developers declined to compare data on a statewide level and instead developed eight regional maps. They also developed their own methodology for determining “opportunity.” CTCAC released these new maps in August 2017.

A few weeks later, CTCAC released its second proposal for regulatory changes to the QAP. Instead of imposing an overall ban, the proposed regulations included a 30 percent cap on projects in low-resource areas, excluding projects that would primarily be replacing existing projects because they are more akin to a rehabilitation project. The regulations also

67. NIMBY-ism stands for “Not in my backyard,” and refers to people that oppose a new development because it is in or near their neighborhood.
69. The indicators considered were poverty, adult education, employment, job proximity, median home value, environmental factors including pollution burdens, math and reading proficiency, high school graduation rates, student poverty rate, along with a filter regarding poverty and racial segregation. See Mapping Methodology, supra, note 68.
70. CTCAC Proposed 2017 Regulations, supra note 62.
71. Id. at 6.
proposed awarding points to projects in the high- or highest-resource areas, as defined by the new opportunity maps, and a significant number of additional points for projects in these areas in the event that there is a tie in determining which projects would receive allocations of tax credits.

The response to these proposed changes varied. While the maps were produced on a regional basis, developers and advocates still had concerns regarding the effectiveness of CTCAC’s methodologies for determining opportunity in rural areas. Even under the new proposed framework, large portions of rural counties were categorized as low- or lowest-resource areas. Additionally, the 30 percent cap on new projects in low/lowest-resource areas was not a set-aside; while 30 percent of projects could be located in these areas, they were not required to be. This fact led to concerns that the proposed changes would exacerbate decades of disinvestment and segregation because there would be little incentive to develop in these areas. Advocates and developers also pointed out that there are differences in what types of opportunities exist within rural and urban/suburban areas. For example, while rural areas “may lack public transportation and significant commercial development,” these areas are “close to the agricultural jobs that employ many of the residents of these communities.” Additionally, some of the opportunity amenities located in high/highest-resource areas may not be accessible to low-income tenants, despite their proximity, such as private schools and high-end grocery stores.

CTCAC made several changes to the mapping methodology in response to these concerns. For example, the agency removed rural areas from the regional maps and created a rural statewide map so that rural areas would no longer be compared with the urban and suburban communities in the regional maps. This resulted in an increase of high- and highest-resource tract designations from 135 to 399 and a three percent decrease in tracts designated as lowest resource. CTCAC also made changes to the opportunity indicators by considering regional medians for job proximity and eliminating consideration of commuting times. The regulations were adopted on December 13, 2017.

72. Id. at 30.
73. Id. at 44.
75. Id. at 3.
76. Id.
77. Id. at 4.
III. Considerations for Housing Agencies Seeking to Take Their Obligation to Affirmatively Further Fair Housing... Further

California’s approach leaves much to learn from and to consider when addressing the historic segregation of LIHTC properties. This process exemplifies the tension between creating housing choice in high-opportunity areas and the need for continued investment in historically segregated and distressed communities. It also illustrates the necessity of fashioning solutions regionally—as a “one size fits all” approach is not effective—as well as the importance of Housing Agencies truly taking into consideration public input from community stakeholders. In light of the ongoing work in California, what strategies and best practices should advocates and stakeholders across the country consider?

A. Considering Regional Variations When Developing a Methodology

Given the regional variations of most states, a nuanced and balanced approach that increases housing opportunities in higher-resource areas while continuing investment in lower-resource areas is essential to avoid further perpetuating segregation and reinforcing its effects. As exemplified in California, placing a vast majority of resources in projects in high-resource areas may have the unintended consequence of harming residents in lower-resource areas. Accordingly, an approach that works in one area may not be appropriate for another. Housing Agencies must look at particular regional variations in their states to develop a methodology appropriate to specific regional characteristics and needs. Regional considerations are also at the crux of the Assessment of Fair Housing (AFH) process, which includes a required regional fair housing analysis.79

It is also imperative for Housing Agencies to utilize data and indicators that reflect the realities of opportunity resources in these areas and to allow stakeholders to appeal and supplement this data if they are concerned the designation is incorrect. For example, California’s opportunity maps initially used commute times and job proximity as indicators. However, these indicators were subsequently removed when advocates pointed out that longer commute times in rural areas are inevitable, given that many of these jobs are with the agricultural industry.

B. Utilizing Community-Based Data

Housing Agencies must find ways to consider real-time conditions, such as gentrification. However, these conditions are rarely captured contemporaneously by traditional data sources such as Census data. Community-based data derived from interviews, focus groups, and surveys of local residents can reveal the actual utility of neighborhood amenities, as well as

79. See e.g., 24 C.F.R. § 5.154(d)(2) (outlining the HUD AFH analysis, which includes the identification of fair housing issues within both the jurisdiction and region). See also note 37, supra, regarding the delay of the AFFH Rule’s implementation.
impediments to opportunity.\textsuperscript{80} Such data also can reveal amenities not reflected in traditional data sources, such as pop-up food markets and informal financial assistance (such as aid from local churches, mosques, synagogues, and other faith-based organizations).\textsuperscript{81} This information also is essential to prevent the displacement of low-income communities of color from areas that are providing access to employment, educational, and other opportunities. The importance of community-driven data can be seen in the adoption of HUD’s AFFH Rule, which requires that HUD grantees completing the AFH planning process supplement HUD-provided data and maps with available “local data”\textsuperscript{82} and “local knowledge.”\textsuperscript{83} HUD also requires that its grantees solicit community input as part of the AFH process.\textsuperscript{84} In fact, failure to comply with community participation requirements is cited as grounds for HUD’s refusal to accept a grantee’s AFH.\textsuperscript{85}

C. Encouraging Investment in High-Resource Areas Without Causing Disinvestment in Lower-Resource Areas

One key criticism of California’s proposed regulations is that because they created a framework in which such a large amount of application points are awarded to projects in high-resource areas, projects in low-resource (primarily rural) areas would be completely unable to compete for allocations of tax credits.\textsuperscript{86} While such a framework would certainly

\begin{itemize}
  \item \textsuperscript{80} See Letter to Mark Stivers, Executive Director, CTCAC, from National Housing Law Project, et al. re: CTCAC Proposed Regulation Changes, at 3 (Oct. 30, 2017) (letter from several advocacy organizations regarding proposed CTCAC regulations) (on file with authors) [hereinafter Advocates’ Letter].
  \item \textsuperscript{81} Id.
  \item \textsuperscript{82} See 24 C.F.R. § 5.152 (defining “local data” as referring to “to metrics, statistics, and other quantified information, subject to a determination of statistical validity by HUD, relevant to the program participant’s geographic areas of analysis, that can be found through a reasonable amount of search, are readily available at little or no cost, and are necessary for the completion of the AFH using the Assessment Tool”).
  \item \textsuperscript{83} See 24 C.F.R. § 5.152 (defining “local knowledge” as referring to “information to be provided by the program participant that relates to the participant’s geographic areas of analysis and that is relevant to the program participant’s AFH, is known or becomes known to the program participant, and is necessary for the completion of the AFH using the Assessment Tool”); 24 C.F.R. § 5.154(d)(2) (“Using HUD-provided data, local data, local knowledge, including information gained through community participation, and the Assessment Tool, the program participant will undertake the analysis required by this section.”).
  \item \textsuperscript{84} See generally 24 C.F.R. §§ 5.154, 5.158; see also note 37, supra, regarding the delay of the AFFH Rule’s implementation.
  \item \textsuperscript{85} 24 C.F.R. § 5.162(b).
  \item \textsuperscript{86} Cal. Tax Credit Allocation Comm.: Proposed 2017 Regulation Changes with Initial Statement of Reasons (last revised Sept. 11, 2017), § 10325(c)(4)(A)11 (proposes to award eight additional amenity application points to projects in the highest-
encourage development in high-resource areas, communities that are historically in need of investment will be left behind. Instead of using application points to prioritize these projects, Housing Agencies could create a set-aside for projects in high-resource areas. Doing so would incentivize construction of projects in high-resource areas while not creating an insurmountable bar for low-resource communities to receive much-needed affordable housing investment.

Another important consideration for Housing Agencies is to avoid implementing a policy that discourages rehabilitation and reinvestment in existing LIHTC units. California addressed this concern by exempting projects that are replacing 75 percent or more existing units. This exemption was proposed because CTCAC recognized that these projects are essentially rehabilitating existing projects and did not want to discourage reinvestment and rehabilitation of current tax credit properties.\textsuperscript{87}

\textbf{D. Eliminating Requirements for “Soft Money”}

One of the largest barriers to creating development in high-resource areas is that current residents and accordingly, local governments, oppose development of housing for low-income residents within their communities. However, many Housing Agencies give preference to projects that receive some form of local government contribution, such as financial resources or land. This gives local governments ammunition to bar or greatly decrease the chances of projects in their areas being funded.

The IRS recently addressed this issue with the release of Revenue Ruling 2016-29.\textsuperscript{88} The ruling clarified that the Code does not require or encourage local approval for new LIHTC properties. The ruling goes on to recognize that requiring local approval may violate the Fair Housing Act and the duty to affirmatively further fair housing—as projects in high-minority and low-opportunity areas tend to get significantly more local support than projects in high-opportunity areas, thereby “perpetuat[ing] residential racial segregation.”\textsuperscript{89} As a means of encouraging development in high-resource communities, state Housing Agencies should consider eliminating such preferences.

\textsuperscript{87} Cal. Tax Credit Allocation Comm.: Proposed 2017 Regulation Changes with Initial Statement of Reasons (last revised Sept. 11, 2017), § 10315(h).

\textsuperscript{88} Rev. Rul., 4-6, 2016-29.

\textsuperscript{89} Id. at 3–4.
E. Ensuring Developments in High-Resource Areas Are Available to a Diverse Applicant Pool

As high-resource areas often have been resistant to building affordable housing—particularly housing that would serve people of color or people with disabilities—Housing Agencies must take steps to address not only the siting of the properties, but also the extent to which communities of color and other groups that have historically experienced housing discrimination can access these units. Without proper oversight, properties in high-resource areas may steer particular applicants to other properties or may only try to serve less “controversial” populations (e.g., the elderly).90

Housing Agencies should require that LIHTC properties, especially in high-resource areas, affirmatively market their properties in order to attract a diverse pool of applicants.91 A 2012 policy brief by the Poverty & Race Research Action Council found that while many Housing Agencies have affirmative marketing provisions, “[a] relatively small number of states issue substantive marketing requirements.”92 In order to ensure compliance, Housing Agencies should require that properties produce written and detailed outreach plans and report on specific marketing activities.93

Additionally, there are currently no mandates for LIHTC properties to have written and transparent admissions policies. Thus, even if a property attracts diverse applicants, non-transparent and informal admissions policies may result in screening out certain applicants.94 Relatedly, Housing Agencies must take significant steps to ensure that managers of LIHTC properties receive appropriate training95 and oversight regarding their obligations during the admissions process under fair housing law.

90. See Advocates’ Letter, supra note 80, at 3.
93. For one proposal on how to build on current HUD affirmative marketing requirements to create plans and metrics in the LIHTC context, see generally id. at 30–32. See id. at 46 (recommending Housing Agencies require housing developers to have a “written tenant selection plan for annual review”).
94. Id. at 41 (noting that “[w]here landlords do rely on credit scores and other background information, this process should be transparent for tenants.”).
95. Id. at 28 (recommending staff training regarding both marketing and tenant selection).
IV. Conclusion

This essay aims to continue a conversation about how Housing Agencies, housing and civil rights advocates, residents, affordable housing developers, jurisdictions, and other stakeholders can search for creative approaches to lessen the impacts of segregation, which have been reinforced through the siting of LIHTC units. However, this worthy goal cannot be accomplished at the expense of low-income communities of color, which also need investments for those families who want to see their communities improve. Finding this balance is admittedly quite daunting when taking into account the competing needs and differing circumstances that exist in communities that range from small, rural areas to large cities and suburbs. That said, the increased interest and willingness to address this issue signifies an important sea change within the LIHTC program to ensure the diverse needs of low-income families and communities are met.
Denouncing acts of blatant hatred and bigotry is easy. But . . . the subjugation of people of color happens every day by those who would never march with citronella torches or drive a car through a throng of innocent protesters. . . . Subjugation occurs by white people . . . who protest public and affordable housing under the polite cover of parking and density concerns . . . .

In January 2018, just shy of the 50th anniversary of the landmark Fair Housing Act, the Trump administration announced that it would delay implementation of the Affirmatively Furthering Fair Housing (AFFH) rule enacted under President Barack Obama. Under the AFFH rule, the federal government was poised to play a stronger role in furthering fair housing by requiring local communities to redouble their efforts to reduce segregation to qualify for federal funds. With the potential to redirect federal and local housing dollars to examine and address issues of racial segregation in the housing market, the AFFH was a huge win for civil rights advocates who diligently worked with federal policymakers to craft the rule and strengthen its enforcement mechanisms. Thus, the deci-

---


2. More specifically, the AFFH sought to provide stronger guidance in defining appropriate remedial action around existing disparities, would mandate stronger efforts around public engagement concerning housing needs, and ultimately would provide greater accountability around local government plans to reduce racial disparities.

---

Dr. Tiffany Manuel (tmanuel@enterprisecommunity.org) is Vice President of Knowledge, Impact & Strategy at Enterprise Community Partners, Inc. and co-author of You Don’t Have to Live Here: Why Housing Messaging is Backfiring and 10 Things You Can Do About it. She lives in Columbia, Maryland, and writes about community development, inequality, social exclusion, and racial equity. She is a frequent writer and speaker on these issues and has been featured by numerous national outlets such as CSPAN, Shelterforce, CityLab, and the Stanford Social Innovation Review.
sion to delay was met with fierce criticism and condemnation by a wide variety of organizations committed to advancing racial equity.³

Civil rights leaders fear that this is really a wholesale policy reversal, and it could not have come at a worse time. Rising housing costs across the country are making it virtually impossible for families with low- or moderate-incomes to afford a decent place to live, and those challenges are even more acute for racial and ethnic minorities who often have the additional burden of facing discrimination in the job market.⁴ Moreover, the racial wealth gap—made worse by the housing losses sustained by African-American and Latino households in the Great Recession—is wider than it has been in decades, and the recently passed federal tax reforms are likely to make a great many of those families even worse off.⁵

On any given night, about 600,000 people are homeless, a disproportionate number of whom are racial and ethnic minorities.⁶ Furthermore, more than twenty million low-income households are severely cost burdened (paying more than fifty percent or more of their household income for housing) and another twenty-four million low-income households are living in communities where poverty is highly concentrated or disproportionately comprised of racial and ethnic minorities.⁷

Against the backdrop of these alarming statistics, the AFFH announcement comes at a time when the nation is also deeply polarized on the issue of race and ambivalent about whether (and how) to strengthen governmental policies that assist low-income people and the impoverished communities in which they live.⁸ In the fight to eliminate housing discrimination, housing advocates have devoted critical resources to craft fair housing legislation, build public awareness of what housing discrimination is, and press government agencies for stronger enforcement of fair

---


⁶. These numbers also increasingly reflect families with children. About one in 30 children is homeless.


⁸. The AFFH announcement also comes at a time when the political environment is widening some very old and very deep racial cleavages in the American electorate.
laws. This has been important and impactful work on behalf of the millions of Americans who have benefitted from those efforts. Yet with so many civil rights, faith-based, housing, and other organizations working to advance better housing access for all Americans, it is disheartening to see how many people still lack a decent affordable place to live in the United States, the extent to which our communities are still racially and economically segregated, and how difficult it continues to be to drive more equitable outcomes through existing housing policies and programs.

Among the many challenges housing advocates face today is one that is particularly daunting—convincing the public that fair housing remains a critical issue that deserves attention on the nation’s very full political agenda. In this article, I will argue that there is a crucial need to refocus attention on building public will for fair housing by reframing the corrosive and toxic public discourse that today engulfs this issue. As I will discuss, Americans have grown fatigued by the idea of talking about race and the lingering effects of discrimination. They do not see their stake in the success of such policies and they have little faith that government mandates of any kind can solve this issue. In addition, I argue that because access to decent affordable housing for millions of racial minorities is being played out in the context of conflicts about the siting of affordable housing in our communities, we need to be especially thoughtful and strategic in how we address the racial locus of these conflicts. I conclude by offering a few recommendations based on empirical research for how we might reframe the public discourse and invite stronger overall policy support, especially regarding the thorny topic of stronger government action on these issues.

The Landscape of Public Opinion About Fair and Affordable Housing

When the delayed implementation of the AFFH was covered by newspapers, hundreds of comments like this one from the New York Times⁹ flooded the comments sections. Some dismissed the AFFH as liberal “social engineering.” Others questioned the deservedness of minorities to get “special treatment” or rejected the notion that the

---

federal government should be asserting its authority over local policymakers in this fashion for any reason.

It is disheartening to see comments like these. They show how difficult it is to generate support for policies that seek to disrupt discriminatory practices—both past and present. Responses to the delayed implementation of AFFH remind us that despite decades of raising the issue of discrimination, many do not see the alarming racial disparities in housing as a call-to-action or as a failure of our public policy. As a result, Americans tell us (in words and in the lack of action) that they are fatigued by, and uninterested in, the continued conversation about race and racial inequality.

Polling on affordable housing more generally finds that Americans believe deeply in the idea that everyone should have decent, affordable housing. They often say that they are in favor of local governments doing more to advance housing options for people across the income spectrum. Yet, many of the same people who say in polls that they are in favor of better housing solutions for residents fail to support affordable housing developments when they are proposed in nearby neighborhoods; use coded language to stand in for racial stereotypes to justify their opposition; fail to support local or national legislation that would make it possible to build, create, or preserve existing affordable housing; and fail to support the organizations trying to build diversity and inclusion into our neighborhoods.

10. For example, a poll commissioned by the Housing America Campaign and the National Association of Housing and Redevelopment Officials (NAHRO) in 2010 found that 86 percent of Americans believe the provision of affordable housing is an important priority in their community. Two-thirds continued support even when the beneficiaries would be low-income families. Yet only 25 percent said that having a decent affordable place to live is their top priority. The poll also indicated that most Americans (about two-thirds) say that the nation is on the “wrong track” when it comes to offering affordable housing options to families. See http://www.nahro.org/sites/default/files/searchable/Zogby.pdf (last visited Jan. 28, 2018). A series of regional polls across the country are reporting similar results. For example, a 2017 poll of the Denver region (sponsored by a group of Denver residents, developers, and advocates called All in Denver) showed wide support for affordable housing and project-based subsidies among likely 2018 voters. Jon Murray, Armed with a poll, affordable housing advocates want Denver to accelerate—or expand—its $150 million plan, DENVER POST, May 3, 2017, https://www.denverpost.com/2017/05/03/armed-with-a-poll-affordable-housing-advocates-want-denver-to-accelerate-or-expand-its-150-million-plan/. A 2017 poll of the Gulf Coast region (conducted by the University of New Orleans and sponsored by nonprofit housing advocates HousingNOLA, Greater New Orleans Foundation, and Enterprise Community Partners) found that “housing was the second leading issue voters said they want candidates in the election to address.” Jessica Williams, Poll: Affordable housing is No. 2 issue on minds of New Orleans voters, NEW ORLEANS ADVOCATE, Sept. 19, 2017, available at: http://www.theadvocate.com/new_orleans/news/article_d30f45b8-9d70-11e7-aa86-c73d5b03d198.html.
Polling and survey data also tell us that Americans generally feel empathetic towards those who are economically struggling, believe in the ideals of fair housing, and when given example scenarios, can identify the kinds of behavior that violates fair housing laws. While these polls suggest that Americans are racial egalitarians in perspective (meaning they generally support the idea that discrimination is a bad thing and that our society has some responsibility to root it out), they are deeply distrustful of government, skeptical that government agencies can positively impact tough social issues like racial discrimination, and appear to have very little appetite for actively advocating for stronger governmental policies.

In this context, fair housing policies, such as the AFFH (specifically designed to strengthen mandates on government agencies to ease racial segregation), are easily dismissed in the court of public opinion. Believing that discrimination is largely a problem of the past—something we solved long ago when we enacted anti-discrimination laws and set up public

11. There are important differences between polls and surveys regarding public support for housing policies. Polls are generally “point-in-time” metrics that measure attitudes about an issue or related issues. They are usually shorter than surveys; ask a more limited range of questions on a given topic; and allow us to capture the brain’s fast, automatic, and intuitive reactions. Surveys, on the other hand, can cover multiple topics or issues areas and are generally better at the depth of knowledge, awareness, and reactions on topics than polls. Both are important as we evaluate public opinion but they have different strengths in terms of how they inform our understanding.

12. For example, a national poll in 2017 commissioned by the Strong, Prosperous, and Resilient Communities Challenge (SPARCC) found that 74% of Americans empathize with the challenges of low-income Americans—they agree that a lack of opportunity exists for many people that is keeping people impoverished. And they generally agree with the idea that as a society, we should be investing more deeply in housing to reduce the number of people in poverty. SPARCC, How Local Leadership Can Drive Prosperity for All, available at: http://www.sparcchub.org/wp-content/uploads/2017/03/SPARCC_Poll-Results_Report.pdf (last visited Jan. 28, 2018). We should be careful to note that Americans also say that the poor should do more to “help themselves,” “get jobs” and stop using/abusing government programs. For example, a 2016 poll conducted by Princeton Survey Research Associates for the American Enterprise Institute and Los Angeles Times compared contemporary attitudes about the poor with the same polling questions they used in 1985, finding a persistence in the perception among Americans that the poor overuse government benefits and “prefer to stay on welfare,” despite a significantly reduced set of benefits offered as part of the public’s social safety net.


agencies to adjudicate complaints—our ability to generate public interest and active engagement in strengthening policy remains appallingly low. Furthermore, our calls-to-action on this issue are often met with exasperation by a public that has grown tired of trying to solve this problem. Our work appears dated and irrelevant to a public that views these issues as historical artifacts.¹⁵

**Undercutting Fair Housing by Opposing the Siting of Affordable Housing and Choosing to Avoid Living in Diverse Communities**

*Our homes have become our wealth. Racial fears linger even if they've become encoded in other language. Change invariably looks like a threat. And the universe of threats has broadened from the toxic spill to the garden shadow, from the property next door to the potential development five blocks over.*¹⁶

The state of public support for expanding fair housing legislation and enforcement reflects the public’s fatigue and antipathy toward addressing the racial and economic consequences of discrimination.¹⁷ The siting of affordable housing is not only a good example of this challenge, but it also represents a particularly tough roadblock for those concerned with expanding housing access to groups that have traditionally been excluded from constructive housing policies. There are a variety of reasons stated when communities oppose affordable housing proposals but, as most affordable housing advocates know, implicit racial bias underlies much of that opposition. Similarly, implicit bias often drives whites’ decisions about where they will live. Both types of conduct undercut fair housing and reinforce current racial segregation patterns.

Implicit bias refers to the unconscious or unintentional preferences we give some racial groups over others and it impacts our judgment in ways that we may not even be consciously or explicitly aware of.¹⁸ Few issues

---

¹⁵. While discrimination is understood as largely addressed by legislation, a good portion of the American electorate believes that whites are facing discrimination. A national survey conducted in late 2017 by NPR, the Robert Wood Johnson Foundation, and the Harvard T.H. Chan School of Public Health found that more than half of whites—55 percent—surveyed say that they believe there is discrimination against white people in America today.


¹⁸. Implicit bias is also important in this context because it is different from suppressed thoughts we might conceal to keep the peace; it reflects the latent preferences in our belief system that are operating somewhat unconsciously to us. Thus, many people who may be operating in good faith, who may consciously oppose racist or discriminatory practices, may be guided unconsciously by racial
demonstrate the power of implicit bias more visibly than affordable housing, where homeowners go to great lengths to avoid diversifying the places where they live, even when they express more progressive and egalitarian attitudes on race. Over the last decade, civil rights advocates have done much to help people understand and address the implicit bias (especially around race) that often comes tangled up in community opposition to affordable housing. Few community residents today risk voicing explicit bias—that is, openly and explicitly voicing “white-only” or “for rich-only” attitudes—at neighborhood meetings, but their implicit biases continue to undermine our ability to create access to much needed housing in communities of opportunity.

In many ways, implicit bias is more challenging for housing advocates to combat because it gets expressed in behavior, actions, and language that are race-neutral but in actions that have deep racial consequences. Implicit bias is at work in the way that people exclude certain neighborhoods as places where they might live or send their kids to school. In the case of affordable housing, it gets expressed when people reject affordable housing because it will be people who are “different” or who “might be uncomfortable” in this community. That is, opposition to affordable housing gets driven by the racial stereotypes that people associate with such housing and its potential residents, even when they do not consciously support or champion the bigoted views that guide their actions. “Stereotypes and negative perceptions of what an affordable-housing dweller looks like don’t help... Potential neighbors fear that the low-income inhabitants will drive ‘junkers’ and mar their pristine suburban landscape. The newcomers have too many children and, of course, the building will resemble a Soviet housing project.”


19. We also grapple with confirmation bias (tendency to view incoming information that confirms our beliefs uncritically but challenge incoming information that disconfirms or is incongruent with our existing beliefs) and attribution error (tendency to ascribe other people’s circumstances to their personal failings while attributing our own failings to forces outside of our control). See Roy Baumeister & Kathleen Vohs, Fundamental Attribution Error, ENCYCLOPEDIA OF SOCIAL PSYCHOLOGY (2007).

20. For example, racial concerns over affordable housing get expressed as concerns about “neighborhood character” or other more neutral issues.


fearing the worst about potential new neighbors and concerned about the value of the most significant asset they have, use all kinds of formal and informal methods of blocking the siting of affordable housing.23

The result of such opposition is that much of the affordable housing that needs to be built—housing that would help ease the cost burdens being deeply felt by racial and ethnic minorities—simply never gets built. And it never gets built even when developers have done the work to engage the surrounding communities early in the planning process.24 “Developers say that perhaps the toughest impediment to new housing construction is local opposition, especially if the proposed construction site is in a safe neighborhood with good schools.”25

Implicit bias not only drives reactions to proposed affordable housing developments but also whites’ own housing location decisions. Whites are not the only racial group to experience implicit bias (we all do, since these biases are cognitive in their orientation) but the dominance of whites in the housing marketplace means that their attitudes, and their behavior as actors in that marketplace, have a more consequential impact on housing outcomes.

The story of how Americans came to peer beyond their own properties is also, inescapably, about race. As urbanization brought blacks and whites closer together, white communities reacted with racially restrictive covenants, aiming to keep blacks and their perceived threat to property values out of white neighborhoods. The Supreme Court ruled such covenants unenforceable in 1948, but they had long-lasting effects on how homeowners looked at the world around them, and the need to control it.26

In her piece, How ‘Not in My Backyard’ Became ‘Not in My Neighborhood’, New York Times journalist Emily Badger writes powerfully about the growing expectation among homeowners to decide what happens beyond their own parcels of land and how the legacy of racially restrictive housing practices in communities across the country has left whites with the perception that the value of their homes is dependent on their ability to keep their communities segregated.27 So, even when their own racial

23. The ways in which communities use formal and informal methods to oppose affordable housing has implications for the extent to which fair housing advocates can expect affordable housing developers to build in “communities of opportunity.” Developers’ ability to do so is conditioned by many mediating forces, including community responsiveness—which can mean that developers who propose affordable housing can find themselves bound up in efforts are extraordinarily difficult to finance, plan, and navigate to completion.
25. Cholo, Affordable Housing, supra note 22.
26. Badger, Not in My Backyard, supra note 16.
27. Id.
bias is not explicit, their behavior in making housing decisions (where to rent, buy, invest, etc.) powerfully shapes the landscape of communities. Numerous studies have shown, for example, that white Americans bring implicit bias to homeownership—preferring to buy in neighborhoods that are predominantly white, over similarly resourced mixed-race or African-American neighborhoods—meaning they prefer white neighborhoods even when the more diverse neighborhoods are just as safe, with good schools, and have homes that are just as nice. The strong preference for white neighborhoods and the perception of those neighborhoods as more “desirable” gives them a higher economic valuation in the housing market.

With dominant purchasing power in the homeownership market, affluent whites have the ability to shun neighborhoods with even a modest black population, and their doing so depresses housing demand, drives down prices, and stifles appreciation of more diverse communities. This kind of implicit racial bias means that when African Americans move into a neighborhood (and represent more than 10 percent of the neighborhood), home values fall because the community visibly becomes less like the “gold standard”—affluent and predominantly white. The impact of those buying preferences, based on implicit biases, reinforces ugly and persistent stereotypes about African Americans and other racial minorities that become almost impossible to dislodge.

Opposition to affordable housing and avoidance of diverse neighborhoods combine in spatial dynamics that make tackling problems like concentrated poverty and racial inequality tougher. It means that people of color in the United States live with vastly higher neighborhood poverty levels than do poor whites because of the long history of private and gov-

28. For example, the General Social Survey found in 2008 that 20% of whites cited their ideal neighborhood as all white with another only 25% saying it was mixed-race but had no blacks. Findings on race from the survey can be found in Lawrence D. Bobo, Camille Z. Charles, Maria Krysan, and Alicia D. Simmons, The Real Record on Racial Attitudes, in Social Trends in American Life: Findings from the General Social Survey since 1972 (2012).


30. Although we should acknowledge that, for a variety of related reasons, even more affluent predominantly minority neighborhoods typically have less home value per dollar of income than wealthy white neighborhoods. See David Rusk, The Segregation Tax: The Cost of Racial Segregation to Black Homeowners, The Brookings Institution Center on Urban and Metropolitan Policy Survey Series (2001), available at: https://www.brookings.edu/research/the-segregation-tax-the-cost-of-racial-segregation-to-black-homeowners/ (last visited Jan. 28, 2018).

ernment discrimination against them. It means that poverty is almost inseparable from race. And it means that for many minorities moving from their existing neighborhoods becomes essential to build wealth and access opportunity. It also means that most affordable housing developments (and the siting conflicts about them) are pushed to already dense parts of our regions—further reinforcing the patterns of racial segregation.32

None of this kind of exclusionary behavior is new—throughout the history of the United States, people have devised and deployed strategies for “excluding the housing types that would be affordable to low-income households.”33 But continued racially motivated opposition reinforces housing as a locus of racial and economic inequality and more practically, “it also means the senior affordable housing, the high-rises and the tiny homes—also arguably vital to the larger community—are never built.” 34 To provide fair access to the nation’s housing resources, fair housing advocates have to develop new strategies to deal with this “old wine in new bottles”—powerful remnants of old forms of discrimination updated for the current socio-economic environment of our neighborhoods.

**Fair Housing Advocates Are Working to Overcome Opposition**

In fact, most whites experience such profound discomfort with being a racial minority that we will arrange our entire lives—from home to work to school—to avoid being in that situation. When we create . . . “whiteness as a lifestyle,” we have all the ingredients to cease to see our race in our own minds.35

The challenge for fair housing advocates is that racialized attitudes make it difficult to comply with and promote fair housing laws and practices. This is true even when people are progressive and generally acting in “good will.” The legacy of racial segregation and implicit biases conspire to coopt their willingness to support fairer housing policies. As a result, people may think of themselves as being progressive and of “good will” on housing issues, but might still act under the influence of racial stereotypes (associating people of color with reduced property values, for example) so that their conduct (e.g., opposing an affordable housing development in the neighborhood or opposing an inclusionary zoning ordinance) appears indistinguishable from people who have explicit bias. And yet, if housing advocates approach them as if they are acting out of explicit bias, those efforts tend to backfire.

One common response fair housing advocates make to public resistance is to offer the work of Richard Rothstein and other prominent housing scholars showing how state and local governments (with federal backing) kept minorities from owning good homes, attending good schools,
and building wealth that their white counterparts enjoyed for decades.36 Through exclusionary zoning and racist lending practices, millions of Americans were offered few real pathways to opportunity, even as they worked to contribute to their communities and their taxes were taken to pay for services they were not given the chance to benefit from.

Advocates offer this information in the hopes that greater awareness of how limited access to good housing was denied racial and ethnic minorities will help more Americans connect to the goals of fair housing policy and to act to remediate the past. This approach assumes that low public support is largely about awareness. While it is certainly true that Americans tend to overestimate the progress that our nation has made in closing the racial wealth gap,37 greater public awareness about the legacy of discriminatory government policies does not (in and of itself) increase support for fair housing policies. If awareness were the issue, it would be much easier to dislodge. Unfortunately, as Christiano and Neimand argue in their March 2017 Stanford Social Innovation Review article, “Stop Building Awareness Already,” “not only do awareness campaigns fall short and waste resources when they focus solely on raising awareness, but sometimes they can actually end up doing more harm than good.”38

So, the challenge remains. While our courts can decide cases in favor of fair housing advocates and legislators can work to tighten fair housing laws and enforcement mechanisms, in the jury of public opinion, we are losing the battle to strengthen fair housing support. We need to win the level of public support that would make it difficult for policymakers to backpedal on the commitment to expand access to decent, affordable housing (as we see today with the AFFH) and to do so in a way that expressly addresses the thorny challenge of racial discrimination.

While fair housing advocates have never shied away from the effort to raise public awareness and have made some gains, the current stalemate we face in building public support serves up the opportunity and necessity to redouble our efforts to resolve a tough question—how can we build stronger public support for policies that advance the goals of fair housing and reduce racial segregation in our communities?

The difficulty we have garnering public interest and support for fair housing is about how Americans perceive both the relevance of such policies and whether they understand their stake in it. Put another way, it is not easy for most Americans to ferret out how proposed system changes,

---

such as the AFFH rule—a policy change that is time-consuming and can lead to protracted government-led planning processes with community participation, would result in meaningful and demonstrable improvements in their quality of life. That is, most Americans (especially those who oppose anti-discrimination policies) do not see their stake in the success of such efforts. They do not see how support for this policy will improve their economic circumstances.

The good news for fair housing advocates is that Americans are keenly aware of how tight our housing markets have become because almost every major newspaper outlet has been covering the “housing crisis” for almost ten years. And they are well aware about how central housing is to their economic well-being. Americans are very aware of how bad things are—not just for racial minorities in this country but for the vast majority of low-and moderate-income families. But they are unsure of how or why AFFH would be a solution for that. So, our task is to focus on building public will by showing the relevance of fair housing policies to a broader range of Americans, who are increasingly concerned about their own economic well-being and who are asking the critical question for themselves—Am I included in the American Dream?

Reframe the Narratives That Drive Public Opinion About Fair Housing

...[T]his kind of good place/bad place language also represents a huge backward step from the longstanding attempt to reframe discussions of disinvested places in terms of their assets rather than their deficits. It implies that those who stay in these neighborhoods are all either saints or victims.

Empirical data consistently tells us that Americans have little trust in the ability of government to resolve the long-standing social ills that involve race. This lack of trust limits their interest in supporting policies like the AFFH that directly aim to do so. While it is true that federal agencies have always had the role of allocating critical housing resources across our communities, the negative response of some to AFFH reminds us just how cynical we are about the capacity of governmental institutions to resolve these concerns. As such, it is not simply that public support for


fair housing policies is limited. It is that public confidence in, and support for, any more governmental mandates is low.42

Thanks to social science research on how Americans think about housing generally, we know that although Americans believe that all people should have fair access to housing, they differ from fair housing advocates in their understanding about how and who is responsible for ensuring that this happens.43 More specifically, the way Americans think about housing is powerfully shaped by the three cultural narratives that dominate public discourse on housing.

• **Narrative of Individual Responsibility** (accessing appropriate housing is the responsibility of the individuals in need, not the responsibility of government or other groups)

• **Narrative of Mobility** (identifying and moving to a community where you are welcomed, can afford, and “fit in,” is the way to solve for challenges in access to housing)

• **Narrative of Racial Difference** (disparities across racial groups in housing outcomes are really a reflection of differences in work ethic and the cultural norms of negatively affected groups)

While it may be true that Americans believe that everyone should have a decent place to live, the logic that Americans use to understand why people do not have the housing they need, as well as what should be done about it, are encapsulated in these dominant narratives. Taken together, these essentially maintain that it is not the responsibility of others (especially not of government) to ensure housing for any group of Americans. And where housing is limited (for any number of reasons), the answer is simple—people should take personal responsibility to move to places where they are welcomed and can find better housing options on their own.

As Kevin Williamson has written in the *National Review*, a conservative political news outlet, “My longstanding advice to ambitious people trapped in stagnant communities—move, for God’s sake!”44 Interestingly enough, Williamson’s admonition to those living in impoverished communities of color is as harsh for those residing in “dying” predominantly white com-

---

42. This cynicism has also been driven by the considerable effort of political conservatives over the last 30 years to discredit and dismantle the role of the federal government in local communities.


communities, where the same issues of economic decline are clear, where the rates of opioid deaths are rising quickly, and where the likelihood that the families will ever again earn enough wages in the labor market sufficient to afford feeding their children is similarly limited. And Williamson’s harsh words are also leveled at the fate of the communities that house poor families. “The truth about these dysfunctional, downscale communities is that they deserve to die. Economically, they are negative assets. Morally, they are indefensible.”45 While civil rights groups have come to expect re-

responses like this from hardline conservatives, Williamson’s sentiment is less of an outlier than we would hope.

In a paper that I co-authored last fall on housing messaging, we presented research showing how housing advocates’ attempts to lift policy solutions, especially those solutions that require government interventions, mandates or public funding, often backfire in the face of the dominant narratives. My co-author and I outlined a series of other common backfires and made specific recommendations for communications practice to build public support. As we state in that paper, “the work to build the public will to address housing challenges may be even tougher than many realize. Our experience and research show that, while advocates are lifting up policy and programmatic solutions, we are missing the opportunity to change the narrative about why housing matters; what ‘affordable housing’ means; why housing is a shared public concern; and what needs to be done to fix this problem.”

On fair housing, a particularly problematic messaging challenge, our attempts to engage the public (however sincere and heartfelt), backfire easily because as advocates, we have not always understood how to dislodge and counter the narratives that so profoundly impact public thinking about housing, race, and discrimination. On this front, our messaging is often out-of-sync with the narratives people use to understand what “affirmative actions” need to be taken to address challenges in the housing market. For example, the extent to which many Americans believe that segregation is natural (that people want to live with others like them) and that different racial groups have “separate fates” are the two most salient areas where public thinking is “out of sync” with the assumptions we make as part of our efforts to engage them with a vision of racially integrated communities.

Reframing the conversation about fair housing means changing the way that we invite a more thoughtful public discourse to strengthen public support. Based on the messaging research, reframing will require at least four messaging shifts.

- **Broaden understanding of who benefits from fair housing policies.**
  Generally, we know that when the groups that are perceived to benefit from a proposed policy are not groups that are thought to be “deserving,” the likelihood of public support significantly diminishes. Although fair housing laws cover a wide range of marginalized groups, the public understanding of who benefits is typically viewed as some combination of low-income and/or racial minority households. Put simply, how the public sees fair housing beneficiaries is a significant challenge to our ability to build public support. This

---

does not mean that we need to mask who the intended beneficiaries are. Our task is to widen the public’s understanding of who benefits from fair housing and to help people see how they benefit from such policies. Useful to this effort is building a case for inclusion based on clear messages about the economic costs of racial segregation to the whole community,48 and the negative impacts from restrictive local housing policies on all home values and regional economic growth,49 as well as the talent communities are excluding when they let racial segregation limit access to good schools.50

- **Help people who struggle to see racial discrimination as an important and relevant social issue to see their stake in prioritizing this issue.** Often when race, class, or cultural issues are the headline of our communications, the response dissolves into cynicism and derision rather than corrective action. The task is to introduce fair housing into the conversation in a way that gives people a reason (in addition to social justice) to resolve it. That is, we must help people to see their stake in solving some very difficult and emotionally charged dynamics that have plagued our communities and our nation for decades—not an easy sell. So, we need to be clear that the future will be won by those regions, communities, and places where there is diverse talent, resources, restaurants, cultural activities, languages spoken, etc. This is in part because our economy, increasingly responding to the pressures of a globalized marketplace, is changing in ways that put a high value on diverse environments. By extension, those communities that remain highly segregated along race and class lines will miss out on opportunities to remain competitive—threatening the livelihoods of all who live in those communities. We need to develop messaging that emphasizes how policies such as low-density zoning (which communities often use to exclude affordable housing developments from their neighborhoods) hurt the regional economy by limiting population growth, restricting the growth of the workforce, limiting the development of the necessary infrastructure to grow economic capacity, and pushing out firms who want (and need to) grow.51 In essence, we need to help

people see that addressing fair housing helps us meet the needs of the economy that is coming and is the smart thing to do to ensure that our cities prosper, in addition to being the “right” thing to do.

- **Contextualize the issue of fair housing as structural and spatial.** Because of the inclination for people to understand fair housing as going after a “few bad apples” (landlords, realtors, or others who are acting intentionally to discriminate against others) rather than a problem of systems and institutions, it is even more important to make the case for fair housing by anchoring the issue in structural, spatial, and/or systems-thinking. “Anchoring” in the context of case making means presenting the systems-level solutions first and then consistently reinforcing and directing attention back to those solutions in that messaging.52 The more firmly fair housing advocates anchor the issue in forward-looking systems-level solutions, rather than the specific actions of individual people, the more likely it is that the resulting public discourse will be grounded there. It is important to note that the reframing effort here requires the bulk of the conversation to be forward-looking. Given the strong public belief that the worst discriminatory practices are a thing of the past, revisiting those issues with any sufficient depth will not change the conversation. So instead, raise the challenges of previous policies but focus more of your message on the ways in which enacting reforms today help us to better address problems and improve outcomes—with a strong and specific focus on the ways in which fairer and more inclusive housing benefits everyone in society. Give specific and concrete examples of how fair housing policies have succeeded in changing systems, undoing racial segregation, and providing better outcomes for a wide range of community stakeholders. Given how little faith Americans have in the ability of public institutions to change the status quo, anchoring in systems-level solutions and providing concrete examples of success, are necessary to quell the cynicism that is often attached to these efforts—especially when they hear historical accounts of how government actions created racially segregated neighborhoods to begin with.

- **Connecting fair housing to the wide range of other social issues that are priorities for Americans.** Housing and community development advocates often miss the opportunity to broaden the audience when we fail to connect housing with other issues. While many in our field are beginning to use a “broader impacts” frame, it is not en-

52. Anchoring responds to the human tendency to give the most weight to the first piece of information or idea provided to us when making decisions. Given this cognitive bias, it is essential that, when making a case for change, we choose the first piece of information—or anchor—strategically.
ough to reshape public debate. As a result, this point is largely absent from media coverage of fair housing issues. Connecting the expansion of housing to other issues allows fair housing advocates to align with advocates in education, health, labor, and other issues for stronger advocacy efforts. The latter is incredibly important if we are to raise the salience of fair housing on the nation’s policy agenda and create a more favorable policy climate for expanding support for fair housing policies, programs, and enforcement.

When we do not effectively reframe the conversation away from the powerful narratives of personal responsibility, mobility, and racial differences, our messages backfire. That is, they do not result in garnering the support we need to change the systems that currently allocate resources to ensure access to opportunity. Our challenge then is to reframe the conversation away from the narratives that today are working against our efforts to build public will and toward equally powerful counter narratives that reinforce the values of American pragmatism, innovation, and prosperity. These values, when expressed well in our messaging, help people do some of the heavy lifting that I am suggesting above. They help position fair housing as a shared public concern with collective benefits for a wide range of people who may not see themselves as clear beneficiaries of such policies. That is, we can solve some of the issues of discrimination in a pragmatic way (helps negate the criticism that fair housing policies are overly bureaucratic) that is innovative (helps people to see this as forward looking, rather than an issue of the past) and with the potential benefit of lifting prosperity for a wide range of community residents (helps to get people up and over the narrow reading of who benefits from these policies). Taken together, values-based messaging allow us to tell a bigger story about how fair housing affects all of us and to widen the circle of support.

We Must Work to Dismantle the Narratives That Constrain Public Support

By definition, reducing opportunity hoarding will mean some losses for the upper middle class. But they will be small. Our neighborhoods will be a little less upmarket—but also less boring. Our kids will rub shoulders with some poorer kids in the school corridor. They might not squeak into an Ivy League college, and they may have to be content going to an excellent public university. But if we aren’t willing to entertain even these sacrifices, there is little hope.\footnote{Richard V. Reeves, \textit{Dream Hoarders: How the American Upper Middle Class is Leaving Everyone Else in the Dust, Why That is a Problem and What to Do About it} 122 (2017), https://www.brookings.edu/book/dream-hoarders/}

Affordable housing for all Americans remains an elusive part of the American dream, especially for racial and ethnic minorities in the nation today. Despite the efforts by housing advocates to make the case for pol-
icies that expand the franchise of housing opportunity to more Americans, it remains a challenging task to convince policymakers to craft and enforce fair housing policies such as the AFFH rule. It can be an even tougher task to enlist the public’s support in ensuring that policymakers stay committed and take the efforts seriously. Public opposition to fair housing plays out in many ways (including opposition to the siting of affordable housing) that powerfully reinforce existing patterns of racial discrimination.

Despite the best efforts of fair housing advocates, our nation seems to be moving further away from the point when race or other social demographic characteristics no longer predict or are correlated with concentrated poverty, low wages, and lack of shelter. And, the lack of broader public support should concern fair housing advocates deeply not just because we need greater public support to fully implement fair housing policies, but because our assumptions have led us down a pathway that is not building public will. While it is important to recognize and explain how the policies of the past have had a deleterious impact on the racial, ethnic, and economic housing issues of today, history lessons are unlikely to be effective in building public will to address these issues.

In order to get traction on these issues, we need to build public will and counter the dominant narratives that today constrain public thinking. Moreover, we need to get much more effective and strategic in how we engage public audiences about fair housing, discrimination, and race. First, we need to reassert the relevance of fair housing policies to many Americans who think that we have already solved the issue of discrimination. Second, we need to reframe the narratives that drive public opinion on fair housing and that today limit support for the government’s role in tackling all forms of discriminatory practices. We should hone in on the ways in which enacting reforms today helps us better address problems and improve outcomes, communicating from a specific focus on the ways in which fairer and more inclusive housing benefits everyone in society.54

54. This is closely akin to what john a. powell has coined as “targeted universalism,” and it simply means “identifying a problem, particularly one suffered by marginalized people, proposing a solution, and then broadening its scope to cover as many people as possible.” john a. powell, Stephen Menendian & Jason Reece, The Importance of Targeted Universalism, Poverty & Race Research Action Council (2009), available at: http://www.prrac.org/full_text.php?text_id=1223&item_id=11577&newsletter_id=104&header=Miscellaneous&kc=1 (last visited Jan. 28, 2018).
OPPORTUNITIES AND CHALLENGES IN THE NEW ADMINISTRATION

Tax Reform and Its Consequences for Affordable Rental Housing

Michael Novogradac, C.P.A., Scot Keller, C.P.A.,
Peter Lawrence, and Mark Shelburne

I. Introduction ..............................................................................................108
II. Provisions Considered but Not Enacted .............................................108
   A. Elimination of Private Activity Bonds and Accompanying
      4 Percent LIHTCs ............................................................................. 109
   B. Affordable Housing Credit Improvement Act............................ 110
   C. Basis Boost and General Public Use ............................................. 111
      1. Basis Boost ....................................................................................111
      2. General Public Use......................................................................111
   D. Offsetting Loss of Equity at Property and Program Levels .... 112
      1. Modernization of Tax Credit Rate............................................112
      2. Increase of Agency Annual Volume Cap ...............................113
   E. Summary ............................................................................................ 113
III. Enacted Provisions ..................................................................................114
   A. Direct Impact on Financial Returns for Federal LIHTC ......... 114
      1. Lower Corporate Rate.................................................................114
      2. Interest Expense and Depreciation...........................................116
         a. Limitation on Interest Expense .......................................... 116
         b. Exceptions from Interest Expense Limitations.............. 117
         c. 100 Percent Asset Expensing..............................................118
      3. Opportunity Zones .....................................................................118
         a. Qualified Opportunity Zones...............................................119
         b. Reasons for Participating .................................................... 119
         c. Qualified Opportunity Funds............................................. 120
         d. Qualified Opportunity Zone Property..................................120
         e. Qualified Opportunity Zone Business ...............................121

Michael Novogradac (michael.novogradac@novoco.com) is managing partner of Novogradac & Company, LLP, based in the firm’s San Francisco and Washington, D.C., offices. Scot Keller (scot.keller@novoco.com) is a CPA Manager in Dover, Ohio. Peter Lawrence (peter.lawrence@nc-llp.com) is Director of Public Policy and Government Relations of Novogradac Consulting LLP in Washington, D.C. Mark Shelburne (mark.shelburne@nc-llp.com) is a Senior Manager with Novogradac Consulting LLP in Raleigh, North Carolina.
I. Introduction

The 2017 tax reform legislation (Pub. L. No. 115-97), initially titled the “Tax Cuts and Jobs Act” (Act), was responsible for the most sweeping changes to the Internal Revenue Code (Code) in a generation. Unlike the experience in 1986, which included the creation of the low-income housing tax credit (LIHTC), nothing in the Act directly addressed affordable rental housing. Nevertheless, the new law has very important consequences for the production and preservation of affordable rental housing.

This article begins with a review of several proposals that were initially included in, or subsequently added to, the draft legislation, but ultimately were not retained in the final bill. This article then reviews the tax changes included in the final bill that are particularly relevant to the use of the LIHTC for the production and preservation of affordable rental housing. These are provisions that: (1) have a direct effect on financial returns to investors, (2) affect investor demand for the federal LIHTC and corollary state tax credits, (3) affect the future supply of the LIHTC and private activity bonds, and (4) make other technical changes.

The discussion presumes readers have a basic knowledge of the LIHTC program. More importantly, by necessity the article is only a summary. Other aspects not addressed may be consequential to particular situations. The development and operation of LIHTC properties require advice from knowledgeable accountants and attorneys. The Act makes this need even more acute. If readers take only one message from this article, it should be to seek out assistance from tax experts.

II. Provisions Considered but Not Enacted

Although the 2017 tax reform process was rapid by historical standards, several ideas came and went along the way. The following section
describes some of the provisions that were considered but ultimately not enacted. This historical background illustrates how the process worked and provides a context for understanding the ultimate outcome. It also is worth understanding the concepts that were added, and then removed, as they could resurface in the future.

A. Elimination of Private Activity Bonds and Accompanying 4 Percent LIHTCs

The tax bill initially passed by the House of Representatives left the 9 percent allocated LIHTC untouched. However, the tax bill eliminated the ability of government agencies to issue tax-exempt private activity bonds (PABs), which under the Code are needed to generate 4 percent PAB LIHTCs. Buildings are eligible for 4 percent PAB LIHTCs only if 50 percent or more of the building is financed with tax-exempt bonds subject to a volume cap. (Any 4 percent LIHTC received for acquisition costs in an allocated 9 percent LIHTC rehabilitation property would have remained unchanged.) The repeal of PABs would have cut LIHTC housing production and preservation by more than half. The elimination of PABs was seen as a way to help pay for other tax cuts, as well as a consequence of the concerns by some Members of Congress about some of the many uses of PABs.

The affordable housing community mobilized in response to this prospect. Through these efforts and long-standing support for the program among key senators, the Senate passed tax legislation that retained PABs. The House consented to retaining PABs in the final bill.

As of the writing of this article, the future of PABs remains a hot topic. How the tool will fit in the upcoming plans for infrastructure spending is very much at issue. There is a very real possibility that the program will

---

1. The historic rehabilitation and new markets tax credits were slated for elimination.
2. Code Section 42(h)(4).
5. House GOP Tax Reform Bill Retains Housing Credit, But Repeals Housing Bonds, AFFORDABLE RENTAL HOUSING ACT BLOG (Nov. 3, 2017), http://rentalhousingaction.org/blog/2017/11/3/house-gop-tax-reform-bill-retains-housing-credit-but-repeals-housing-bonds. Multiple interest groups representing other activities utilizing PABs (e.g., hospitals) also made their views known.
see a substantial expansion, perhaps in part because of the goodwill and support generated by last year’s advocacy efforts. However, House Ways and Means Committee Chairman Kevin Brady (R-Tex.) continues to express concerns about some of the eligible uses of PABs, as well as the need to allow unused PABs to be carried forward and be available to be issued in a subsequent year.

B. Affordable Housing Credit Improvement Act

The Affordable Housing Credit Improvement Act (AHCIA) was introduced in Congress initially in 2016 during the 114th Congress and then reintroduced in 2017 (S. 548, H.R. 1661). The legislation contains two dozen revisions to the LIHTC program. Early versions of tax reform included the following no- or low-cost improvements from the legislation:

- **Reconstruction or Replacement Period After Casualty Loss**: This provision would allow owners up to 25 months to restore a property after experiencing a casualty loss that occurred outside a presidentially declared disaster area before being either at risk of recapture or unable to claim LIHTCs. The current requirement is to restore such a property within the same calendar year.

- **Modification of Rights Relating to Building Purchase**: This provision would replace the ability to allow a non-profit to possess a right of first refusal to acquire a LIHTC property at a price equal to existing debt and exit taxes with a purchase option on such terms. A purchase option is seen as less prone to conflict over what triggers a nonprofit’s ability to exercise its right of first refusal and acquire a LIHTC property.

- **Determination of Community Revitalization Plan to Be Made by Housing Credit Agency**: This provision would add criteria for credit allocating agencies’ review of plans, including being geographically specific and commitments of non-housing infrastructure.

- **Prohibition of Local Approval and Contribution Requirements**: This provision would preclude credit allocating agencies from requiring that LIHTC allocation applications have local support.
• **Native American Housing**: This provision would require Qualified Allocation Plan selection criteria include consideration of the needs of those living on tribal lands.

• **Renaming to the Affordable Housing Tax Credit**.

None of the above-enumerated provisions made it into the final version, as they failed to meet the requirement under budget reconciliation rules that they have a revenue impact.

The AHCIA could still be enacted in its entirety. And if not, the fact that the items above were included in the Senate Finance Committee-reported version of tax reform legislation will likely enhance their prospects for being attached to other tax legislation not subject to budget reconciliation rules.

**C. Basis Boost and General Public Use**

Proposed changes to the basis boost and general public use requirements were problematic provisions that were introduced together in an amendment from Sen. Roberts (R-Kan.) and were included in the final Senate-passed version of tax reform legislation.\(^\text{10}\) The provisions were not included in the final tax bill.

1. **Basis Boost**

The Roberts amendment would have allowed all 9 percent LIHTC properties in rural areas, as defined by the U.S. Department of Agriculture,\(^\text{11}\) to be automatically eligible for a 25 percent increase in eligible basis, similar to properties located in difficult development areas and qualified census tracts. Congressional staff considered this allowance to have a fiscal impact, despite coming out of a jurisdiction’s limited LIHTC ceiling. The amendment also reduced the current maximum boost of 30 percent to 25 percent for all LIHTC properties eligible for a basis boost under current law if placed in service after the date of enactment. The loss of up to a 5 percent boost in LIHTC equity would have created significant gaps for developments in the pipeline.

2. **General Public Use**

In 2008, Congress overruled an IRS interpretation of the law by adding a general public use exception to Section 42. The new exception made explicit that a property’s occupational preference for certain groups, including artists, did not violate the general public use requirement.\(^\text{12}\) The other

---


12. Code Section 42(g)(9).
half of Senator Roberts’ proposal would have removed artists\textsuperscript{13} from this protection and replaced them with veterans. The amendment did not apply only to future properties; it also applied to existing properties. Eliminating artist housing from the general public use exception raised serious concerns from many, particularly considering its retroactive effect. Developers and investors involved in hundreds of existing artists’ properties were potentially at risk.

\textbf{D. Offsetting Loss of Equity at Property and Program Levels}

As further described infra, changes resulting from the Act will reduce what otherwise would have been the number of LIHTC rental homes produced, renovated, and preserved. The drop in the number of units occurs principally because of the drop in the corporate tax rate and resulting decline in the value of tax losses to investors, leading investors to invest less equity per dollar of tax credits\textsuperscript{14}.

In consultation with other LIHTC stakeholders, Novogradac & Company assisted in the preparation of draft legislative text to counteract these effects. The proposal adopted a two-step approach to respond to the drop in corporate tax rates, which is the primary but not sole cause of the estimated reduction in future units. The two steps operate together but are not interdependent, such that one step could be enacted separately from the other. The proposal remains in consideration and may yet be enacted.

1. Modernization of Tax Credit Rate

The first step was to modernize the calculation of the annual tax credit rate or percentage\textsuperscript{15}. This change would increase the amount of LIHTCs for which a property could qualify. While many properties are allocated fewer LIHTCs than the maximum allowed, some properties are limited by the maximum allocation rules. Increasing the maximum allocation available to a LIHTC property is often needed for a variety of underwriting reasons, such as properties serving tenants at very low income levels (e.g., permanent supportive housing).

The changes included in the modernization proposal respond to the fact that the current tax credit percentage formula does not accurately reflect LIHTC investors’ cost of capital because the current formula is based


\textsuperscript{15} Code Section 42(b).
on after-tax federal government borrowing rates. Congress partially addressed this problem by establishing a 9 percent floor. However, the mismatch would manifest with a rise in interest rates and associated investor yield hurdles, which is made worse with a lower corporate rate. Furthermore, Congress did not establish a similar tax credit percentage floor for PAB LIHTCs, so the mismatch for properties using such financing remains unaddressed.

The proposed amendment addresses this mismatch. Under current law, the annual tax credit percentage formula is based on the average of the mid-term and long-term applicable federal rates (AFR), reduced by 28 percent and discounted on a present value basis over a 10-year period designed to cover either 70 percent or 30 percent of eligible costs. The present value calculation assumes an investor receives the first year’s tax credit on the same day the entire investment is made.

The revised formula makes three key changes:

- eliminates the 28 percent discount and adds 150 basis points to the average of the mid-term and long-term AFRs to represent the spread between federal government borrowing rates and private investor borrowing rates;
- delays the present value discount by two years to incorporate the fact that investors invest capital much earlier than the point at which they have received the benefit of a full year of LIHTCs; and
- adjusts the LIHTC rate based on the change in corporate tax rates.

If enacted, and based on the newly established corporate tax rate, the tax credit percentage would need to increase by 16 percent to restore the financial feasibility of developments to pre-tax reform levels.

2. Increase of Agency Annual Volume Cap

The other proposal increases credit allocating agencies’ annual volume cap based on the degree to which the corporate tax rate is reduced below the level (35 percent) when the LIHTC was made an indefinite part of the Code. Furthermore, to incorporate the effect of changing the annual inflation adjustment in the IRC to the Chained Consumer Price Index (see section III.C. below), a further increase would be needed. A hypothetical allocating agency with a current $20 million volume cap would require an increase of 19 percent, or $3.8 million, enabling the agency to allocate $23.8 million in LIHTCs to restore production to pre-tax reform levels.

E. Summary

The preceding discussion enumerated some of the provisions considered during the tax reform legislative process that would have fairly directly affected the LIHTC program—some negatively, some positively. These provisions ultimately were not enacted. As we follow the machinations of congressional deliberation, we expect to see many of these provisions continue to be discussed, considered, and potentially enacted.
III. Enacted Provisions

The following is a review of the tax changes included in the final bill that are particularly relevant to the use of the LIHTC for the production, renovation, and preservation of affordable rental housing. These are provisions that: (1) have a direct effect on the financial returns to investors, (2) affect investor demand for the federal LIHTC and corollary state tax credits, (3) affect the future supply of the LIHTC and private activity bonds, and (4) make other technical changes.

A. Direct Impact on Financial Returns for Federal LIHTC

Four enacted provisions have a direct impact on financial rates of return for federal LIHTC investors: (1) the lower corporate tax rate, (2) limitations on the deductibility of interest expense, (3) 100 percent asset expensing, and (4) Opportunity Zones.

1. Lower Corporate Rate

Novogradac & Company has determined that the Act will reduce the supply of LIHTC rental homes by nearly 235,000 and support 262,000 fewer jobs over the next 10 years.\(^\text{16}\) The conclusions are based on the lower corporate tax rate and on the change to the method of determining inflation (the latter is discussed further infra). The analysis uses after-tax rates of return prevalent in the LIHTC equity market and does not take into account:

- adverse effects on investor demand from other provisions, such as the base erosion and anti-abuse tax;
- widely anticipated rising interest rates;
- the post-tax reform increase in after tax return on taxable investments;
- an anticipated increase in secondary market transactions;
- Fannie Mae’s and Freddie Mac’s return to LIHTC investing;\(^\text{17}\) or
- the anticipated reduced size of the annual aggregate supply of tax credit equity investments.

These factors are difficult to quantify but taken together, in the aggregate, likely will further reduce the production and preservation of affordable rental housing.

---


The lowering of the corporate tax rate percentage does not directly affect the value of LIHTCs. As long as a corporation is paying income taxes, a dollar of credit against tax liability is worth a dollar.\(^{18}\) The corporate tax rate affects the amount of tax credit equity generated by federal LIHTCs because part of an investor’s tax benefits are derived from losses and depreciation. A LIHTC investor is generally a direct or indirect partner in the entity that owns and operates the LIHTC property and, as such, is allocated a proportionate share of LIHTC property deductions.

The corporate tax rate determines the amount of taxes an investor saves when allocated losses and depreciation from a LIHTC partnership. Using an overly simplified explanation:

- In 2017 and before, a corporation with \(\$10,000,000\) in taxable income owed \(\$3,500,000\) in taxes (applying the then-applicable marginal tax rate of 35 percent).
- Having \(\$1,000,000\) in additional deductions (reducing taxable income to \(\$9,000,000\)) reduced that liability to \(\$3,150,000\), saving the corporation \(\$350,000\) in taxes.
- In 2018, the corporation owes \(\$2,100,000\) on \(\$10,000,000\) in taxable income (applying the current marginal tax rate of 21 percent).
- The same \(\$1,000,000\) in additional deductions reduces the corporation’s tax bill to \(\$1,890,000\), a corporate tax savings of \(\$210,000\).

When this corporation decides to invest in LIHTCs, it will see less income tax savings per dollar of allocated tax losses.

The enacted 21 percent corporate rate will result in approximately 14 percent less equity for a total of about \(\$1.7\) billion each year.\(^{19}\) Per our calculations, this reduction will translate into the loss of 200,500 to 212,400 rental homes, or more, over the next 10 years. Other analysis supports these conclusions.\(^ {20}\)

Evidence of this reduction in tax credit pricing was observed in the post-election anticipation of tax reform, which caused a drop in equity pricing starting at the end of 2016.\(^{21}\) Novogradac & Company compared tax credit

---

18. Less time value of money and other investment considerations.
19. Id.
allocations made in 2015 to those made in 2017 allocations in select states and found this market shift led to fewer rental homes produced.\textsuperscript{22}

2. Interest Expense and Depreciation

A key value component for LIHTC equity investors is the ability to deduct their allocable share of a LIHTC partnership’s interest expense and depreciation expense with residential rental real property depreciation generally claimed straight line over a 27.5-year life. For taxable years beginning after December 31, 2017, the deductibility of interest expense may be limited, and if not, real property depreciable lives generally will be lengthened. As such, after 2017, LIHTC investors will likely see lower than expected annual tax losses from LIHTC investments placed in service before 2018.

\textit{a. Limitation on Interest Expense}

The Act limits annual business interest expense deductions; the limit applies at the taxpayer level, with partnerships being treated as taxpayers. The limitation is applied by first netting any business interest income against business interest expense to arrive at net interest expense.\textsuperscript{23} This net is then limited to 30 percent of adjusted taxable income.\textsuperscript{24} Adjusted taxable income is taxable income computed without regard to any item of income, gain, deduction, or loss that is not properly allocable to a trade or business; any business interest or business interest income; the amount of any net operating loss deduction; the amount of any deduction allowed under section 199A (Qualified Business Income deduction); and, in the case of taxable years beginning before January 1, 2022, any deduction allowable for depreciation, amortization, or depletion.\textsuperscript{25}

Because of depreciation expense, LIHTC rental real estate partnerships’ taxable income, before interest expense deductions, is generally low or negative. As such, a limitation of interest expense deductions equal to 30 percent of taxable income generally would be a severe reduction in annual tax benefits from tax losses from LIHTC partnerships. However, the last adjustment to the calculation of adjusted taxable income, as noted above, in the case of taxable years beginning before January 1, 2022, moderates the impact of the interest expense limit until the year 2022. More specifically, the deduction for interest expense before the year 2022 generally would be limited to 30 percent of taxable income before depreciation expense. After 2021, the limitation would be more severe.

\textsuperscript{22} Observational Study Corroborates Lower LIHTC Unit Production, supra note 20.
\textsuperscript{23} Code Section 163(j)(1) as amended by Act Section 13301(a).
\textsuperscript{24} Id. These terms have more specific definitions.
\textsuperscript{25} J. William Callison, article to be published in CCH \textit{Journal of PassThrough Entities}, Spring 2018.
b. Exceptions from Interest Expense Limitations

There is an exemption from the interest deduction limitation for entities with less than $25 million in average annual gross receipts, but not for partnerships where more than 35 percent of losses are allocable to limited partners.\(^26\) This 35 percent of losses limitation means this option is not generally available to LIHTC partnerships because LIHTC partnerships generate tax losses and 99.99 percent of these tax losses are typically allocated to limited partners.

The good news for LIHTC partnerships is an exception to the interest expense limitation rule for real property trade or businesses. LIHTC property partnerships can avoid a limitation on the deductibility of interest expense by electing to be treated as a real property trade or business.\(^27\) There is no statutory deadline for making the election, but once the election is made, the election is irrevocable. The election does come at a cost—the partnership must depreciate residential real property using the alternative depreciation system (ADS). Before the tax bill, ADS was 40 years for residential rental property; under the new tax bill, it is 30 years for properties placed in service after 2017.\(^28\) Adding two-and-a-half years to the depreciation recovery period should not have an appreciable consequence on depreciation losses for LIHTC transactions involving properties placed in service in 2018 and later years.

However, it is unclear how properties placed in service in 2017 and before are treated if the real property trade or business election is made. There is a pending question of whether, after switching to ADS, owners of properties placed in service before 2018 will be allowed to use the new 30-year ADS life or will be forced to revert to the prior law ADS life of 40 years.\(^29\) Absent federal guidance to the contrary, the more likely answer under existing regulatory guidance is that the net remaining basis is depreciated over the remaining 40-year ADS recovery period. Exactly what this new treatment means for investors’ returns (and possible adjusters\(^30\)) will vary, but overall it is generally not positive.

For properties placed in service in 2018 and later, we anticipate most investors will require LIHTC partnerships to elect to be a real property trade or business. The longer depreciation life of 30 years versus 27.5 years generally reduces depreciation expense much less than the amount of interest expense deductions that would be deferred if interest expense

---

26. Code Section 163(j), as amended by Act Section 13312. Certain regulated public utilities and electric cooperatives also are exempt.
27. Code Section 168(g)(1)(F), as amended by Act Section 13301(a).
28. Code Section 168(c) as amended by Act Section 13301(a).
29. Callison, supra note 25.
30. This term describes a provision in the partnership agreement whereby the general partner is obligated to make the investor whole because of not realizing identified anticipated tax benefits.
limitations applied. However, the answer is likely different for properties placed in service before 2018. Since, as noted above, until the year 2022, the adjusted taxable income limit excludes depreciation expense, many LIHTC partnership with properties placed in service before 2018 will find that extending the depreciable life of partnership residential real property to 40 years has a greater reduction in tax deductions than the 30 percent limit on interest expense. We at Novogradac & Company are running calculations for clients, and one bright line test is that if a property has a debt service coverage ratio of over 1.15 percent, they likely will defer the election until 2022. Note: Treasury has not issued guidance as to when such an election needs to be made, and this analysis presumes that a partnership with a property placed in service before 2018 can make such an election in any future year.

c. 100 Percent Asset Expensing

The Act extends the additional first-year depreciation deduction for qualified property and allows for a temporary 100 percent expensing in lieu of 50 percent through December 31, 2022. As was the case with the 50 percent expensing, the 100 percent expensing allows for an alternative to the commonly used fixed asset depreciation recovery periods of 15 and 5 years for site improvements and furniture, fixtures, and equipment, respectively. For tax years after December 31, 2022, there is a 20 percent annual phase down ending on December 31, 2026. Electing real property trades or businesses are eligible for this provision.

A LIHTC partnership using 30-year (instead of 27.5) depreciation on buildings because of electing out of the interest limitation could use 100 percent expensing to help maintain an investor’s desired rate of return. Owners have the option to expense on an asset class basis.

The Act also expands the type of property eligible to include used property. This expansion will notably affect tax losses generated by LIHTC acquisition/rehabilitation/preservation properties.

3. Opportunity Zones

The most innovative concept in the Act is not specifically connected to LIHTCs, but it may provide a benefit to investors in LIHTC properties located in qualifying areas. The provision is the tax reform act’s only explicitly helpful addition to the field of community development: namely, the enactment of the Opportunity Zones tax incentive. In short, the concept

31. Generally includes any depreciable asset with a recovery period of 20 years or less, such as furniture, fixtures, equipment, and site improvements; buildings are specifically excluded.
32. Code Section 168(k), as amended by Act Section 13201.
33. Classes include personal property and site improvements.
is using tax law to promote private sector equity investment in certain 
geographically defined distressed communities.

a. Qualified Opportunity Zones

Becoming a qualified opportunity zone (QOZ) involves meeting several 
criteria. Eligibility starts with being a Low Income Community (LIC), as de-
defined in the new markets tax credit (NMTC) program,35 or a contiguous cen-
sus tract.36 LICs are census tracts with either a poverty rate of at least 20 per-
cent or a median income that does not exceed the highest of 80 percent of the 
median income of the metropolitan area or of the statewide median income.37 
Contiguous tracts are eligible if they do not exceed 125 percent of the median 
family income of the adjacent LIC and may be no more than 5 percent of a 
state’s total QOZs. Together, QOZs may not exceed 25 percent of a state’s 
total number of low-income communities.38 We estimate that approximately 
10 percent of the country may be designated as an Opportunity Zone.

Meeting the above parameters alone does not result in being designated a 
QOZ. Rather, governors had until March 21, 2018, to nominate tracts or ask 
for a 30-day extension.39 The Act is silent on the consequences of failure to 
do so. Treasury has 30 days to certify the nominated tracts. Designations re-
main in effect for 10 years.

b. Reasons for Participating

The Act creates three major benefits to investors who invest recognized 
gains in a qualified opportunity fund (QOF):

• deferral of recognition of taxable gain;40
• one or more step-ups in basis for long term holds;41 and
• no tax on gains, in excess of initially deferred gains, for investments 
  held at least 10 years.

With respect to the first benefit, taxpayers may temporarily defer an un-
limited amount of gains from the sale of property to an unrelated party42 to
the extent such gains are invested in a QOF within 180 days. Each sale may be deferred only once. The deferral period ends no later than December 31, 2026. Generally, any gain deferred under this provision must be included in the taxpayer’s income on the earlier of the date of a sale or exchange of a QOF investment, or December 31, 2026.

Regarding the second benefit, holding an investment for at least 5 years allows for an upward basis adjustment of 10 percent of the original gain deferred. After 7 years, there is an additional 5 percent upward adjustment. In other words, 10 percent or 15 percent of the tax on the deferred gain is permanently eliminated.

Finally, with respect to the third major benefit, taxpayers holding investments in QOFs for at least 10 years are exempt from any gain recognition above on the sale of their QOF investment that which was previously deferred.

c. Qualified Opportunity Funds

In order for gain to be deferred, the investment must be in a QOF certified by Treasury. These entities must take the form of a corporation or a partnership. As of the writing of this article, rules regarding the QOF certification process have not been announced.

QOFs have an ongoing obligation to ensure at least 90 percent of the fund’s assets are in QOZ Property (as defined below). The percentage is determined by averaging the fund’s QOZ Property on the last day of the first six-month period of the taxable year and on the last day of the taxable year. Failure to meet the 90 percent threshold without being able to show reasonable cause will result in a penalty.

d. Qualified Opportunity Zone Property

QOZ Property may be:

- QOZ stock,
- QOZ partnership interests, or
- QOZ business property.

---

46. Code Section 1400Z-2(b)(1).
47. Id. at 41.
48. Code Section 1400Z-2(c).
49. Code Section 1400Z-2(d)(1).
50. Id.
51. Id.
52. Id.
QOZ Property must be acquired after December 31, 2017. QOZ stock and partnership interests must be in a QOZ Business (defined below). QOZ business property is tangible property used in a trade or business in a QOZ; the QOF must either be the original user of the property or make a substantial improvement to the property; and substantially all of the property’s use must take place in a QOZ.\textsuperscript{54}

e. Qualified Opportunity Zone Business

An entity may be a QOZ Business if substantially all of its tangible assets qualify as QOZ Property and at least 50 percent of its total gross income is derived from the active conduct of such business, which cannot include activities described in Code Section 144(c)(6)(B), such as private or commercial golf courses, country clubs, racetracks or other facilities used for gambling, and so on.\textsuperscript{55}

There is no restriction against residential rental real estate businesses as is the case for the new markets tax credit. As noted above, substantially all of a QOZ Business’s tangible property must be purchased after December 31, 2017, and be new, or substantially improved.

B. Investor Demand

In addition to provisions that have a direct effect on the financial returns to investors, the Act also contains provisions that affect investor demand for the federal LIHTC and corollary state tax credits. In particular, the Act creates the Base Erosion and Anti-Abuse Tax, a provision that adversely affects the demand of some tax credit investors for tax credit investments. By contrast, the Act also enhances the value of state tax credits for tax credit investors.

1. Base Erosion and Anti-Abuse Tax

The Base Erosion and Anti-Abuse Tax (BEAT) has garnered a great deal of interest and attention by the tax credit community. The corporate alternative minimum tax (AMT) was repealed by the Act, but the BEAT was created. The BEAT is similar to the AMT, in that it is a parallel calculation of income tax liability.\textsuperscript{56} Similar to the AMT, international entities must pay the larger of their tentative BEAT liability or their regular income tax amount. BEAT imposes a minimum tax on international corporations that generate U.S. tax benefits from payments to foreign subsidiaries and other foreign related parties. Congress expects BEAT to limit the ability of international corporations to lower their U.S. tax liability by shifting income to foreign jurisdictions. This provision was triggered by Congress’s decision to change international taxation from a global basis to a territorial one, where profits earned abroad do not trigger U.S. tax liability.

\textsuperscript{54} \textit{Id.}

\textsuperscript{55} Code Section 1400Z-2(d)(3)(A).

\textsuperscript{56} Act Section 14401.
a. Covered Entities

The BEAT applies to businesses that:

• generated at least $500 million in average annual gross receipts for the last three years;
• are not regulated investment companies, real estate investment trusts, or S corporations; and
• have more than a certain de minimis percentage of base erosion payments.57

Although the number is unknown, it is likely that at least some current LIHTC investors will pay the BEAT. The situation is fluid, as international corporations are in the midst of adjusting their international tax planning strategies in response to the Act.

b. Consequence for LIHTCs

The vast complexity of the BEAT math is beyond the scope of this article.58 In the context of tax credits, the main issue is how much of the reduction in an entity’s regular tax liability counts before making the comparison to what is owed under the BEAT. The extent varies based on the credit. For LIHTCs, through the year 2025, 80 percent of LIHTCs are disregarded before determining whether regular tax liability is more or less than BEAT.59 After 2025, no portion is disregarded.

Stated differently, for the next eight years investors will take into account only 20 percent of the reduction from their LIHTCs before checking if they owe BEAT. If the alternative calculation results in effectively not being able to take the benefit of the LIHTC, there is no provision for carrying forward tax credits for which a benefit was not received. Such amounts are permanently lost.

The prospect of this potential loss of credits will force corporate taxpayers to carefully evaluate and manage their exposure to the BEAT. In situations where tentative BEAT liability is projected to exceed regular tax liability, investors may choose to adjust their future plans and may also decide to sell some portion of their existing portfolios. Either a drop in demand for, or increase in supply on the secondary market of, LIHTCs will cause a further reduction in equity pricing beyond what is already projected due to the lower corporate tax rate.

57. Code Section 59A(e)(1)(A), as amended by Act Section 14401.
59. Code Section 59A(b)(1)(B)(ii)(II) and (b)(4), as amended by Act Section 14401.
2. State Tax Credits

State tax credits across the country generally share a limitation: every dollar not paid in state taxes is a dollar less to deduct from taxable income for federal income tax purposes. As a result, investors generally must adjust the value of the state tax credit for the effect on their federal tax liability. For corporations, in 2017 this generally meant sending the IRS an additional $0.35 for every dollar saved in state taxes. The reduction in the corporate tax rate generally means there is now a lower $0.21 reduction.

On the individual taxpayer side, the elimination of all but up to $10,000 in state and local tax deductions for individuals should considerably increase the appeal of state tax credits. However, many state laws will need to be revised to better facilitate the process by which individual taxpayers can avail themselves of state income tax credits.

The effect of the Act on market pricing is as yet uncertain but should be positive. States should consider program revisions to increase the market value investment of state tax credit.

C. Supply of Tax Credits and Bonds: Chained Consumer Price Index

Credit allocating agencies have either a per-capita or small state minimum for 9 percent LIHTCs and PABs. In October 2017, the Internal Revenue Service tentatively said the LIHTC ceiling in 2018 would be the greater of $2.40 multiplied by the population, or $2,765,000. A state with 8,333,333 residents would have approximately $20 million to allocate. The tentative PAB volume cap was the greater of $105 times the population or $311,375,000.

These amounts change year to year with population and inflation. Previously, the Code used the “Consumer Price Index for all Urban Consumers” (CPI), but the Act switched to “Chained Consumer Price Index for all Urban Consumers” (Chained CPI). CPI does not take into account consumers making substitutions in response to rising prices. By contrast, chained CPI captures substitutions by averaging prices before and after variations each month (creating a “chained” index from month to month). Chained CPI has been consistently lower. Since 2000, it has grown 39.7 percent, as opposed to 45.7 percent for CPI.

---

60. Act Section 11042, amending Code Section 164(b).
62. Code Section 42(h)(3)(C). A jurisdiction could have less to allocate over time if its population decreases.
63. Code Section 1(f)(3), as amended by Act Section 11002(a). This change also applies to other Code sections with CPI adjustments.
In early March 2018, the IRS announced the LIHTC and PAB per-capita amounts remained the same ($2.40 and $105, respectively). The small state minimum for LIHTCs decreased by $5,000 ($2,760,000) and the PAB amount went down by $665,000 ($310,710,000).\(^{66}\)

The shift will mean less inflationary growth, which is particularly consequential when considering how inflation compounds over time. Novogradac & Company estimates 18,700 to 19,900 fewer LIHTC rental homes will be produced over the next decade because of chained CPI.\(^{67}\)

### D. Other Technical Tax Changes

The Act also contains some technical tax changes that will affect the LIHTC community and the tax consequences of certain transactions: (1) the repeal of the technical termination rules, (2) the tax treatment of non-shareholder capital contributions, and (3) the accelerated taxable income of certain items based on book income treatment.

1. **Repeal of Technical Termination**

   The Act repeals technical termination under Code Section 708(b)(1)(B).\(^{68}\) Previously, these terminations occurred upon transferring 50 percent or more of a partnership’s interests in profits and capital during any rolling 12-month period. Doing so caused a restart of depreciation.

   The change is mostly positive because improperly characterizing transactions no longer creates a risk of unintentional terminations. A downside is the elimination of what had been an option to address a problem with capital accounts when a property’s performance differed notably from the original projections. If the extent of losses claimed over time is larger than planned, the investor may not be able to fully realize expected tax benefits. Triggering a technical termination restarted and slowed depreciation, which sometimes was enough to correct the issue.

2. **Non-Shareholder Contributions**

   Before the Act, generally any contribution from a shareholder to a corporation in the form of money or property to the capital of the taxpaying corporation was excluded from gross income for tax purposes.\(^{69}\) This exemption also applied when a governmental entity or civic unit contributed land or other property to a corporation for the purposes of encouraging the corporation to relocate its business in a particular community or to enable the corporation to expand its operating facilities.

---

67 Id. at 16
68 Act Section 13504
69 Code Section 118.
Now any contribution made to aid construction or any other contribution to a customer or potential customer, as well as any contribution made by any governmental entity civic group, is no longer excluded from the taxable income of the recipient corporation.\textsuperscript{70}

3. Accelerated Income Recognition Based on Audited Financial Statements

Under the Act, LIHTC partnerships generally will be required to recognize income no later than the taxable year in which such income is recognized on their audited financial statements.\textsuperscript{71} This provision is not expected to affect most LIHTC partnerships directly, although the impact at the investor level needs to be further analyzed.

IV. Conclusion and Lessons Learned

To the extent outcomes are known, from legal and accounting perspectives the Act produced mixed results, which on balance are likely negative. While increased asset expensing is beneficial, and state tax credit programs are stronger, the other changes create challenges. Most importantly, almost all LIHTC owners will need to change their depreciation, and at least some investors have a new potential limitation on reducing their tax liability.

The results also are mixed, and overall negative, when considering the Act’s effect on programs. Of greatest concern is the indirect consequence of limiting future LIHTC production. The reduction could hardly have come at a worse time. America is in the midst of an increasing affordable housing crisis. By any measure, the nation needs more, not fewer, options for low-income individuals and families. For example, seven in ten households earning less than 30 percent of their area median income spend more than half of their income on rent and utilities.\textsuperscript{72} The consequences span from increased homelessness\textsuperscript{73} to changing neighborhood characteristics.\textsuperscript{74}

However, the outcome for housing could have been much worse. Advocacy by the LIHTC community was crucial to saving private activity bonds and convincing Congress not to advance several proposals negatively affecting the LIHTC. Such advocacy efforts must continue to advance legislation that could help address the negative impact on affordable housing

\textsuperscript{70} Act Section 13312.
\textsuperscript{71} Code Section 451, as amended by Act Section 13221.
\textsuperscript{72} National Low-Income Housing Coalition, \textit{The Gap: A Shortage of Affordable Homes}, http://nlihc.org/research/gap-report.
production. The pending AHCLA legislation that may be able to advance this year not only could increase production to status quo ante, but also could go beyond that to help address the large unmet need for affordable housing nationwide.

Contrasting the loss of affordability is the bright spot of Opportunity Zones. This innovative concept has great potential to improve low-income neighborhoods. According to the Economic Innovation Group, there are over $2 trillion in unrealized capital gains held by U.S. investors, and Opportunity Zones have the potential to deploy some of those gains for community development in low-income communities. Housing and community development professionals should learn how to implement the law to its maximum potential.

Last but not least, as noted in the Introduction, LIHTC developers and investors should consult with expert tax professionals immediately to better understand all relevant implications of the recent tax reform law.

V. Epilogue

As this article went to press, changes to section 42 were enacted. The fiscal year (FY) 2018 omnibus appropriations law (Omnibus) includes several tax provisions, including an expansion of the low-income housing tax credit (LIHTC), and income averaging, a new income election option for owners of LIHTC properties.

The LIHTC provisions were included in the Omnibus along with a top priority for congressional Republicans, a correction to Section 199A previously enacted by the Act to address the tax advantage that cooperatives were inadvertently given as compared to other competing businesses.

A. Allocation Cap Increase

The Omnibus provides a 12.5 percent increase in LIHTC allocations, starting in 2018 and lasting until 2021. The new 2018 per capita amount should be $2,70 and the new small state minimum should be $3,105,000. For 2019–2021, annual inflation adjustments would be applied to the new 2018 allocation amounts. Barring an extension, the LIHTC annual allocation in 2022 would revert to current law, adjusted for inflation. Novogradac estimates that this provision will increase production by approximately 28,400 affordable rental homes compared to current law.

77. Id., Section 102.
78. Michael Novogradac & Peter Lawrence, Omnibus Spending Bill Contains Affordable Housing Credit Improvement Act Provision, AFFORDABLE HOUSING RESOURCE CENTER, Mar. 21, 2018 (12:00 A.M.), https://www.novoco.com/notes-from-
B. Income Averaging

In addition to an allocation cap increase, the Omnibus includes a provision from the Affordable Housing Credit Improvement Act (AHCIA) to create an income-averaging option in addition to the existing low-income requirements.79 Prior to the enactment, household incomes in LIHTC properties could not exceed 60 percent of the area median (AMI) at move-in.80 The maximum housing expense (rent, utilities, and required fees) was correspondingly restricted.81

This new provision, at the election of the taxpayer, allows certain apartments in a LIHTC property to be available to residents with incomes up to 80 percent of AMI, as long as the development-wide average income is 60 percent or less.82

Allowing income averaging permits a broader mix of incomes and makes developing LIHTC properties more attractive in places where it now is difficult, such as:

- high housing cost areas;
- sparsely populated low-income areas, where finding enough renters earning less than 60 percent of the AMI to justify construction of new property is difficult;
- low-income neighborhoods in need of revitalization; and
- existing developments in need of preservation, but where tenant incomes have risen over the years.

C. Conclusion

While these LIHTC provisions together could increase affordable rental housing provision by more than 28,400 homes, they would not offset the 235,000 affordable rental home deficit because of tax reform.83 Nevertheless, the proposal represents the first expansion of the LIHTC in 10 years. And, if the temporary allocation increase is made permanent, it would bring the 9 percent allocated LIHTC program to production levels close to pre-tax reform.
State Housing Finance Agencies (HFAs) are a necessary and influential component of the national housing finance system. They can propel home sales, spur new multifamily construction starts, and nimbly respond to housing market disruptions. Despite their broad portfolio, they remain largely unknown to both the general public and housing professionals. This article will provide a brief overview of the different activities HFAs currently engage in and also share with readers some of the different topics HFAs will tackle in 2018, including those raised in the new administration.

**What Is a Housing Finance Agency?**

HFAs are state-chartered entities that advance housing options for low- and moderate-income residents. Their relationship with the state government varies: some are cabinet-level actors with leadership directly appointed by the governor’s office; others are independently structured with a private sector operational style. Their mandates and programmatic offerings are similarly diverse with every HFA organized around and tailored to the unique housing needs of its state.

In the single-family sphere, HFAs are most commonly known for offering First Time Home Buyer (FTHB) discounts to support the next generation of homeowners. Similar programs can expand availability to other special populations, e.g., veterans or members of the armed forces, college graduates, first responders, or seniors. The benefits can include down payment assistance, rehabilitation loans, interest rate reductions, or mortgage tax credits. Depending on the source of funds, these programs can carry with them affordability requirements, minimum contract lengths, repayment terms, or neighborhood targeting components. Because these state lending products expand ownership opportunities to people who have reliable earnings but lack traditional indicia of creditworthiness or savings, borrowers are also provided with counseling, coaching, or education courses to ensure a successful transition to homeownership.

These programs are largely financed through the proceeds of each state’s issuance of tax-exempt Mortgage Revenue Bonds (MRBs) or Multifamily Housing Bonds. Other financial instruments and state resources

---

Carlie J. Boos (carlie.boos@gmail.com) is the Program and Policy Manager at the Ohio Housing Finance Agency where she develops the Qualified Allocation Plan, oversees the Ohio and National Housing Trust Fund Allocation Plans, and creates other affordable housing tools. The opinions, findings, conclusions, or recommendations expressed herein are those of the author and do not necessarily represent the views of either the Ohio Housing Finance Agency or the State of Ohio.
can also support mortgage initiatives. For instance, the Mortgage Credit Certification is an Internal Revenue Service (IRS) credit issued by states that reduces federal tax liability above and beyond what the standard home mortgage interest deduction already provides. Because HFA assistance is often paired with conventional mortgages or those insured by the Federal Housing Administration (FHA), U.S. Department of Agriculture, or U.S. Department of Veterans Affairs, strong relationships with private banking entities and real estate agents are critical to reaching the intended consumer and raising public awareness about these opportunities.

Some HFAs outsource mortgage servicing to third party entities while others have intricate internal structures to manage their portfolios. Similarly, some HFAs self-securnitize or make their own bond offerings, while others rely on external support for these vital functions.

When the Great Recession threatened the homeownership gains states made, HFAs responded by expanding their preservation networks. Many participated in the National Foreclosure Mitigation Counseling (NFMC) grant program to offer loss mitigation counseling and assistance either directly to homeowners or by providing pass-through funding to housing counseling agencies. Eighteen states and the District of Columbia also launched foreclosure prevention programming through the Hardest Hit Fund (HHF), a Troubled Asset Relief Program initiative.1 Because the foreclosure crisis affected localities differently, HHF was designed as a flexible resource, customizable by states to respond to their unique challenges. Assistance could be geared toward both individual and neighborhood-wide recovery and included options such as ongoing mortgage payment assistance, rescue payments, principle reduction, transition assistance, blight elimination, and down-payment assistance. While NFMC began sunsetting its operations in 2017, HHF remains available in many states and continues to evolve to address emerging issues with origins rooted in the foreclosure crisis.

HFAs are also significantly involved in the multifamily arena. Whereas single-family activities tend to be customized for low- to moderate-income families, multifamily programs tend to assist low- to extremely-low income renters. The flagship program for most HFAs is the Low Income Housing Credit (HTC), as regulated by Section 42 of the Internal Revenue Code. This complicated public-private partnership is the federal government’s primary vehicle for supporting capital contributions to affordable housing and is responsible for the creation or preservation of approximately 110,000 low-income housing units per year.2 It is offered in

two varieties, the highly competitive “9 percent” program, which funds approximately 70 percent of development costs, or the non-competitive “4 percent” program, which funds approximately 30 percent of development expenses and is paired with Private Activity Bond (PAB) debt to cover an additional 50 percent of development costs. The allocation of credits is governed at the local level through the establishment of annual Qualified Allocation Plans (QAPs), which set forth a state’s threshold requirements for HTC participation and the competitive criteria applied to determine which developments qualify for these limited resources. In exchange for credits, developments must maintain rents that are affordable to households earning no more than 60 percent of the Area Gross Median Income (AGMI) for at least thirty years.

Beyond HTC and tax-exempt bond programs, HFAs can also offer an array of other multifamily construction and preservation tools. Some states developed innovative products to offset the complexity and cost of HTCs, including bridge, construction, or permanent financing options that bolster credit pricing and reduce interest rates on hard debt. Other HFA-run programs operate in tandem with HTCs to leverage the credit investment. For example, some states administer the HOME Investment Partnership Program (HOME), a federal block grant to deliver rental assistance and support to nonprofits in their creation of affordable housing opportunities. The National Housing Trust Fund is another federal allocation to state governments often administered by HFAs. It is designed to expand affordable housing options for Extremely Low Income (ELI) residents, those earning 30 percent of the AGMI or less. State-sponsored trust funds are also available in a growing number of states. These local programs support an ambitious array of housing services; some are dedicated to work in conjunction with HTCs, while others support special initiatives such as increasing accessibility for homeowners or supporting homelessness shelters’ operating expenses.

Although some HFAs focus primarily on the “bricks and sticks” of affordable housing, concentrating their efforts on construction and capital preservation needs, others also provide direct rental subsidies. Examples include the Michigan State Housing Development Authority, which oversees the Section 8 Housing Choice Voucher Program, and the more narrowly tailored Section 811 Supportive Housing for Persons with Disabilities Project Rental Assistance program, now offered by 27 states and the District of Columbia.

Like any business, the core mission of HFAs is supported by a sophisticated compilation of support offices. Communication teams are tasked with raising awareness of homeownership support programs while managing the public image of intricate financial products. Legal departments must vet constantly evolving regulation and issue guidance on shifting judicial precedents. Internal auditors provide oversight and accountability to the public. Finance professionals manage funds to optimize productivity and ensure tight budgets are appropriately balanced. Information technology workgroups develop niche tools and support public engagement
efforts. And human resource staff must recruit and retain top talent in an increasingly competitive industry.

Despite their established and often traditional role in the finance sector, HFAs are also incredibly dynamic with a massive policy agenda. As the housing market and economy ebb and flow, HFAs must adapt to new challenges and provide quick relief when signs of distress emerge. The following is a brief, non-exhaustive summary of the issues that will be discussed, debated, and decided by HFAs in 2018.

Tax Reform

The biggest topic on the HFA radar in the waning moments of 2017 was undoubtedly the impact the Tax Cut and Jobs Act of 2017 would have on affordable housing programs. The potential for upheaval was high, as HTC followers observed in late 2016, when the mere rumor of tax reform caused credit pricing to plummet by 20 percent. However, the final legislation appears to have only grazed, rather than maimed, the housing industry. A number of proposals that were floated—but ultimately abandoned in the final draft—could have had a devastating impact. These included the elimination of the tax exemption for PABs, permanent changes to the HTC basis boost calculation and general use provisions, ending the Mortgage Credit Certificates, and termination of community development programs such as the New Market Tax Credit and Historic Tax Credits.

While high-tax states such as California, New York, and New Jersey might still worry about dips in home sales due to new limits on the state and local tax deduction and narrowing of the mortgage interest deduction, tax reform is unlikely to influence purchasing decisions in the rest of the country, particularly for low- to moderate-income buyers who historically take the standard deduction. However, states that were already struggling to maintain their FTHB balance sheets will need to continue to find innovative ways to generate new business, e.g., the Wyoming Community Development Authority’s zero percent interest rate Home$tretch program. HFAs will continue to monitor both the tax reform consequences as well as overarching market trends, such as how student loan balances may limit millennial purchasing power and how baby boomer retention rates restrict available housing stock.

Unfortunately, revisions to non-housing tax provisions will have a collateral impact on the HTC program that could result in 235,000 fewer affordable units over the next ten years than were otherwise expected. In

analysis from Novogradac & Co., an accounting and consulting firm specializing in affordable housing and community development fields, the new 21 percent corporate tax rate will downgrade credit pricing by approximately 14 percent, equivalent to a $1.4 billion annual equity reduction. Moreover, switching to a chained consumer price index\(^5\) for urban consumers calculation will reduce states’ annual allocations of both HTCs and private activity bonds. The Base Erosion and Anti-abuse (BASE) Tax, which affects global companies’ ability to benefit from credits and deductions, and amendments to the Alternative Minimum Tax will influence how corporations can benefit from HTCs and may make the credit less attractive or available to certain investors, resulting in lower demand for the HTCs.

Tax reform will continue to be a prominent issue for HFAs in 2018. Most immediately, states will need to assess their HTC cost requirements to ensure they are still relevant under new pricing schedules. States that establish minimum credit-per-unit thresholds or incentivize lower credit requests in exchange for points will need to revisit those pricing expectations to ensure they remain reasonable without pushing incentives to an unobtainable level that could compromise construction quality. More broadly, it is widely speculated that a technical correction bill will be needed to fix flaws identified in the hastily drafted Tax Cut and Jobs Act of 2017.\(^6\) Unexpected loopholes and unintended consequences will be identified in the coming months as tax professionals become more versed in the law’s text. These issues are commonly corrected in cleanup legislation. Some hope that these fixes will include relief for nonprofits\(^7\) or farmers,\(^8\) while others are evaluating the need for corrections to provisions regarding pass-through income\(^9\) and overseas profits.\(^10\)

---

As it relates to housing, one of the biggest opportunities in a technical correction bill is adoption of the Cantwell-Hatch/Tiberi-Neal HTC reform measures that would not only correct adverse tax reform effects but also adopt common sense modernizations. In addition to operational advantages, the proposed bill increases the credits available, establishes a permanent floor to the 4 percent rate, resolves questions regarding who defines what qualifies as a revitalization plan and what types of local contributions can be encouraged by states, and permits income averaging to achieved a broader band of affordability adaptable to more market variations. While the original tax bill passed with a simple majority vote through the reconciliation process, a filibuster-proof majority may be needed for future updates. The potential for politicization is high, particularly if corrections become intertwined with a spending bill, making the extensive bipartisan support for the Affordable Housing Credit Improvement Act all the more critical moving forward.

Federal Appropriations

Optimistically looking ahead to full budget negotiations, with the deficit now expected to top $1 trillion by 2019, fiscal hawks are already calling for steep cuts to safety net programs. Meanwhile, housing advocates seek parity in spending cap relief, demanding equitable increases to defense and domestic spending, which they assert is necessary to further the president’s forthcoming infrastructure agenda.

However, the White House’s proposed HUD Fiscal Year 2018 budget called for major cuts in housing infrastructure, including zeroing out Community Development Block Grants and HOME and a 67 percent reduction to the Public Housing Capital Fund. President Trump’s proposal would reduce Housing Choice Vouchers more than 4 percent, eliminate over 250,000 vouchers, and slash the Public Housing Operating Fund by $500 million.  

The multifamily side of HFAs will be watching these negotiations carefully. Federal dollars are often used to leverage state investments in housing development: the more funds that can be leveraged, the more likely a project is to receive HTC or other state funding. Beyond soft capital contributions,

11. As of this writing, the government ended a brief shutdown. If a longer shutdown occurs, and past closures are predictive, we can expect delays in multifamily loan closings (since HUD runs a skeleton crew during shutdowns), difficulties for prospective homeowners securing tax records necessary to substantiate mortgage applications, and suspension of non-essential duties related to policy implementation and program guidance. The HUD Contingency Plan for a Possible Lapse in Appropriation would provide a roadmap for operations in the absence of another continuing resolution.

operating subsidies can be critical to ensuring project cash flows for the full affordability period. This is particularly true for Permanent Supportive Housing (PSH) projects serving ELI households with disabilities that are unable to contribute significant rental payments. Many HFAs encourage developers to build in areas where significant collateral investments occur; piggybacking off local redevelopment infusions not only leverages state investment for a catalytic impact, it also helps preserve affordability where targeted redevelopment zones pose a risk of gentrification. If federal allocations to cities limit the ability of local governments to invest in their communities, HFAs may need to reanalyze their QAP structure to ensure that these incentives are not unduly skewed to higher tax-base cities that are better equipped to maintain infrastructure commitments in the absence of federal support.

Outside the budget process, reallocations of the HHF by the U.S. Department of the Treasury in advance of the 2020 wind-down date ensure that all available funds are directed to those areas most in need of foreclosure prevention and community recovery assistance. As of September 30, 2017, 88 percent of all HHF program funds were expended, with significant variances in draw-down rates across states. HFAs must innovate and modify these tools to meet the shifting challenges the foreclosure crisis continues to generate. Ongoing HHF programming is likely to revolve around mortgage reinstatements for homeowners in struggling localized economies, large-scale blight remediation in neighborhoods besieged by decaying zombie properties, and down payment assistance to close the purchasing holes left by underwater pre-recession mortgages. The extent to which Treasury officials and program auditors are able to acknowledge and understand on the ground conditions and authorize HFAs’ proactive solutions to these entrenched foreclosure legacies will be a monumental factor in the states’ foreclosure prevention agenda for the foreseeable future.

**Containing Housing Development Costs**

As stewards of public funds, HFAs are responsible for maximizing value and efficiency in the programs they operate. Cost containment is one of the hottest topics in the HTC world and one that will continue to preoccupy HFAs in 2018. The first step to solving this problem is understanding it inside and out. To that end, states will continue to enhance data analytic tools and pursue cross-border information exchanges to provide real-time tracking information on cost accelerations and savings potentials. A great example of this is the new Midwest Cost Database, a consortium of similarly situated HFAs sharing annual HTC cost data and monitoring patterns and trends.

---

Equipped with this information, we can expect to see new techniques for promoting cost containment in QAPs. More states are abandoning developer fee calculations that award a percentage of basis-eligible costs in favor of fee models that incentivize economies of scale; increased unit production; or the inclusion of policy priorities in the apartment scope, such as accessible or green design or service provision elements. States will also continue to explore per-unit, -bedroom, or -square foot cost caps; point systems that promote greater leveraging; tiebreakers that weigh in favor of value-added design elements; and architectural requirements that focus on durability and practicality over style.

The housing market is particularly vulnerable to and interlaced with a variety of seemingly unrelated external influences, particularly with regard to cost. In 2017, forest fires in Canada contributed to startlingly high lumber prices, storms in the Southwest ratcheted up oil and shipping expenses, and rebuilding from these natural disasters led to marked labor shortages. Because of the clear interplay between national issues and local costs, HFAs will closely monitor policy debates about disaster spending, immigration reform, and trade deals. Moreover, states may begin to look for ways to isolate their expenses from market instability, for example, by promoting modular or prefabricated construction techniques. Some larger housing developers are also exploring bulk purchasing options to further insulate themselves from cost swings, an advantage which QAP scoring may implicitly favor simply through current point offerings for cost efficiency.

Beyond containing costs, HFAs must get better at communicating the worth of affordable housing. Insiders and experts know that HTC housing is more expensive than its market rate counterparts because it is more valuable. They know that affordable housing is built to last 30 years, instead of 7. They know that the high upfront costs of energy efficiency pay for themselves over the life of the building. They know that capitalized operating costs ensure that quality is maintained, even during recessions and lean years. They know that prefunded service coordinators will help residents move to self-sufficiency more quickly, clearing the path for the next family who needs help. And they know that professional fees are a necessary part of the checks-and-balances system that ensures the program rules are being followed. Of course, there are simpler ways to pay for housing but, right now, there are no better ways. Learning how to message these facts properly is an indispensable part of the cost containment dialogue and will need to be perfected quickly.

Multifamily Siting

Long before the Inclusive Communities decision, policy makers, advocates, and community leaders debated where affordable housing is most

---

needed and how limited development resources should be allocated geographically. Authorities on both side of the debate correctly assess that centuries of racist, segregationist policy largely concentrated affordable housing in communities that were purposefully disinvested and disenfranchised, leaving black and brown families without equal or equitable prospects for education, employment, and advancement. Today, some fair housing advocates are fighting to redirect housing spending away from concentrated areas of poverty and into “high opportunity” neighborhoods, a move they believe will offer low income families a meaningful choice in where they live. Longtime residents and leaders in these minority communities often disagree, arguing that decades of neglect cannot be remedied by more government disinvestment, but rather by an increased commitment to the communities where they have long found faith, family, and familiarity. HFAs, as statewide actors with fidelity to all residents, find themselves torn between two meritorious but diametrically opposed positions. In a world of constrained resources, many policymakers suggest pursuing a “both/and” approach that seeks an ethical balance between both approaches.

In crafting this solution, HFAs will continue to rely on research partners for a deeper understanding of the current landscape through refinements to the opportunity mapping process. A number of issues remain in this body of work, including:

- How to define spatial subjects in a way that is both measurable and meaningful. The county-level perspective may have the strongest data, but is too diffused. The census tract may have the most data, but is over-inclusive. And the neighborhood-level may have the most relevant focus, but lacks reliable information streams.

- How to avoid measuring the opportunities people have had rather than the opportunity that places themselves offer. For example, opportunity mapping that looks only at resident educational attainment, instead of the quality of local schools, potentially misrepresents the opportunity available in rapidly gentrifying neighborhoods where single, highly-educated transplants skew the geographical education data of low-performing schools. How and if race should be mapped in these processes is another contentious question HFAs will need to resolve.

- How to map opportunity when residents’ expectations differ. Being within one mile of a grocery story may be a valuable amenity in a highly concentrated urban city, but it neither practical nor necessarily desirable in a dispersed rural township. However, maps that differently weigh geographical variances are considerably more complex and difficult to communicate, potentially diluting their utility.

- How to avoid linguistic insensitivities that can have real world impacts. What does it mean for a community to be labeled “low opportunity”? Even if HFAs are able to appropriately contextualize the his-
torical framework that resulted in that branding, will the public and other funders exercise the same analytical restraint when making their own investment decisions to avoid recreating redlining maps? HFAs will need to work closely with their scholarly counterparts to ensure culturally sensitive messaging is a substantive objective of the mapping process.

Beyond the exercise of mapping resources and opportunity, HFAs will also grapple with the complicated implementation questions these empirical methodologies will raise. The structural preference embedded in Section 42 for Qualified Census Tracts (which tend to be low on the opportunity scale), escalated costs from developing in highly desirable locations, and community backlash to siting affordable housing in stabilized economies all create an uphill battle for HFAs proactively attempting to diversify their housing portfolios. QAP tools such as granting basis boost to high opportunity locations, supplementing developer fees to offset the increased administrative burdens of securing the site, and offering set-asides or points to guarantee a competitive edge can all help ensure that a variety of different sites will be able to find a pathway to funding success. Likewise, policymakers appear poised to achieve significant advances in the integration of market rate housing units within affordable developments through inclusionary housing programs; the cross-subsidization potential is an attractive funding vehicle, but is still hindered by investor hesitations and local demand that make it an unlikely option outside highly competitive rental markets.

In 2018, HFAs will also continue evaluating how their regional funding decisions align with the Affirmatively Furthering Fair Housing (AFFH) rule. This procedure and its companion assessment tool remain complicated by the bureaucracy embedded in the reporting requirements and uncertainty regarding the rule’s finality after HUD Secretary Ben Carson’s recent pledge to “reinterpret” the rule.15 Similar to the Small Area Fair Market Rent requirements, the new administration’s first step in this reinterpretation appears to be delaying implementation the Obama-era rule. The public backlash to this announcement was swift, with seventy-six housing and faith groups issuing a joint statement condemning the move as antithetical to the Fair Housing Act’s integrative mandate. Also similar to the Small Area FMR rule suspension, advocates are closely evaluating whether HUD’s actions comport with the Administrative Procedure Act or if they instead form a sufficient basis for a legal challenge.

Regardless of whether consolidated planning occurs under the newer AFFH tool, or the older Analysis of Impediments, HFAs will be well-

served by strengthening partnerships with sister state agencies such as those overseeing education, health care, and infrastructure priorities to ensure that the nuanced policy concerns of each of these fields are appropriately deliberated and factored into their consolidated planning process. The prominent role of data may also lead smaller or resource-constrained participating jurisdictions to seek assistance from contractors and outside analysts who are better equipped to crack the code HUD has created.

When assessing neighborhood stabilization and recovery tactics, a number of additional issues will also have a prominent role in HFAs’ planning processes. Preservation of affordability in rapidly gentrifying neighborhoods is imperative, but the tools to identify those at-risk neighborhoods need further refinement. Opportunity maps, particularly those with progress or trajectory components, may be adapted to fill this need but prospects remain for further academic invention. The Urban Displacement Project, a collaboration of researchers at University of California Berkeley and Los Angeles, is an intriguing and comprehensive start.16

Moreover, at the HFA level, preservation funding has been primarily restricted to rehabilitate properties with expiring HUD or USDA place-based vouchers. As older HTC developments approach their 30-year anniversary, HFAs will need to strategize how to deploy their preservation resources, and whether resyndications should be permitted in preservation funding pools. Because of IRS Notice 2016-77, which sought public comments on whether and how the Service should issue guidance concerning the implementation of Section 42(m)(1)(B)(ii)(III) regarding the “concerted community revitalization plan” preference in the HTC program, QAP drafters will need to carefully define the term “revitalization plan” to avoid IRS preemption with a one-size-fits-all definition that risks over simplification or erasure of intricate local conditions.

Finally, while urban planners are well versed in local opposition arguments that seek to exclude new development in high-income, single-family areas, they are not as readily prepared to combat the similar underlying concerns that surface during the redevelopment of distressed neighborhoods. A growing impediment to investment in high-need communities is that current residents can launch costly opposition campaigns against any development for fear it will inherently lead to displacement. While gentrification is a real risk and should be avoided with careful planning, strategists must carefully plan for how to gain meaningful buy-in of local leaders and incorporate residents’ visions into the long-term redevelopment plan. This is often expressed in the phrase “nothing about us, without us.”

Intersections of Housing and Health Policy

There is an undeniable, symbiotic relationship between health and housing. Physical environment, access to health care, and the condition and quality of one’s home all impact a person’s health prospects. Conversely, a person’s well-being influences her housing decisions and can limit the housing options accessible to her. Understanding the health needs of low-income residents is a growing practice for HFAs that will continue to expand in the coming years. QAPs may operationalize this health care agenda by providing scoring points for siting near affordable health care institutions, offering onsite health interventions and partnerships, or creating additional accessible or universally designed building plans that allow residents to age in place with the assistance of community-based health supports.

With new health emergencies occupying a conspicuous place in the public discourse, HFAs will be called upon to participate in multi-sector response plans that acknowledge the social determinants of health. The Ohio Housing Finance Agency (OHFA) provides two prime examples of these types of emergency interventions. First, with an infant mortality crisis consuming hot-spot neighborhoods, OHFA is partnering with issue experts CelebrateOne and their health care and research associates to sponsor a rental assistance pilot program for pregnant women and new parents that targets the hardest hit zip codes in Columbus. Second, responding to the opioid overdose epidemic, OHFA is supporting the expansion of service-enriched, sober living housing models that help families recovering from drug addiction through the creation of a new substance abuse recovery funding pool in its QAP.

Evolutions in Medicare and public health policy will also impact HFAs’ future programming. Importantly, HFAs are increasingly using HTCs to create affordable assisted living options. This fills an important gap for seniors who need a higher standard of care than independent living can safely provide, but do not need the fully institutionalized services a nursing home offers. How states interpret the Home and Community Based Services rule\(^\text{17}\) will determine how easily IRS and Medicaid regulations can be interwoven. And the daily reimbursement rate state Medicaid offices set for intermediate care facilities will impact the feasibility of overlaying affordability requirements on top of assisted living protocols.

Ending Homelessness

In many states, HFAs are at the forefront of the fight to end homelessness. Securing sufficient funding and advancing best practices for PSH housing or homeless shelters will remain an important challenge for many HFAs in 2018. States are likely to continue to work within a collaborative of other state and local actors to develop comprehensive homeless-

\(^{17}\) 42 C.F.R. Part 430, 431 et seq.
ness response plans, such as the Minnesota Interagency Council on Homelessness’ “Heading Home” plan.\textsuperscript{18}

Moreover, as jurisdictions begin to achieve a “functional end to chronic homelessness,” HFAs that long prioritized serving the hardest-to-house will need to revisit how these resources are allocated and evaluate whether they can successfully adjust to the next challenge, be it family homelessness, veteran homelessness, or youth homelessness. One area of increasing concern is the need to better support former foster youths as they transition into independent adulthood. With the HTC Student Rule carving an explicit exception for former foster youth, the tax credit program can be a well-tailored answer. Another potential area of interest for HFAs may lie in re-integrating individuals involved in the criminal justice system into stable housing situations. Both these special populations are likely to have medical and substance abuse issues and would benefit from established service-enriched housing models, making current PSH providers a natural intervention point. Moreover, the high institutional service costs for both these populations may make pay-for-success financing terms particularly attractive.

HFAs have also begun to carve out an expertise in data warehousing and homelessness information systems consolidation. Because Continua of Care all use different case management and triage systems, homelessness service usage data is often collected and analyzed exclusively at the local level. State agencies, including the Michigan Housing Development Authority, have launched initiatives aimed at anonymizing and aggregating this data at a statewide level, and then combining it with other social service records to better predict and understand demographic and usage patterns.\textsuperscript{19} This body of research stands to benefit multiple systems and aid in crafting a more responsive social safety net by streamlining intake procedures across public benefit applications, informing behavioral health systems of the impact homelessness has on well-being, aligning housing and employment supports, and coordinating training of front-line staff to increase provider capacity in underutilized diversion techniques.

\textbf{HUD: EO13771 Recommendations, Rulemaking, and Guidance}

In 2017, President Trump issued Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs, which directed all agencies to repeal at least two existing regulations for each new one issued. In response, HUD solicited public recommendation of regulations that “may be outdated, ineffective, or exceedingly burdensome.” The National Council of State Housing


Agencies, a trade group representing most HFAs, submitted suggestions on behalf of its membership that included: (1) reducing Consolidated Planning requirements and correcting inconsistencies in the submission process; (2) standardizing physical compliance requirements across multifamily program types; (3) eliminating contradictions in utility allowance calculation requirements; (4) systematizing environmental review requirements across all HUD programs; (5) reassessing flood control measures that unduly restrict housing availability; (6) loosening Community Housing Development Organization requirements and untangling confusion stemming from the 2013 HOME rule; and (7) streamlining and standardizing foreclosure prevention and loss mitigation requirements for FHA-insured mortgages. Should any of these recommendations materialize, the procedural benefits would save time and money for HFAs and their subgrantees, allowing more resources to be directed into programming and away from administrative overhead.

A number of other rules promulgated or proposed during the Obama era require HUD follow through and could impact HFAs or the affordable housing industry generally. The final rule, Narrowing the Digital Divide Through Installation of Broadband Infrastructure in HUD-Funded New Construction and Substantial Rehabilitation of Multifamily Rental Housing, seeks to expand Internet access to low income and rural communities. Some HFAs have incentivized or mandated resident Internet accessibility in HTC housing. Zealous enforcement of these requirements could bolster those efforts. Similarly, the Smoke Free Public Housing and Multifamily Properties final rule will be fully implemented by July 31, 2018, and may provide a reliable template for HFAs desiring to launch smoke free requirements in new multifamily housing. Finally, HUD’s 2017 guidance for implementing the Violence Against Women Act (VAWA) in HUD-assisted housing will not only affect HFAs that heavily leverage federal financing, but it can also serve as a prototype for HTC compliance with VAWA requirements until IRS-specific guidance is issued.

**Government Sponsored Entities and Finance Reform**

While both the left and right appear to agree that housing finance reform and the unwinding of government sponsored entities (GSEs) Fannie Mae and Freddie Mac are necessary, the path forward is not clear. Further uncertainty is likely with so many major policy leadership vacancies on the horizon, including long-term leadership at the Consumer Financial Protection Bureau, a replacement for retiring House Finance Services Committee Chairman Jeb Hensarling, and Mel Watt’s 2019 replacement at the Federal Housing Finance Agency.

Fannie, Freddie, and Ginnie are the largest purchasers and securitizers of HFA mortgages. By acquiring these mortgages, the GSEs can take the paper assets off state balance sheets in exchange for the liquid capital necessary for HFAs to continue issuing new loans that support their homeownership missions. As reform conversations begin in earnest, HFAs will closely track the Federal Housing Finance Agency’s Duty to Serve
program, the proposed relationship of GSEs with state HFAs, and national objectives to promote and protect affordable housing.

Because GSE reform may implicate the national Housing Trust Fund, multifamily interests will also be vested in this dialogue to ensure any new policy protects or potentially expands this relatively new resource. As Freddie Mac considers the need for an advance from the U.S. Department of Treasury to compensate for tax reform changes, potentially jeopardizing the National Housing Trust Fund distributions, a legislative re-shuffling may need to address how the Trust Fund is endowed.

**QAP and HTC Considerations**

A number of other topics will continue to be relevant in HTC programs through 2018, including: (1) the best ways to support transit oriented design; (2) the proper role of anchor institutions, such as high impact medical and education centers, in planning and sustaining affordable housing; (3) the best approach to workforce housing; (4) how to tactfully define contentious terms like “urban” or “substantial rehabilitation”; (5) how lease-purchase programs can perfect their conversion rates; (6) creative mixes of 4 percent and 9 percent credits; (7) whether and how to incorporate deference to local government desires in scoring systems; (8) what affordability term best balances the housing demand against operational and financial realities; (9) how and when modifications of restrictive covenants should be considered; and (10) how should an applicant’s successful ownership and management histories be factored into HTC proposal scoring.

**Opportunities for Support Offices**

HFAs support offices play an essential role in executing the agencies’ mission including by supporting HFAs’ programmatic staff. In the information technology sector, government agencies that still rely on basic, off-line spreadsheets to monitor program performance will find significant utility in software products that link different programmatic offices and improve access to real-time data. Some, like the Colorado Housing Finance Agency, found success in internal information sharing through third party platforms like Tableau. Others, like OHFA’s Allita Hardest Hit Fund Manager, contracted with developers to create a portal customized to the state’s unique program needs. HFA communication teams will also play an important role in 2018 as the need to raise affordable housing’s profile to advance funding prerogatives become more acute. Campaigns such as Washington State Housing Finance Commission’s “What If” and Indiana Housing & Com-


Community Development’s “Portraits of the Human Spirit,”\textsuperscript{22} which raise awareness of elected officials and community leaders, will effectively and compassionately advance affordable housing objectives. Human resource officers will continue to face the challenges familiar to many state government entities, including recruiting and retention for public service jobs in high demand employment markets.

Conclusion

The opportunities for HFAs far outweigh the challenges. With sound leadership and a principled mission, HFAs’ 2018 prospects are strong. Nationally, both single-family and multifamily housing industries are well situated for a successful year. If state housing experts continue to host exceptional programming that promotes affordability and provides strength and diversity to the overall housing market, HFAs will help a new generation of homeowners and renters find stability and even prosperity in the new year.

Achieving Housing Choice and Mobility in the Voucher Program: Recommendations for the Administration

Deborah Thrope

Introduction

Housing Choice Vouchers help deconcentrate poverty and improve the lives of low-income families. There is evidence, however, that the program has failed to meet its housing choice and mobility goals. Tenants with a voucher disproportionately live in low-rent, racially segregated neighborhoods. In fact, almost a quarter million children in the voucher program live in neighborhoods of extreme poverty. Many voucher families are unable to obtain rental housing outside of areas of poverty and, in some cases, fail to lease up at all. The way HUD administers the voucher program has contributed to the mobility and utilization barriers faced by low-income families.

This article will address voucher families’ key barriers to housing choice and mobility and provide policy recommendations to HUD, including (1) increasing the value of vouchers to reflect market rent by improving HUD’s Fair Market Rent (FMR) methodology, (2) improving landlord participation in the voucher program by prohibiting voucher discrimination and creating landlord incentives, (3) funding mobility counseling programs that will assist voucher families who want to move to areas of opportunity, (4) revising consortia and portability regulations to make it easier for families to move around in a given region, (5) creating an effective incentive to deconcentrate in the Section 8 assessment system, and (6) enforcing housing authorities’ duties to affirmatively further fair housing.

Each policy change alone will not break down all of the barriers to choice and mobility. Taken together, however, these policy recommenda-

---

1. Also referred to as “Section 8 vouchers” after the statute that created them.

Deborah Thrope (dthrope@nhlp.org) is a Supervising Attorney at the National Housing Law Project.
tions provide a comprehensive approach that HUD can use to improve the voucher program so that low-income families are able to more easily obtain safe and stable housing in communities of their choice.

Background

The Housing Choice Voucher program provides housing subsidies to 2.2 million low-income households in America. A majority of voucher households include seniors, children, or people with disabilities and over one million families with children use vouchers. Vouchers are now the largest assisted housing program administered by the Department of Housing and Urban Development (HUD), having grown while other HUD programs, such as public and multifamily housing, have decreased in size over the past decades. Tenant-based housing vouchers have reduced homelessness and housing instability and provided steady revenue to private landlords while improving opportunities for low-income families.

The cornerstone of the voucher program is mobility, i.e., the ability of voucher families to move from one unit to another while continuing to receive rental assistance. In contrast to participants in “project-based” housing assistance programs, whose assistance is tied to a particular property, families with vouchers can move around inside and outside the jurisdiction of the housing authority that issued the family’s voucher. Housing choice and mobility allows families to access neighborhoods with high-performing schools, reliable transportation, and quality jobs.

Recent studies highlight the importance of the voucher program’s mobility feature by demonstrating that where we live has a lasting impact on our health and future economic advancement. For example, children who move to high opportunity neighborhoods tend to have greater adult earnings.

---

Research also shows that neighborhood poverty is correlated with behavioral and emotional health. Yet an increasing number of poor families live in areas of highly concentrated poverty where over 40 percent of residents are low-income. Voucher families in particular are concentrated in racial and ethnic areas of concentrated poverty.

Families across the country report difficulties using their vouchers in the private rental market. Despite spending years on waitlists, families who cannot use their voucher within a limited search time must give them back and often return to high-poverty areas. As a result, housing authorities are experiencing historically low “success rates” as measured by the percentage of families who receive housing vouchers that are actually able to use them in the private market. Low success rates are often tied to low voucher utilization rates, i.e., the number of units leased with voucher assistance as a percentage of the number of units that the PHA was authorized to lease by contract with HUD. Housing authorities are funded based in part on the average number of vouchers utilized in the prior year. Low utilization rates cause PHAs to leave money that could be used to provide

High-work and -income neighborhoods (census tracts with poverty rates below 15 percent and labor force participation rates above 60%; High-education neighborhoods: tracts where more than 20% of adults have completed college; Predominantly white neighborhoods: tracts where non-Hispanic white share of the population exceeds 70%; and High-job-density neighborhoods: tracts with more than 200,000 low-wage jobs located within five miles of the tract centroid.

Id. High opportunity neighborhood is used broadly in this article to mean areas with low poverty, job opportunities, and high educational attainment.


13. It is not uncommon for PHAs to have a waitlist of up to 10–15 years. Many PHAs close their waitlists for periods of time when the list becomes too long.

14. 24 C.F.R. § 982.203. The initial term of the voucher must be at least 60 days although PHAs have discretion to extend the term.

15. The Housing Authority of the County of Santa Clara, for example, had a success rate of 14 percent in June 2014. Probably one of the lowest, the San Francisco Housing Authority, experienced a success rate of 5 percent in 2015. HUD does not require the reporting of success rate data. The success rates here were discovered through a California Public Records Act request.
critical services for families experiencing homelessness and housing instability on the table.

The surrounding housing market, condition of the affordable housing stock, quality of landlord relations with the housing authority, and availability of housing search assistance all play a role in the implementation of the voucher program. Some factors are “external” and outside the control of HUD and housing authority. Other stakeholders, such as local governments, are therefore needed to help shape policies and programs that desegregate voucher families. There are many ways for HUD however, to improve implementation of the voucher program and create housing choice and mobility.

Set Rent Levels That Compete with the Local Market

Some voucher tenants simply cannot compete for private housing because the value of their voucher is less than market rent. The two main factors at play are HUD’s setting of “fair market rents” and housing authorities’ setting of “payment standards.” First, HUD sets “fair market rents” (FMRs) for Metropolitan Statistical Areas (MSAs) around the country. FMRs are meant to reflect gross rent estimates in a given geographical area and are used by housing authorities to set the maximum assistance that a housing authority will pay for a particular bedroom-sized unit, i.e., the “payment standard.” Housing authorities have considerable discretion in setting their payment standards, but HUD generally requires them to be set at 90 percent to 110 percent of FMR. In some cases, the FMR is lower than average rents but the PHA still maintains a low payment standard. These decisions reduce both the amount of assistance a family can receive and mean that there may be very little housing available to voucher families in low-poverty, high-opportunity neighborhoods.

For example, in Jacksonville, Florida, FMRs fall below actual rents in many neighborhoods: the 2017 FMR for a 2-bedroom unit was $969, well below the average rent in many zip codes. The Jacksonville Housing Authority, which manages roughly 7,200 vouchers in the Jacksonville metro area, set the payment standard at 97 percent FMR ($939). This means that voucher families, the overwhelming percentage of whom are African American, are limited to low rent neighborhoods. Their vouchers just do not pay enough to allow them to rent in higher income neighbor-


17. 42 U.S.C.A. § 1437f(c); HUD, Office of Policy Development & Research, Fair Market Rents for the Section 8 Housing Assistance Payments Program (July 2007). Note that 50th percentile rents are being phased out by the Small Area Fair Market Rent policy.

hoods. In fact, 75 percent of Section 8 voucher families—including 79 percent of African American voucher households—live in racially concentrated minority neighborhoods.¹⁹

Statutory law requires HUD to revise FMRs annually using the most recent available data.²⁰ HUD sets FMRs at either the 40th or 50th percentile rent—the dollar amount below which the rent for 40 percent or 50 percent of standard quality rental housing units are rented by recent movers in a given geographic area.²¹ HUD’s methodology for setting FMRs is flawed, however, and often results in inaccurate market rent determinations. FMRs are problematic because, while HUD requires an annual update, the data used for that update is usually several years old, making a big difference in a hot rental market. In addition, FMRs are based on rents across an entire metropolitan area, where rents can vary drastically between (and even within) cities and towns. As a result, voucher holders are effectively barred from living in many areas, especially low-poverty neighborhoods with access to high-performing schools and other community amenities. Not surprisingly, then, a majority of voucher tenants continue to live in low-rent, high-poverty areas.²²

One way to improve the FMR methodology would be to require HUD to account for trends in local rental markets. HUD currently uses a “trend factor” to calculate FMRs that measures the anticipated changes in national gross rents. Instead, HUD should use the percentage change in MSA-wide rents issued as part of the quarterly U.S. Housing Market Conditions Regional Reports²³ published by HUD’s Office of Policy Development and Research (PD&R). Using the MSA, instead of the whole nation, as the unit of analysis for measuring rental market changes will result in a trend factor that is more sensitive to local conditions. HUD already has access to these data so changing the methodology would not be an administrative burden. As a result, the FMRs and payment standards will better

²¹. 24 C.F.R. § 888.113(a). 50th percentile rents are used to address neighborhoods where voucher families are highly concentrated in areas of poverty although the program is being phased out by SAFMRs.
²³. HUD’s Office of Policy Development and Research is tasked with “maintaining current information on housing needs, market conditions, and existing programs, as well as conducting research on priority housing and community development issues.” About PD&R, HUD Office of Policy Development & Research, https://www.huduser.gov/portal/about/pdrabout.html.
reflect actual rents, opening up housing opportunities for low-income families.

Second, HUD should take steps to fully implement its Small Area Fair Market Rents (SAFMRs) rule. HUD recently published a rule addressing the problem of rent variability between neighborhoods and to “establish a more effective means for voucher tenants to move into areas of high opportunity and lower poverty.” The rule replaces Fair Market Rents (FMRs) with zip-code level (or “small area”) rent data, thereby increasing the potential maximum assistance amount in some areas and lowering it in others. Under the regulation, the new SAFMRs will be applied to 24 areas that meet HUD’s criteria, although other housing authorities may choose to opt in. These 24 metro areas represent some of the most segregated regions in the country. By starting with these 24 regions, HUD can perform a rigorous analysis of the policy’s impacts and broaden the rule’s application if it is a success.

The adoption of the SAFMR final rule represents an important step toward addressing the concentration of voucher families in high-poverty, racially segregated neighborhoods. In the preamble to the proposed SAFMR rule, HUD acknowledges that the agency’s existing policy of utilizing 50th percentile rents to address voucher concentration “has not proven effective in addressing the problem of concentrated poverty and economic and racial segregation in neighborhoods” because “the majority of voucher tenants use their vouchers in neighborhoods where rents are low but poverty is generally high.” By revising the way FMRs are calculated and shrinking the geographic unit, the SAFMR rule attempts to deconcentrate voucher families from areas of high poverty by expanding affordable housing options in a range of neighborhoods and communities. HUD should continue implementation and closely monitor the results.


25. Note that HUD suspended the mandatory implementation of SAFMRs by sending notice to all PHAs. Civil rights groups sued under the Administrative Procedure Act and the Fair Housing Act in Open Communities Alliance et al v. Carson, No. 17-2192 (D.D.C. 2017), and were successful in obtaining a preliminary injunction that ordered HUD to rescind the suspension on December 23, 2017. Although HUD published a notice in the Federal Register requesting comments on the suspension, subsequent to the injunction, it issued guidance requiring that housing authorities implement the rule by April 1, 2018.

Prohibit Discrimination or Incentivize Landlords to Accept Vouchers

In addition to needing vouchers that reflect market rents, participant families must be able to find a landlord willing to rent to a voucher tenant. In many areas, this is no easy task. In cities like San Diego, for example, where hundreds of veterans remain on the street because they have nowhere to use their housing vouchers, government officials are desperately seeking landlords who will accept vouchers and help house the nation’s veterans. This is particularly disturbing because vouchers are largely responsible for the reduction in homeless veterans nationwide. The blanket refusal of some landlords to house voucher holders increases the harm and severity of the country’s rental housing crisis, continues a cycle of poverty and segregation, and perpetuates housing barriers that are often based on misguided stereotypes. Yet there are a number of ways to address this issue.

Ban source of income discrimination: One of the most effective ways to improve housing choice and mobility for all voucher families would be to prevent unreasonable discrimination against voucher tenants or otherwise legally require landlords to accept vouchers. HUD should work with Congress to create a federal prohibition on discriminating against voucher families by expanding the Fair Housing Act to explicitly protect individuals who pay rent using a federal housing voucher. HUD should also consider working with Congress to craft federal legislation that would require landlords to accept tenants that meet all of their eligibility requirements.

The failure of landlords to accept vouchers is so pervasive that many states and local jurisdictions have adopted “Source of Income Protection” (SOI) laws to protect voucher families from discrimination. Such laws broaden housing opportunities for low-income voucher families by increasing the amount of housing available. They also help reduce the stigma associated with using a voucher. Research demonstrates that state and local SOI antidiscrimination laws improve outcomes for voucher

---

27. Targeting Homeless Vets, Faulconer Launches ‘Housing Our Heroes’, KPBS NEWS, Jan. 15, 2016, http://www.kpbs.org/news/2016/jan/15/faulconers-housing-our-heroes-program-leadership-a/. San Diego Mayor Kevin Faulconer announced the initiative because the city had enough vouchers to house all of its homeless veterans, but not enough landlords willing to rent to them.


holders. Several studies have found that the probability of successfully using a voucher within the allowed search time was significantly higher in jurisdictions with a SOI antidiscrimination protection.

State and local laws are insufficient strategies to combat the racial and class segregation of voucher tenants, however, because they are vulnerable to legal challenges and inconsistent across jurisdictional boundaries. Federal action is necessary to truly safeguard voucher families from discrimination based solely on their receipt of federal housing assistance.

In addition to protecting voucher tenants, HUD should also address discrimination against landlords who rent to voucher participants by insurance companies. Based on false stereotypes about the risks of renting to a voucher family, insurance companies often deny coverage to a landlord simply for agreeing to house voucher tenants. Charging higher premiums or refusing to provide insurance altogether may be a violation of federal fair housing laws. Landlords who wish to rent to voucher families should be explicitly protected by law from such discrimination. HUD should enforce the fairhousing rights of voucher landlords by issuing guidance or an opinion from HUD’s Office of General Counsel that discrimination against voucher landlords is illegal under the Fair Housing Act. The practice is already prohibited in some states.

Loosen regulatory requirements: Under federal regulations, housing authority staff must inspect every voucher unit prior to move-in and verify that it meets HUD’s Housing Quality Standards (HQS). Such costly delays act as a disincentive for private landlords to participate in the voucher program. Housing may remain vacant for weeks while the landlord waits for the housing authority to inspect the unit, resulting in a financial loss to the landlord. HUD should loosen or eliminate certain regulatory requirements on
PHAs so that tenants can move into units more quickly. The Housing Opportunity Through Modernization Act (HOTMA) provided some regulatory relief to housing authorities by allowing families to move into a unit that fails an inspection for a non-life threatening HQS violation. However, it can still take a few weeks for a housing authority to perform an initial inspection and landlords prefer to rent out apartments immediately to other applicants. HUD should revise the inspection regulations to make it easier for tenants to quickly and efficiently move into a new unit.

**Offer additional financial incentives:** HUD should also consider allowing housing authorities to pay more than market rent to compensate landlords for the additional administrative requirements required by the voucher program. State governments have experimented with different financial incentives. For example, the State of Illinois created a program that allows PHAs and counties to jointly administer tax incentives for property owners in low poverty neighborhoods to rent to voucher tenants. Oregon created a “Housing Choice Landlord Guarantee Program” that allows voucher landlords to file claims of up to $5,000 in damages and receive money out a fund administered by the state Housing Community Services Department.

**Fund and Encourage Mobility Counseling Programs**

Families who wish to move to higher opportunity areas have a hard time doing so due to a variety of administrative and social constraints. Even with an adequate amount of rental assistance and a willing landlord, many voucher families find it difficult to successfully obtain and maintain housing with a voucher in higher opportunity areas. Mobility counseling is an essential component of a successful voucher program.

There are an increasing number of mobility programs throughout the country. Mobility programs offer a range of services, including counseling families on the benefits of moving to different neighborhoods, coordinating moves to other jurisdictions, outreach to landlords, financial assistance for security deposits and moving assistance, and long-term support for second and third moves. One pilot in Dallas, for example, has successfully helped families move to areas with lower crime rates by giving them access to critical information; helping with landlord negotiations and bonuses; and providing them with fair housing counseling, referrals to social service providers, and moving assistance.

---

service agencies, and other post-move help.42 The Baltimore Housing Mobility Program provides another example of a successful housing mobility program that has helped thousands of voucher families move to low poverty areas through tenant education, training, and landlord outreach.43

Despite the strong evidence that mobility programs help families overcome obstacles to locating housing in low-poverty neighborhoods, a majority of housing authorities do not provide mobility counseling and do not partner with mobility counseling agencies, most likely due to the cost of administering such programs. However, investment in such services is worth it. Among other benefits, there is evidence that mobility programs could generate medical cost savings (to government health programs, such as Medicaid) in the long term due to the health benefits of living in high opportunity areas.44

In 2016, HUD proposed the Housing Choice Voucher Mobility Demonstration to support collaboration at housing authorities in ten regions with initiatives to help low-income families use existing vouchers to move to high opportunity neighborhoods.45 Congress did not fund the program. Under the proposal, the one-time funding would have supported research to learn what strategies are most cost-effective by providing participating housing authorities with the financial capacity to build mobility programs. HUD should revisit the demonstration project, provide funding, and encourage local housing authorities to start mobility programs.

Remove Barriers to Portability

Nearly 4,000 housing authorities around the country administer public housing and/or vouchers.46 About 3,300 of these agencies are small, administering fewer than 550 units.47 In a given metropolitan area, there can be dozens of different housing authorities administering HUD’s housing programs. For example, in the Hartford, Connecticut, metro area, there are twenty housing authorities administering anywhere between thirteen and 7,800 vouchers.48

43. Berdahl-Baldwin, supra note 41.
44. Dan Rinzler et al., Leveraging the Power of Place: Using Pay for Success to Support Housing Mobility, FEDERAL RESERVE BANK OF SAN FRANCISCO (July 2015).
45. HUD, FY 2017 Budget Proposal, Sec. 270, “Housing Choice Voucher Mobility Demonstration.”
46. Barbara Sard & Will Fischer, Bill to Simplify Housing Program Administration Contains a Few Promising Proposals, but Numerous Problematic Ones, CENTER ON BUDGET AND POLICY PRIORITIES (Nov. 15, 2012).
47. Id.
When several housing authorities administer assistance in a particular area like Hartford, voucher tenants who wish to move are more likely to experience the challenges created by the portability process. “Portability” refers to carrying voucher-based assistance from the jurisdiction of one PHA to the jurisdiction of another. Even families moving just across a county may enter a different housing authority’s jurisdiction and are therefore impacted by portability rules. Existing portability regulations are burdensome and confusing for tenants and housing authorities alike and can put tenants at risk of homelessness. For example, the roles of the current and receiving housing authorities are often unclear, particularly with respect to billing requirements and search times, leading to delays in approval of portability requests.

Given that families must find new units within a limited time period, any delay can result in eviction or termination of assistance. Tenants are also provided conflicting information from housing authorities about eligibility requirements. Even though housing authorities have an obligation to accept most porting tenants, families may be discouraged from moving because of a misunderstanding about the eligibility criteria at a receiving housing authority. HUD’s recent changes to the portability regulations and subsequent guidance are an improvement, but they did not go far enough to have a real impact on ensuring continued assistance when a tenant moves to the jurisdiction of a new housing authority.

A single point-of-contact can make the process of applying for and obtaining rental assistance less confusing and more transparent. This is especially true for applicants who face special barriers to housing access, such as people with disabilities, seniors, and individuals with limited English proficiency. For this reason, Massachusetts developed a statewide system for voucher applications. The waitlist is centralized and applicants need only apply once for a housing voucher. The most effective way to address portability barriers is to encourage the formation of consortia and regional housing authorities and revise the portability rules.

Consortia and regional housing authorities: A consortium is an entity formed by two or more housing authorities for the purposes of administering housing programs. Consortium members maintain independent legal identities but share some of HUD’s reporting requirements. Consortia and regional housing authorities have the potential to significantly im-

49. HUD, Housing Choice Voucher (HCV) Family Moves with Continued Assistance, Family Briefing, and Voucher Term’s Suspension, PIH 2016-09 (HA) (June 6, 2016).


51. 42 U.S.C. § 1437k(a); 24 C.F.R. § 5.100, “Public Housing Agency (PHA) means any State, county, municipality, or other governmental entity or public body, or agency or instrumentality of these entities, that is authorized to engage or assist in the development or operation of low-income housing under the 1937 Act.”
prove the operation of the voucher program while expanding families’ housing choice and mobility because they eliminate portability requirements and consolidate waitlists, among other benefits to applicants and tenants. In areas where housing authorities form consortia or regional entities, voucher participants are free to choose a unit without the existing barriers created by complex portability rules. Expanding the jurisdiction of a housing authority allows an avenue of mobility for families to move closer to a current job, for example, or to move out of neighborhoods with high concentrations of poverty.

Consortia also provide a degree of administrative relief by allowing housing authorities to pool resources, share program staff, reduce reporting requirements, and increase efficiency. Because a housing authority retains its separate existence and some ability to maintain local policies while participating in a consortium, housing authorities and their trade groups tend to support flexible rules on consortia while opposing more comprehensive consolidation. However, very few agencies currently take advantage of the consortia option. Given that most functions of a consortium can be met through the use of a less formal cooperative arrangement, there is little incentive for housing authorities to participate in one. HUD issued a proposed rule in 2014 that would have provided additional incentives to form consortia by allowing participating agencies to fully merge reporting and other obligations under a “single-Annual Contributions Contract.” However, HUD withdrew the proposed rule in response to executive orders 13771 and 13777, which were issued as part of the administration’s “Regulatory Reform” agenda. HUD should consider reissuing the final rule on this important issue.

HUD should also work with Congress to ensure that there are no state law barriers to the formation of consortia. Federal law broadly permits housing authorities to form consortia, but a minority of states have laws that appear to limit the practice. HUD should urge Congress to eliminate

52. 42 U.S.C.A. § 1437a(6)(A); 24 C.F.R. § 943.122.
58. Id.
the barriers created by the lack of uniform state-enabling legislation by revising the U.S. Housing Act to include explicit authorization for the formation of consortia that would preempt any state law barriers.

Portability regulations: Existing portability regulations are ineffective at promoting housing choice for voucher families. HUD published a new portability rule in 2015. The rule revised the portability regulations for the voucher program with the goal of streamlining the portability process for PHAs and reducing the burden on participating families. The rule revised the regulations in several important ways, but fell short of removing significant barriers to housing choice because it failed to adequately preserve tenants’ rights in the porting process.

Specifically, the final rule allows housing authorities to re-screen tenants who are seeking to port their vouchers. Ongoing program participants can be screened out by a receiving jurisdiction that has a different policy regarding criminal history, for example. HUD should adhere to the statute and implementing regulations, which prohibit receiving PHAs from conducting elective screening of current participants, and revise the regulation accordingly.

HUD should also revise the regulations to require that information about porting be shared with families not only at the initial briefing, but at other times during the families’ participation in the voucher program, including after a request to port is submitted. Without this provision, the briefing requirements on mobility are somewhat less effective, especially for long-time voucher holders that decide to move outside of their jurisdiction after years of program participation.

Finally, HUD regulations currently require that a request to port be denied if there are any outstanding issues with the current housing authority, even if those issues are unsettled or being contested by the tenant. HUD should relax the regulations and allow housing authorities to port a voucher even if there are loose ends from a prior tenancy. Housing authorities could still have the discretion to deny a port for severe program violations. Allowing tenants to port more quickly would promote rapid rehousing. HUD should revise the portability regulations to maximize family choice and increase the effectiveness of the voucher program.

Revise HUD’s Evaluation Tools

HUD uses the Section 8 Management Assessment Program (SEMAP) to measure housing authority performance with respect to the voucher pro-
gram. SEMAP uses information in HUD’s national database to score housing authorities in 14 areas. Each housing authority is then assigned a rating. SEMAP’s purpose is to “assess whether the Section 8 tenant-based assistance programs operate to help eligible families afford decent rental units at the correct subsidy cost.” The tool is used to motivate housing authorities to competently manage their tenant-based programs. Housing authorities are rated in different program areas and then receive a total SEMAP score. The score determines whether the agency is labelled “troubled” or “high performing.” Troubled agencies are subject to more requirements, such as on-site reviews by HUD and corrective action plan procedures. High performers, on the other hand, may receive national recognition by HUD or be given a competitive advantage for new funding.

HUD currently awards bonus points in SEMAP for deconcentration efforts. HUD will assess the percent of housing choice voucher families with children who live in, and who have moved during the housing authority’s fiscal year, to low-poverty census tracks in the housing authority’s area. If the deconcentration assessment is significant, HUD will award bonus points to the housing authority. Unfortunately, however, the number of bonus points awarded for this type of result has proven insufficient to incentivize housing authorities to take aggressive and effective deconcentration measures. HUD should revise SEMAP to increase the points awarded for deconcentration and include measures that would further incentivize housing authorities, such as points for mobility counseling and for moves to areas of opportunity.

Enforce Fair Housing Laws

The duty to affirmatively further fair housing refers to the obligation to promote desegregation proactively—an obligation that requires more than just merely prohibiting discrimination. The text of the FHA imposes an

61. 24 C.F.R. § 982.452(b).
63. 24 C.F.R. § 985.107.
64. 24 C.F.R. § 985.3(h).
65. HUD, HOUSING CHOICE VOUCHER GUIDEBOOK, at ch.2–4 (7420.10G), available at: https://www.hud.gov/program_offices/administration/hudclips/guidebooks/7420.10G.
66. See Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,274 (July 16, 2015) (codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, and 903) [hereinafter “AFFH Rule”] (“In examining the legislative history of the Fair Housing Act and related statutes, courts have found that the purpose of the affirmatively furthering fair housing mandate is to ensure that recipients of Federal housing and urban development funds and other Federal funds do more than simply not discriminate: Recipients also must take actions to address segregation and related barriers for groups with characteristics protected by the Act, as often reflected in
obligation on the HUD Secretary to affirmatively further fair housing (AFFH). 67 In fact, the FHA requires all federal agencies and executive departments to affirmatively further fair housing and to cooperate with the HUD Secretary to accomplish this objective. 68 Both case law 69 and statutes 70 governing certain HUD programs have extended the AFFH obligation to recipients of HUD funding, including housing authorities.

In accordance with their duty to AFFH, housing authorities are required to identify and analyze “fair housing issues” (such as segregation, racially/ethnically concentrated areas of poverty, disproportionate housing needs, and disparity in access to opportunity) and the “contributing factors” that create, contribute to, perpetuate, or increase the severity of one or more racially or ethnically concentrated areas of poverty.”); 24 C.F.R. § 5.152 (2016) (defining “affirmatively furthering fair housing” to mean “taking meaningful actions, in addition to combatting discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics”); see also N.A.A.C.P. v. HUD, 817 F.2d 149, 154 (1st Cir. 1987) (observing that a “statute that instructs HUD to administer its grant programs so as ‘affirmatively to further’ the Act’s fair housing policy requires something more of HUD than simply to refrain from discriminating itself or purposely aiding the discrimination of others”). The following section provides a very basic overview of the duty to affirmatively further fair housing. For a more in-depth background discussion that predates the issuance of the final AFFH Rule, see Timothy Smyth, Michael Allen & Marisa Schnaith, The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients, 23 J. AFFORDABLE HOUSING & CMTY. DEV. L. 231 (2015).

67. 42 U.S.C.A. § 3608(e)(5) (West 2014) (HUD Secretary will “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of this subchapter.”).

68. Id. § 3608(d) (West 2014). The full text of the subsection reads as follows: “All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes.”

69. See, e.g., Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 73 (D. Mass. 2002) (in finding PHA had AFFH obligation, court stated, “When viewed in the larger context of [the Fair Housing Act], the legislative history, and the case law, there is no way—at least, none that makes sense—to construe the boundary of the duty to affirmatively further fair housing as ending with the Secretary”); Otero v. N. Y. City Hous. Auth., 484 F.2d 1122, 1133–34 (2d Cir. 1973) (also recognizing that the housing authority has an obligation to affirmatively further fair housing).

70. See, e.g., 42 U.S.C.A. § 5304(b)(2) (West 2016) (CDBG grantees must certify that they will affirmatively further fair housing.); 42 U.S.C.A. § 1437c-1(d)(16) (West 2016) (PHA Plan includes civil rights certification wherein the PHA must certify that it will affirmatively further fair housing).
fair housing issues. Through this process (“the Assessment of Fair Housing” or “AFH”), housing authorities should set policy goals that (1) help low-income, minority voucher families move out of high-poverty areas; and (2) expand affordable housing options in a range of neighborhoods and communities. The administration can and should take steps to enforce the FHA and the duty to AFFH against local PHAs. In particular, HUD should scrutinize housing authorities’ deconcentration policies and goals under its AFH.

Conclusion

Vouchers are an essential component of a multifaceted national housing policy. Coupled with project-based assistance and the preservation of the existing affordable housing stock, tenant-based vouchers can improve the lives of low-income families across the country. As the nation’s largest housing assistance program, vouchers can go a long way towards reducing homelessness, improving health outcomes, and desegregating our communities. In order to realize the program’s potential, HUD must address existing obstacles to true housing choice and mobility.
Strategies to Address Homelessness in the Trump Era: Lessons from the Reagan Years

Maria Foscarinis

I first began working on homelessness in the early 1980s, during the Reagan era, which was also when modern homelessness first emerged as a national crisis. Now, with the advent of the Trump Administration, it sometimes feels depressingly like déja vu, with anti-government rhetoric driving proposed cuts to safety net supports, bolstered by racism, sexism, xenophobia, and discrimination of all types. At the same time, progressive activism is also on the rise, and resistance to the current regime is pushing more people to engage in the political process to champion social justice on a range of fronts.

During the Reagan years, we were able to spur a federal response to homelessness despite steep political odds. Now, despite the challenges, there may also be opportunities for progress—in fact there may be more. Looking back at the initial emergence of the crisis and the early advocacy to address it may offer lessons for the current moment and for the future.

* * *

My part of the story starts in 1983, when I was a litigation associate at Sullivan & Cromwell in New York. A memo came around asking whether anyone wanted to take a pro bono case representing homeless families who had been denied emergency shelter on Long Island, a generally affluent suburb of New York City. I’d grown up in the city and I’d been to Long Island many times, but I’d never seen the extreme poverty that co-existed alongside the wealth. I was intrigued and signed up.

Florence and John Koster and their five children had been evicted from their home because the landlord needed it for his own family. John had been injured three years earlier and was unable to work; the family lived on his disability check. Rents had shot up and after the eviction the family hadn’t been able to find a place they could afford. The county had paid for them to stay in a cheap motel for three days; private charities stepped in to help for a few more. The family stayed with relatives, splitting up the children and sleeping on couches or the floor, but their welcome wore thin. Eventually, they slept in their old station wagon, parked...
in the lot of an outdoor shopping mall. The Koster children missed school, ate poorly, and had only their summer clothes.

The Kosters were the lead plaintiffs in the case I volunteered to work on. It had been filed in federal court by a local legal services organization along with a New York City advocacy organization.1 Our interviews with dozens of families revealed that the problems the Kosters faced were widespread, and we moved successfully for class certification. The defendants—New York State and Nassau County—were now looking at a significant chance of a big loss and, eventually, we negotiated a favorable settlement agreement. Reports of homeless families denied shelter and being placed into substandard temporary housing in Nassau County dropped off significantly.

But it turned out that the plight of these families was not unusual, in ways that stretched beyond the bounds of our class action. Nationally, homelessness was exploding, transforming what had previously been a limited problem into a mass phenomenon. Many experts believed that more people were homeless than at any time since the Depression,2 and surveys documented the inability of cities around the country to meet the increasing demand for emergency shelter. Families with children were the fastest growing segment of the homeless population. Racial and ethnic minorities were increasingly affected, along with younger, working men and women. No longer limited to large urban areas, homelessness was reaching into suburban and rural communities. What I had witnessed on Long Island—suburban family homelessness—was a part of this larger trend.

A number of developments had converged to drive it. During his first year in office, President Reagan led a successful effort to slash in half funds for public housing and Section 8, the major federal rent subsidy program.3 In the private market, urban development was replacing inex-

1. Koster v. Webb, 598 F. Supp. 1134 (E.D.N.Y. 1983); Koster v. Perales, 108 F.R.D. 46 (E.D.N.Y. 1985). Our case was novel: we were making our claim under federal law, the Aid to Families with Dependent Children (AFDC) program. (In 1996, President Bill Clinton signed into law Congress’s repeal of the program as part of “welfare reform.”) The county and state disputed our reading of the law and asked the judge to throw our case out, but the judge had sided with us and ruled that we had stated a claim. To win, we still had to show that our version of the facts was correct.

2. The Great Depression pushed large numbers of people into homelessness and extreme poverty, but the New Deal, followed by World War II, resolved much—though by no means all—of it. (As Matthew Desmond recently noted, Black Americans were largely denied the benefits of the New Deal, Stanford Poverty and Inequality Report at 17 (2017)) Those not absorbed by the war effort tended to be elderly and disabled, and they later began to constitute the “typical” homeless person on skid rows in major cities. KIM HOPPER, RECKONING WITH HOMELESSNESS 55 (2002).

3. In 1979, the federal government funded 347,600 new units of low-income housing; by 1983, that number had fallen to 2,630. Across-the-board cuts aimed at deficit reduction, not specifically at social programs, actually began at the end of the Carter Administration. MICHELE WAKIN, OTHERWISE HOMELESS: VEHICLE LIVING
pensive housing—such as single room occupancy units—with luxury housing; during the 1970s alone, a million such units were destroyed.\textsuperscript{4} Much of that housing had accommodated former residents of mental institutions who had been promised residential community care; when that was not fully funded, they ended up in SRO housing; when that was destroyed, many became homeless.\textsuperscript{5}

At the same time, economic shifts meant the loss of higher paying manufacturing jobs, leaving many working people unemployed, underemployed, or with sharply diminished incomes.\textsuperscript{6} Wages remained stagnant, with the first increase in the federal minimum wage since 1981 not coming until 1990. Federal income support programs were cut and some had their eligibility standards tightened.\textsuperscript{7} At the state level, beginning in the early 1980s, programs known as “general assistance,” which provided very modest cash aid to single people who were down on their luck, were being cut or eliminated.

By the early 1980s, these trends came together to create a crisis. Options for affordable housing were shrinking at the same time that incomes, whether through employment or safety net support, were declining, pushing poor and vulnerable people into homelessness at an alarming rate.\textsuperscript{8} The media was increasingly covering this sudden explosion of extreme need, with feature stories recounting the plights of specific families and individ-

\textsuperscript{4} See \textit{GENERAL ACCOUNTING OFFICE, HOMELESSNESS: A COMPLEX PROBLEM AND THE FEDERAL RESPONSE 23 (HRD-85-40) (1985)}.

\textsuperscript{5} Beginning in the 1960s, advances in the treatment of psychiatric disorders, coupled with public exposes of horrendous conditions in mental institutions, led to a movement to stop institutionalizing people and instead treat them in community settings. But of the planned 2,000 federally supported community mental health centers, only 800 were actually funded. \textit{See id. at 20–21 & n.18.}


\textsuperscript{7} GAO, \textit{supra} note 4, at 23–24. These included AFDC, the main cash support program for needy families, and Social Security Disability programs that provided income support to poor disabled individuals. An estimated 491,000 people lost their benefits; more than 200,000 of these were reinstated on appeal. These changes were litigated at length in court; eventually further legislative reform addressed some of the impact, but benefits are still extremely hard to get.

uals. Homelessness was becoming a national crisis, but there was virtually no federal response. Communities were left to fend for themselves.

The organization I was working with on the pro bono case, the Coalition for the Homeless, focused on New York, but it had recently formed a national arm to address the emerging national crisis, and it wanted to launch an office in Washington, D.C., to develop a campaign for a federal response through lobbying and litigation. The salary on offer was a fraction of that at the firm; there would be funds for part time secretarial help, but no other staff. I would be responsible for establishing a Washington office—including everything from renting space, installing a phone, and developing and executing a strategy for getting the federal government to respond to homelessness. It seemed like an exciting opportunity and I said yes.

* * *

To me, as a young lawyer, it seemed clear that homelessness was a national problem and that a federal response was thus both appropriate and necessary. But this was by no means the dominant view in Washington, D.C. President Reagan called homelessness a “lifestyle choice,”9 a HUD official claimed “no one is living in the streets,”10 and Attorney General Ed Meese said that people were going to soup kitchens “voluntarily” because “the food is free.”11 According to the Administration, homelessness was a matter to be addressed by private charity or, at most, local government. With few exceptions, it was not viewed by the Administration as an issue for federal action.12

Congressional action had also been scant. Starting in 1980, Congress had held three hearings on the growing crisis,13 but no federal legislation

12. In 1983, the Secretary of the Department of Health and Human Services, Margaret Heckler, created the Federal Task Force on the Homeless, consisting of representatives of 15 federal agencies, chaired by HHS, to “cut red tape and to act as a ‘broker’ between the federal government and the private sector when an available federal facility resources [was] identified.” GAO, supra note 4. It was terminated in 1987 with the creation by the McKinney Act of the Interagency Council on the Homeless. Advocacy, too, focused on the local level, with law playing a key role: one of the earliest strategies was litigation to establish a right to shelter under state and local law in New York and several other cities. *See* Maria Foscarinis, *Homelessness, litigation, and law reform strategies: a United States perspective*, 10(2) AUST. J. OF HUMAN RIGHTS 105 (2017).
13. The first focused on a report published by the Community for Creative Non-Violence (CCNV) documenting the crisis. *VICTORIA RADER, SIGNAL THROUGH*
was enacted or considered. The sole federal response, beginning in 1983, was a series of appropriations for emergency food and shelter, not authorized by any legislation, but rather made on an *ad hoc* basis through the Federal Emergency Management Agency, the agency responsible for aiding victims of natural disasters.14

A group of national anti-poverty organizations had been meeting for over a year to develop national legislation to address the crisis. Local legal services offices, much like the legal services office I had worked with on Long Island, were increasingly seeing homeless and near homeless clients. Based on their reports, the group had put together a long list of problems faced by these clients as well as proposed solutions. But none of the groups worked specifically on homelessness, nor did they have the time or capacity to focus on moving this work forward. That would be my job, and I worked with the group to shape the list into a legislative proposal that I could take up to the Hill.

Some in the group felt that we should pare the list down and focus on politically “realistic” proposals, while others wanted to maintain the ambitious list. I decided to combine the two approaches, organizing the proposal into a single piece of proposed legislation, consisting of three titles—Emergency Relief, Preventative Measures, and Long Term Solutions—each with many subtitles. The larger, single piece of legislation—styled the Homeless Persons’ Survival Act15—laid out an ambitious national agenda for which I could mobilize groups across the country to lobby. The smaller pieces I could get introduced as separate bills in the relevant committees with jurisdiction and look for opportunities to lobby for their passage.

With respect to legislative strategy, first I would have to find a lead sponsor to introduce the whole proposal.16 As a litigator, I had little knowledge of the legislative process, but I did know how to make a case. Drawing on research, I outlined the problem and our proposed solution in a memo, arguing that the broad demographic and geographic

---


16. I could then work with congressional legislative counsel, or “leg counsel,” to turn it into legislative language that could be introduced as a bill.
scope of homelessness meant it was a national issue that the federal government had an obligation to address. Memo in hand, I began making visits to the Hill, confident that the strength of my arguments would garner support.

I started from the short list of members of Congress deemed “sympathetic” to our cause, mostly liberal New York Democrats. Repeatedly, I was told that what I was doing was very important and the Congressperson fully supported it. However, he was facing election in the fall, the proposal was expensive, and “the homeless don’t vote.” Thus, unfortunately, the Congressperson would not be able to sponsor the proposal. Others were ideologically opposed; their goal was to shrink the federal government, not expand it. Sometimes, there was no staff person assigned to the issue, and there was literally no one to meet with. Some just laughed: to them homelessness did not rise to the level of a national political issue appropriate for congressional action. And even if they personally felt it should, this was the Reagan era. Did I seriously think such an effort was possible? How terribly naïve I must be!

After a couple of months, I had met with dozens of legislative offices, to no avail. Then what was beginning to seem like a miracle happened: I met with Rep. Mickey Leland’s office and they were interested. Leland was a Congressman from Texas who had previously been an anti-poverty activist. In Congress, he chaired the Congressional Black Caucus as well as the Congressional Select Committee on Hunger that he had helped create, along with Rep. Ben Gilman, a Republican from New York. He was a liberal Democrat, but he was respected on both sides of the aisle. Once Leland agreed to serve as lead sponsor of the Homeless Persons’ Survival Act, I discovered that getting the second sponsor was a tiny bit easier, the third slightly easier and so on until we had 36 “original” co-sponsors in the House, all Democrats. Later, we’d add a lone Republican, Rep. Gilman.

Getting the proposal introduced in the Senate was even harder. Then the Congressional Wives for the Homeless, a group that had come together out of concern for the growing crisis, invited me to speak at a tea for its members. Sipping from fancy china, I discussed the Homeless Persons’ Survival Act and my efforts to garner support for it. Tipper Gore, wife of then-Senator Al Gore, had become interested in homelessness as part of her in-
terest in mental health, stemming from her experience with depression following the near death of her son. Tipper promised to speak to her husband, and she helped me arrange a meeting with his chief of staff.

I had met with Gore’s staff previously, without success. They had expressed concern that the proposal’s potential cost was “mind boggling,” and that some of its provisions, while “well intentioned,” were “very controversial.” But Tipper Gore’s passionate interest had apparently made a critical difference, and Senator Gore agreed to be our first Senate sponsor; Senator Daniel Patrick Moynihan became the second. Finally, on June 26, 1986, some six months after I’d begun work on it, the Homeless Persons’ Survival Act of 1986 was introduced in both the House and Senate, endorsed by almost 100 national, state, and local organizations.

So far, my lack of knowledge of the legislative process had helped give me the confidence to go to meetings based simply on the strength of my evidence and arguments, rather than political calculation. But now that I had to try to get pieces of the bill actually passed, I was out of my depth. I had been getting valuable pro bono advice from Akin Gump, a law firm with high-powered political connections, but I needed more hands on deck. I knew that some law firms, especially in D.C., had legislative practices, and I made a cold call to Covington & Burling’s pro bono coordinator. Rod DeArment, a partner in the government relations practice, responded to the call for volunteers and put together a team to work on the project.

A self-described conservative Republican, Rod had arrived at the firm right out of law school. Later, he signed up for a six-month program offered by the firm to work for Neighborhood Legal Services, representing poor people in Washington, D.C. Eventually, he left the firm to work on the Senate Finance Committee, then chaired by Senator Robert Dole; when Dole became Senate Majority Leader, Rod became his chief of staff, serving from 1985 to 1986. A seemingly unlikely ally, Rod had a deep religious faith and a personal connection to homelessness and poverty through his

20. They feared that, if enacted, the bill would lead to an “outcry” for restoration of other benefits that had been cut, further adding to the expense. For example, with regard to a proposal to restore aid to students aged 18–21 as a way to prevent homelessness, a staffer noted that “it was just a couple of years ago that social security benefits were phased out for students after high school. We still hear from folks wanting these SS benefits restored. If AFDC student benefits were restored, there likely would be an outcry for restoration of SS benefits as well.” Homelessness for young people is a pressing issue that is today getting renewed attention—at times as if it is brand new. Advancing an End to Youth Homelessness, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, July 2017, https://www.usich.gov/resources/uploads/asset_library/federal-national-youth-initiatives.pdf. But its causes go back at least to these original cuts and the reluctance to address them.

21. Tim Davis, a lobbyist at Akin Gump Strauss Hauer & Feld, a big corporate law firm known for its political connections, especially to Democrats, helped me with the basics of developing a strategy and introductions to key people on the Hill.
pro-bono work. When I met him, he had recently returned to the firm as a partner and as chair of the firm’s legislative practice.22

By then it was becoming clear to me that party affiliation was not necessarily an indicator of interest. At the time, a Republican majority controlled the Senate, and in order to get legislation enacted we would need bipartisan support. Rod’s background and connections would be critical. We began meeting with key Senate Republicans, most notably Senator Pete Domenici, and getting some interest. Domenici, who was Catholic, had a daughter who was mentally ill, and because a significant minority of homeless people suffers from mental illness, he had taken a personal interest in the issue.23 Also important was that we had an active local partner organization in New Mexico, his state, and it was able to engage key local officials to help lobby our case. Eventually, we impressed Domenici’s staff enough that they arranged a meeting with the Senator himself.

I wasn’t sure what to expect, but Domenici was very personable. Accompanied by Rod, I made the pitch for the Homeless Persons’ Survival Act, explaining our view that homelessness was a national crisis that required a federal response. After the meeting, his staffer asked us to prepare a “Domenici package” consisting of the proposal’s low and no-cost items. This included provisions to remove address requirements from a series of federal benefits programs,24 opening access to such programs for homeless people. Also included were provisions to allow people to apply for benefits while they were in institutions (such as hospitals, jails, and prisons) so that they would have them upon release.

22. Later, in 1989, he would again take a leave to serve as Deputy Secretary of Labor under Elizabeth Dole in the first Bush Administration.
23. He was especially interested in housing for the mentally ill.
24. Homeless Eligibility Clarification Act, Pub. L. No. 99-570, Stat. 3207-167 (codified at 7 U.S.C. § 2011 et seq.), https://www.gpo.gov/fdsys/pkg/STATUTE-100/pdf/STATUTE-100-Pg3207.pdf, at 168–71. It allowed homeless persons to use food stamps to buy prepared meals; explicitly included homeless persons as eligible for assistance under a federal job training program; and required the Social Security Administration to develop a process to make Supplemental Security Income (SSI) payments (federal disability benefits for poor persons) and to provide cards evidencing eligibility for medical assistance available (under Medicaid) to “an eligible individual who does not reside in a permanent dwelling or does not have a fixed home or mailing address.” It also required the Secretary of the Department of Health and Human Services to issue guidelines to the states for providing welfare payments (under the Aid to Families for Dependent Children program then in effect) to “a dependent child who does not reside in a permanent dwelling or does not have a fixed home or mailing address.” It also provided that persons confined to public institutions could apply for food stamps and SSI benefits before their release in a single application. Finally, it provided that veterans’ benefits could not be denied based on an applicant’s lack of a mailing address and required the Veterans Administration to devise a method for delivering benefits to such applicants. Id.
The non-partisan Congressional Budget Office (CBO) had assigned a zero cost to these provisions. The Administration’s reluctance to acknowledge homelessness as a problem had worked in our favor. CBO had gone to each of the federal agencies administering the benefits programs and asked them how many homeless people were denied benefits because they lacked a permanent address. In each case, the response was that the number was negligible; thus the cost of removing barriers would also be negligible.25

Several pieces of legislation were moving and were potential “vehicles”26 for the bill, which was called the Homeless Eligibility Clarification Act. Among these was anti-drug legislation, which was moving quickly though Congress with strong bipartisan and Administration support.27 By noting a connection between drug use and homelessness, Domenici was able to attach our pieces to it. Because he was the lead sponsor, other Republicans, including conservatives such as Senator Jesse Helms, signed on as co-sponsors. On October 26, 1986, the legislation was passed with strong bipartisan support; it was signed into law the next day.28

Passage of the bill was a milestone event. Just months earlier the Administration had explicitly disavowed responsibility for homelessness—and indeed denied its very existence as a social problem—while in Congress, many, including liberal Democrats, were reluctant to acknowledge it as an issue for federal legislative action. In this climate, the enactment of our legislation was a remarkable success. Constituent pressure, persistent “inside the beltway” lobbying, and personal interest by powerful, key players had made the difference.

***

25. The question of numbers of homeless people was also highly controversial, with HUD estimating the number at 250,000 to 350,000 in a 1984 report to Congress, U.S. Dep’t of Hous. & Urb. Dev., A Report to the Secretary on the Homeless and Emergency Shelter, at 18–19 (1984), and the Community for Creative Non-Violence (CCNV) putting the estimate at 2.5 to 3.5 million, MARY ELLEN HOMBS & MITCH SNYDER, HOMELESSNESS IN AMERICA: A FORCED MARCH TO NOWHERE xvi (CCNV 1983). It is still controversial. See, e.g., National Law Center on Homelessness & Poverty, Don’t Count on It: How the HUD Point-In-Time Count Underestimates the Homelessness Crisis in America (2017).

26. Larger bills that were likely to move through the legislative process with a reasonable chance of being passed and signed into law and to which we could attach our pieces.

27. Another possibility we considered was a bill relating to insecticides. But we would be better off with something “germane,” or related to our issues.

28. Two other important bills became law at about the same time. They created a small Emergency Shelter Grant program (funded at $10 million) and a Transitional Housing Demonstration program (funded at $5 million). See Maria Foscari-nis, Federal Legislative and Litigative Strategies: An Overview, 1 MD. J. CONTEMP. LEGAL ISSUES 9, 17 (1990).
Soon after this victory, I began work on a more ambitious legislative proposal,29 this time with a high profile and controversial partner, Mitch Snyder, de-facto leader of the Community for Creative Non-Violence (CCNV), a “radical-Catholic” activist group founded in 1970 by a Paulist priest. CCNV ran a large shelter—the largest in the country—in downtown Washington, and its members lived as well as worked there, preparing meals, running programs, and serving as advocates for their homeless residents and for homeless people generally.30 Mitch was often in the media and was widely known, both for his devotion in living in a shelter, side-by-side with homeless people, and his confrontational tactics, which included hunger strikes and civil disobedience. Mitch had followed my efforts on the Hill and seemed offended that our bill had been deemed “no cost.” He proposed working together to push Congress to allocate $500 million in aid to homeless people that winter with a campaign that would keep the urgency of cold weather front and center.

I feared this would further the prevailing view of homelessness as a temporary crisis that could be addressed with emergency measures, not a systemic problem with deeper causes. But I had just experienced the enormous difficulty of getting support for the mere introduction of the Homeless Persons’ Survival Act, and I knew that getting Congress to commit $500 million would be a huge challenge; emphasizing the emergency nature of the need would surely help. Eventually, I agreed, calculating that I could also keep a focus on the need for comprehensive long-term policies. If we succeeded, it would be a step towards the bigger goal and I would frame it that way.

A number of developments had converged to focus a high degree of public attention on homelessness, making this an opportune time for our campaign.31 A made-for-TV movie about Mitch and CCNV, starring Martin Sheen, previewed in Washington, D.C., with celebrities and politi-

29. Meanwhile, I was also pursuing the second prong of the national campaign strategy, looking for potential federal litigation, and filed several cases, including a successful federal court suit against the Department of Defense challenging its failure to implement a program to offer surplus military real property to non-profit providers of services to homeless people. See Foscarinis, Homelessness, Litigation and Law Reform Strategies, supra note 12 at 113–14, for a discussion of this and other cases I filed during this time.


31. There was an “explosion” of coverage during the period from 1981–87. ENCYCLOPEDIA OF HOMELESSNESS 304 (David Levinson ed., 2004), https://books.google.com/books?id=q-PgHH8Tji8C&pg=PA302&lpg=PA302&q=M%20homelessness+1980s&source=bl&ots=Bk7_GK_85p&sig=Oqq3MVicZ6_aOm18X_gmHv22rN4&hl=en&sa=X&ved=0ahUKEwinzfSzr_fUAhXBGz4KHcDfDCoQ6AEIOzAD#v=onepage&q=Media%20homelessness%201980s&f=false.
Hollywood comedians and HBO organized Comic Relief, a show to raise funds for aid to homeless people. Hands Across America, a highly publicized event with millions of people joining hands in a single line across the country, raised awareness and funds to help homeless people. Mayors convened to discuss strategies for addressing homelessness, and a new advocacy organization of homeless and formerly homeless people, the National Union of the Homeless, was formed.

That September, over 500 activists from around the country gathered, including those I had relied on to lobby Congress. As the gathering was ending, the Senate voted to pass the Homeless Eligibility Clarification Act, electrifying the group. The next day, CCNV sent letters to every member of Congress urging continued congressional action and especially funding, while I continued to build support for the Homeless Persons’ Survival Act. Later that fall, Mitch set up camp on a heat grate outside the Capitol with a statue of a homeless nativity scene, an act of civil disobedience intended to draw attention to our campaign.

* * *

The November elections brought potentially helpful changes. Control of the Senate had shifted from the Republicans to the Democrats. The House remained under Democratic control, but Jim Wright replaced Tip O’Neill as Speaker. The week after his election, Wright toured the CCNV shelter and met with Mitch, who agreed to remove the nativity scene statue from its spot outside the Capitol. Speaker Wright would make homelessness one of his top priorities, a commitment that would prove instrumental to our efforts.

In early January, Mickey Leland re-introduced the Homeless Persons’ Survival Act, with leadership support. Two days later, the Foley-McKinney

---

33. It aired on March 29. The funds were distributed through the Robert Wood Johnson Foundation to fund health care services for homeless people across the country.
35. Robert Byrd taking over as Majority Leader from Bob Dole, who became Minority Leader.
36. Tom Foley as Majority Leader, and Tony Coelho as Majority Whip.
38. Leland appealed to his colleagues to support his bill by specifically noting that “[a]s we approach the harshest days of winter, millions of Americans face the cold and windy nights without the comfort of basic shelter.” Dear Colleague Letter, Jan. 5, 1987. But at the same time, in line with our agreed upon strategy, he called the Survival Act “definitive legislation expressing a long term federal commitment
Urgent Relief for the Homeless Act, named after the new Majority Leader and the bill’s primary Republican sponsor, Stewart McKinney, was introduced. That bill consisted of most of Part I of the Homeless Persons’ Survival Act—the Emergency Relief part—and authorized a total of $500 million. Speaker Wright promised to “fast-track” its passage.

To develop a lobbying strategy, I had to figure out a way to collaborate with Mitch, who had resolved to live on the heat grate until Congress passed legislation, while also continuing to work with Rod and his team at Covington. I arranged an initial meeting of the three of us on a Saturday at the firm’s offices. Rod drove in from his suburban home in Virginia, Mitch came in from his heat grate, dressed in the clothes he had been living in, and I arrived from my downtown apartment. Despite my nervousness about this meeting between people who could hardly have been more different, all went smoothly, and after that first meeting we began going on Hill visits together. We made an impression: Rod and I in suits, looking like lawyers, Mitch looking like a homeless person. But despite our wildly different backgrounds and appearance, we had the same message. Homelessness was a national crisis and the federal government had to take action. The Urgent Relief for the Homeless Act was a much-needed step, and we wanted their support.

The House scheduled a hearing on the bill, signaling its importance and urgency. Governor Mario Cuomo of New York, a powerful moral voice, testified in support. So did Mayor Raymond Flynn of Boston, bringing to bear his Catholic faith as well as his leadership of the Task Force on Hunger and Homelessness of the U.S. Conference of Mayors, another important lobbying group. Speaker Wright testified, showcasing to end this national disgrace,” noting that permanent affordable housing was exponentially cheaper than emergency shelter. News Release, Jan. 7, 1987.


40. One major omission was the national right to shelter; our Hill allies felt it was too controversial and would torpedo the bill. Instead, funding shelter and transitional housing—without creating a right—through two small programs, enacted at the same time as the Homeless Eligibility Clarification Act, was added.

41. Held by the Subcommittee on Housing and Community Development, the subcommittee taking the lead on the bill. The bill had also been referred to Energy and Commerce Committee and its Subcommittee on Health. The Education and Labor Committee took up portions of the bill, but separate from the Urgent Relief Act.

42. He had earlier lent his name to an important report on the issue.

43. The Conference of Mayors, which represented big cities, had recently created a special task force to address the growing crisis of hunger and homelessness. Starting in 1984, and continuing to this day, the Task Force has conducted an annual survey of its members to assess the status of hunger and homelessness in their cities. See U.S. Conference of Mayors’ Report on Hunger and Homelessness (Dec. 2016), https://endhomelessness.atavist.com/mayorsreport2016.
the leadership’s commitment. Days later, the *New York Times* ran a national story headlined “The Homeless Become an Issue”;[44] the influential “inside the beltway” *National Journal* followed with a piece along similar lines.[45] Our efforts were starting to be taken seriously, with coverage shifting away from exclusively “soft” feature, metro section stories to the national political pages. On March 5, 1987, the Urgent Relief for the Homeless Act passed the House with bipartisan support.[46]

But the bill that passed did not include critical provisions designed to ensure access to education for homeless children.[47] To my surprise, this part of the bill had been controversial with the education “establishment,” and the education committee had kept it out to address their concerns.[48] Fundamentally, it seemed the education groups, generally Democratic,


46. The Rules Committee issued an open rule that waived all “points of order,” fast-tracking the bill: amendments would be allowed but technical objections—such as those based on budget constraints—would not be. The vote was 264 to 121, with 43 Republicans voting in favor along with 231 Democrats (including five members of the Democratic Farm Labor (DFL) party). CONG. REC.–HOUSE (daily ed. Mar. 5, 1987).

47. Homeless children face myriad challenges, already well documented, even compared to housed children living in poverty; these include challenges in keeping up academically—or even going to school at all. Lacking a permanent address, homeless children were no longer considered “residents” of their original school district, but they were not considered “residents” of their current location either. They could be denied access to school or be forced to move from school to school as they moved from one shelter or temporary arrangement to another, disrupting their education and adding more instability to their lives.

48. The offending section required school districts to allow homeless children to enroll in either their original school or the school in the district they were currently living in and included specific provisions to make this possible, such as requiring school districts to pay for transportation back to the original school if necessary; it authorized a small amount of federal funding to help cover the costs. It included a right for parents to choose between the school of origin and the school in the district the family was living in, if these were different. Kirsten Goldberg & William Montague, *Shelter Kids*, ED. WEEK, Apr. 24, 1987, http://www.edweek.org/ew/articles/1987/04/24/3030home.h06.html. It required school districts to take other specific steps to make sure these kids got their education, such as making records immediately available for children who transferred. It provided for sanctions on school districts that did not comply and included a right to sue for violations.
were concerned about the potential cost of educating homeless children. Eventually, we neutralized the opposition and while we had to give ground on a number of issues, we still achieved strong legal protections. But despite agreement on all sides on the need for increased funding, we were far less successful on that point. Even with a Democratic Congress and a highly supportive leadership, the lobbying might of the education “establishment” had been able to water down our language but not to increase funding for schools, a testament to the difficulty of building political support for impoverished children.

* * *

Meanwhile, we needed the Senate to introduce a counterpart to the Urgent Relief for the Homeless Act, and we would need bipartisan support. Thanks to our work on the Homeless Eligibility Clarification Act, we had a strong relationship with Senator Domenici; thanks to Rod, we also had strong ties Senator Dole. When Majority Leader Byrd introduced the Urgent Relief for the Homeless Act later in March, of the 27 original co-sponsors, ten were Republicans, including Dole and Domenici. This put us in a good position to seek support for a budget waiver.

49. Senator Kennedy included them in the Senate version. This meant that negotiations could continue in the “conference committee” that would be constituted to resolve the differences. There the House leadership and Lowry leaned heavily on the committee to adopt strong language protecting the education rights of homeless children.

50. We agreed on very specific requirements, and I made sure that the language included as many “shall” as possible. This mandatory and specific language was critical in establishing our ability to sue, even without an explicit right to do so. The National Education Association agreed to remain neutral—neither supporting nor opposing the bill. The School Board Association opposed it, but agreed to remain silent, and not actively oppose it. See Goldberg & Montague, supra note 48.

51. The education groups opposed parental choice, and we resolved that issue by agreeing that the decision would be made based on the “best interests of the child.” They also opposed a clear right to education for these kids; we had to accept a more muted statement that it was “the policy of Congress” that homeless children have a right to education. There was no explicit right to sue, and no sanctions for non-compliance.

52. To get support for the bill we would either have to find funds within the existing budget, which meant cutting something else, or get 60 Senators to support a budget waiver, which would require bi-partisan support.

53. Dole had been Majority Leader from 1985–87; now that the Senate had shifted to Democratic control, he was Minority Leader.

54. S.809. By April 9, 1987, when it was brought to the floor for a vote, there were a total of 40 co-sponsors, including one more Republican.

55. Unlike the House, the Senate did not have a process for a general budget waiver. Instead, each Senator would have to vote for it. CONG. REC. S4919 (daily ed. Apr. 9, 1987).
First, we had to overcome a challenge from Senator Gordon Humphrey, a Republican from New Hampshire, who proposed an amendment that nearly derailed the whole process. Humphrey wanted to repeal a congressional pay raise by President Reagan that had automatically gone into effect, without any member of Congress having to vote on it. His strategy was to offer an amendment to bills moving through Congress in order to force Members to go on record for or against it. Byrd wanted to avoid this through a parliamentary maneuver that would require 60 votes and "unanimous consent." We would need to get Humphrey to agree.

Winter was slipping away and we feared losing our window for urgent action. Mitch’s idea was to stage a sit in at Humphrey’s office, a plan he claimed Byrd’s office supported as a “reasonable” way to put pressure on Humphrey and make everyone nervous. Dole’s staff, possibly having caught wind of this or simply just fearing Mitch’s known propensity for such tactics, warned me against attacking Republicans, and advised me to keep a low profile. Meanwhile, on Rod’s advice, I found allies in New Hampshire who could put pressure on Humphrey. I also put out a press release, not attacking anyone but calling on the Senate to act quickly to help homeless Americans.

Just before Easter recess, our bill passed, 85 to 12. Was it because of Mitch’s threatened sit-in? Rod’s connection to Dole? My constituent pressure and focused press outreach? I think it may have been the combination.

***

We spent the next few months working to persuade Congress to “appropriate” the funds it had “authorized,” a difficult process that also further illustrated the difference between political rhetoric and reality. As finally passed, the authorizing bill was for two years, 1987 and 1988, and appropriations for 1987 were especially tricky because we were already

56. As a fiscal conservative, Humphrey was outraged by Reagan’s maneuver; he was working with Public Citizen, a liberal group that opposed it on government accountability grounds.

57. Both Byrd and Dole wanted to avoid forcing their colleagues to have to choose between forgoing a pay raise—which they wanted—and going on record to vote for it, which would make them look bad politically. Byrd moved to invoke "cloture" to preclude any amendments, including Humphrey’s, that were not relevant to the bill.

58. Cloture passed 68 to 29. A conference committee later worked to resolve differences between the House and Senate versions, with most of the negotiations focused on funding authorizations; the final conference committee report, filed June 19, included authorization for two years, with $443 million for 1987 and $616 million for 1988.
deep into the federal fiscal year. But 1988 appropriations were also challenging, with the Democratic staff of the House committee initially claiming there was “just no money” and that he expected the 1987 funds to “carry over.” In the end, efforts by Speaker Wright, and key Democratic allies Mike Lowry and Bruce Vento, were instrumental in the House, while in the Senate, Republican Pete Domenici played a critical role. Still, final funding fell short: Congress appropriated just over 72 percent of the funds it had authorized.

Meanwhile, the authorizing legislation had been renamed the Stewart B. McKinney Homeless Assistance Act, in honor of its chief Republican sponsor, who had just died. On July 10th, Congress sent the bill to the President. On the evening of July 22, on the very last day that he could act, President Reagan signed our bill into law. There was no signing ceremony; according to anonymous White House sources quoted in the press, this omission was intended to signal Reagan’s “lack of enthusiasm.”

The enactment of the new law made the front page of the New York Times. By then I was exhausted and had not put out a press release. But two days after the signing, Robert Pear of the New York Times called, asking for details and comment in his soft, feathery voice. He quoted me with this assessment: “The new law will provide material aid that is badly

59. A bill for a much larger Supplemental 1987 appropriation was pending, and the House leadership made sure it included $425 million for our bill. But it was more than $2 billion over the budget limit, and even though the House had agreed to waive the budget rules, a moderate Democrat from Florida, Rep. Buddy McKay, was pushing an across-the-board cut to all programs. Mike Lowry, our key behind-the-scenes champion in the House, lobbied to exempt funding for our bill, and the Speaker made a deal: he would agree to the cuts if the homeless programs were exempted. Jonathan Fuerbringer, Wright Accepts a Loss to Win a Spending Bill, N.Y. TIMES, Apr. 25, 1987, http://www.nytimes.com/1987/04/25/us/wright-accepts-a-loss-to-win-a-spending-bill.html. In the Senate, the Democratic appropriations sub-committee chair had not included any funding for our bill’s shelter and transitional housing programs. A floor amendment by Senator Domenici, supported by Senator Cranston (D-CA), restored most of the funds.

60. For 1988, the relevant House subcommittee claimed there was just “no money” for 1988; it expected the 1987 funds to carry over. But we learned that NASA, the space program, had gotten $1 billion in funding from the same subcommittee. With this information and help from the Speaker, Lowry, and Congressman Bruce Vento, we were able to get $300 million for our bill.


64. Robert Pear, President Signs $1 Million Bill to Aid Homeless, N.Y. TIMES, July 24, 1987.
needed. It also represents an important recognition of the federal responsibility to deal with homelessness. But it is only a first step. There must be longer-term efforts to address the causes of the problem, as well as the symptoms."

As enacted, the McKinney Act authorized over $1 billion in federal aid for homeless people over two years. It created 20 new programs to fund shelter, transitional housing, and a very modest amount of permanent housing, as well as health and mental health care, food, and drug abuse treatment; most operated by funneling federal funds to states, local governments, and private non-profits. The Act protected the right of homeless children to education and granted a right of first refusal to vacant federal properties to groups serving homeless people.

The McKinney Act made clear that the federal government did have a responsibility to address homelessness, with both its language and the fact of its enactment, shifting the existing paradigm. The findings specifically acknowledge that homelessness is a national crisis and that the federal government has a responsibility to address it. The Act created a new independent agency, the U.S. Interagency Council for the Homeless, to coordinate the federal response to homelessness, defining a central point for federal accountability. Touching on many of the issues included in the original Homeless Person’s Survival Act, it suggested what a comprehensive solution might look like: embedded in the Act were amendments to larger social programs, such as job training, designed to ensure that homeless people could and would benefit from them, as well as “demonstration” programs—such as one for adult literacy—with small amounts of funds attached to them.

It was a huge accomplishment, but somehow I was less than overjoyed. I had knocked myself out, along with Mitch and many other allies, and mobilized high-powered pro bono support. But I knew that it would not be enough to solve the problem. At $720 million over two years, appropriations were significant but short of authorizations.

And more importantly, the appropriations were way short of the need. In some cases, these discrepancies were enormous. For the Emergency Shelter Grants program, $120 million was authorized for 1988, but only $8 million was actually appropriated. For the Section 8 single room occupancy program, no funds at all were appropriated for 1988. Applications

---

65. Id.
67. The Council superseded a Task Force for the Homeless that had been created in 1983 by administrative action. United States Interagency Council on Homelessness Historical Overview, https://www.usich.gov/resources/uploads/asset_library/USICH_History_final.pdf. Mitch especially thought the Council was important to create federal accountability. This would be an agency we could point to as responsible for responding to the crisis.
for the 1987 funds exceeded availability ten-fold, despite the newness of the program.

It was not just the funding shortfall that muted my reaction. From the beginning, I had made sure to include statements from our key supporters in the Congressional Record that the McKinney Act was intended as a first, emergency step only, and that longer-term measures would be needed to solve the problem. Speaking on the floor of the Senate when the bill was first introduced, Senator Gore said: “[This legislation] is an essential first step towards establishing a national agenda for action to eradicate homelessness in America. . . . No one in this body should believe that the legislation we begin considering today is anything more than a first step towards reversing the record increase in homelessness.”68

Clearly, there would be much more to do. Two years later, I founded the National Law Center on Homelessness & Poverty to carry the work forward.

* * *

Today, thanks to our work and that of our allies, annual funding for the McKinney Act has grown to over $2.8 billion, the vast majority of it allocated to shelter and housing programs.69 The programs and the rights created by this landmark Act help millions of people each year; they have undoubtedly saved and improved many lives. Together with our allies, the Law Center has also worked to add protections for homeless people to other federal, anti-poverty, and civil rights programs. And while full compliance remains a challenge, thanks to sustained monitoring and repeated litigation, the rights the bill created have made a clear and measurable difference.

But despite this progress, many of the promised next steps remain largely unfulfilled. Allowing an emergency like homelessness to continue for decades without solving it leads to continued suffering and devastated lives for those directly affected. But it can also further a broader public perception that the problem is unsolvable, or that it is the fault of those affected. Indeed, laws that punish homeless people for living in public places—typically in the absence of any alternative—are on the rise across the country, often buoyed by a claim that help is available, but that people do not want to avail themselves of it and instead “choose” to live on the streets.70

These echoes of Reagan are not new, but the advent of the Trump Administration has intensified the dangers for poor and homeless people—and marginalized and disenfranchised people more broadly. Proposed cuts to housing and safety net programs threaten many more people with homelessness, and regulatory rollbacks and the focus on “law and order” threaten increased criminalization and further loss of basic rights. The landscape has shifted considerably since the Reagan era, but as we face new challenges, we can remind ourselves that change is possible even in the face of seemingly insurmountable odds.

Several factors stand out in the success of our work for an initial federal response to homelessness against high political odds. First, we had an ambitious but actionable agenda. The Homeless Persons’ Survival Act laid out a comprehensive proposal while also including smaller more bite-sized pieces. The Urgent Relief for the Homeless Act made an ambitious but potentially achievable funding request. Both were critical to mobilizing local activists to lobby their representatives. Both looked past “conventional wisdom” about what was or was not politically realistic in an effort to change that reality.

Second, it was a multipronged effort. Our campaign brought together “direct action” such as Mitch’s camping out, media and events that brought public attention to the issues, and more traditional grassroots and “inside the beltway” lobbying. The grassroots lobbying was possible because of all the groups that had sprung up around the country to respond to the crisis—but also critical was having a common agenda to organize and energize them behind, accompanied by actionable pieces that they could lobby their political representatives to support. Media outreach targeted to national political pages, in addition to attention grabbing events and displays, helped elevate debate and capture the attention of policymakers.

Third, finding points of personal connection to the issue made a powerful difference and also brought together strange bedfellows. At times conservative Republicans unexpectedly supported us when liberal Democrats did not. Peter Domenici played a key role in the Senate, and Rod DeArment was a critical advisor and advocate. Expected allies like the education “establishment” at times became opponents. This underscores how difficult it is to find support for impoverished and politically powerless people, but it also shows how critical finding personal points of connection is: many of those who became supporters—Domenici, Tipper Gore, and Rod—did so

because they either had or could see a personal connection to homelessness that made them care about it. Those personal connections were key, not party affiliation.72

Questions also stand out. Chief among them is whether it was a correct strategic move to focus on the crisis nature of homelessness and push for an emergency response with the 1986–87 winter campaign. As I’ve said elsewhere, my view is that ultimately the problem was not so much that decision—we likely could not have succeeded otherwise—but the failure to follow up with long term solutions.73 But I also think that the lack of a broader movement backed by institutional funders—and the “lone ranger” tactics favored by advocates at the time—may have allowed that to happen.

Today, despite very real threats, we also have strengths to build on. Many government agencies are invested in addressing homelessness. At the federal level, this includes a cadre of career staff. Secretary Carson has said publicly that homelessness is a solvable problem.74 We also have many examples of programs, including many funded by the McKinney-Vento Act, that work. We have consensus that housing—together with any needed services—works, and the data to back it up.75 And with increased focus on criminalization, and data that show that housing is not only more effective but also more cost effective, we also have many more potential allies—including “strange bedfellows,” such as law enforcement, to support a call for housing-based solutions.

We also have a much larger potential coalition with more familiar bedfellows. Funding cuts threaten a cross section of social programs. Increasing criminalization doesn’t just affect homeless people, but poor people more generally. And homelessness disproportionately affects people of color, as does criminalization. Trump has spurred increased activism on many fronts, and we have the possibility of being part of and engaging a much broader progressive coalition and agenda across issues.

An ambitious, unifying policy agenda can be built around the consensus that housing is the solution to homelessness. Our movement started with

72. The joint campaign that led to enactment of the McKinney Act could go only so far. We tried afterwards to continue our push for the longer-term solutions, but we did not have the capacity—the coalition, resources, staff, or the ability to navigate the suddenly more complex internal politics that came with success—to capitalize and build on our huge success. See Foscarinis, supra note 13, at 58–59.

73. Id. at n.77.


advocacy for a right to shelter; we got shelter, though not enough, not adequate, and rarely as a right. But we knew then and know now temporary shelter is not the solution; permanent housing is. We need to advocate for it not just as a program that works, but as a policy enshrined in law. To really end homelessness, housing must be treated—and funded—as the basic human right that it is. Just as health care is increasingly viewed as a right, we need to shift the paradigm towards accepting housing as a right.

The critical challenge is not as simple as partisan politics—that is clear from past experience—but rather power imbalance. Deepening inequality and increased influence of money in politics have exacerbated that imbalance. As advocates working to end homelessness, we can and should draw on the intersectional nature of our work to link to bigger coalitions both to resist new threats and to push for positive change. Strange bedfellows are also increasingly joining forces on issues like criminal justice reform, and we are making those links. Drawing on personal points of connection to homelessness, as well as self-interest, such as cutting costs, can help make those links. So can drawing on our power as lawyers. Rod’s involvement was critical, not just because he was instrumental in getting Republican support, but also because he guided me with sophisticated legislative advice. Through his involvement I was able to bring to bear the resources and clout of a major corporate law firm, and I drew on my own background as a former big firm lawyer to help me engage him in this effort.

***

This early work affirmed for me that law is a powerful tool for advocacy. At the National Law Center on Homelessness & Poverty, our mission is to use the power of the law for systemic reform to end and prevent homelessness in America. In the same way that I had first gotten involved, today dozens of law firms and corporate legal departments work with us. But law is not the only tool. An organized effort must also include strategies such as community organizing and public education, both essential to building the political support needed to advance an ambitious agenda. This requires the investment of resources in advocacy that can make the case for an agenda to really end and prevent homelessness—and to ensure the human right to housing. And that investment must be consistent and long term. It’s needed more than ever.
ARTICLE

The Challenge of Housing Affordability in Oregon: Facts, Tools, and Outcomes

Paul A. Diller and Edward J. Sullivan

Introduction ....................................................................................................184
I. The Federal Role in Housing .................................................................186
   A. Housing Finance ................................................................................187
      1. New Deal to the Bubble ............................................................. 187
      2. The Bubble Burst ......................................................................... 190
      3. Federal Efforts to Combat Mortgage Discrimination............ 191
   B. Public Housing and Federal Assistance for Rental Housing ....192
      1. Public Housing............................................................................. 193
      2. Tenant-based Vouchers—“Section 8” ...................................... 195
      3. Project-based Vouchers and Rental Assistance...................... 197
      4. Low-Income Housing Tax Credit............................................. 199
   C. Federal Efforts to Combat Housing Discrimination ...................201
II. Housing in Oregon: Planning and Land Use Regulation.................204
   A. Goal 10: Housing ...............................................................................206
   B. The Early Days of the Oregon Housing-Land Use Relationship....207

Paul A. Diller (pdiller@willamette.edu) is Professor of Law at Willamette University. He received his J.D. from the University of Michigan in 2001 and his B.S. and B.A.S. from the University of Pennsylvania in 1996. Edward J. Sullivan received his B.A. from St. John’s University (N.Y.), 1966; J.D., Willamette University, 1969; M.A. (History), Portland State University, 1973; Urban Studies Certificate, Portland State University, 1974; M.A. (Political Thought), University of Durham; Diploma in Law, University College, Oxford, 1984; LL.M., University College, London, 1978.

The authors also wish to thank Dr. Andrée Tremoulet, Portland State University, for her tremendous contributions to the substance and organization of this article. This article would not have been possible without her assistance. For outstanding comments, we thank Sy Adler, Jennifer Bragar, Nestor Davidson, Al Johnson, Bill Kloos, Daniel Mandelker, Mary Kyle McCurdy, Greg Winterowd, and the participants in the State and Local Government Works-in-Progress Conference at Golden Gate University in October 2017. For outstanding research assistance, we thank Mary Rumsey, reference librarian at Willamette University.
Introduction

Housing, particularly affordable housing, has been the center of much discussion in the second decade of the 21st century in the United States. This article focuses on that discussion in one American state—Oregon—containing slightly more than one percent of the country’s population, but possessing a land-use planning system that aspires to promote housing affordability, as well as address other social, economic, and political concerns. Indeed, Oregon’s land-use system is nationally known for its centralization and focus on containing sprawl.

Despite its national reputation, much of Oregon is currently in the throes of a housing crisis. Since the end of the Great Recession, the popularity of Oregon—particularly, the Portland and Bend metropolitan areas—as a haven for young, well-educated professionals has surged. With steady population growth fueled by in-migration from other states, the Oregon housing market has struggled to keep up with demand in a way that provides realistic housing opportunities for all income levels. More inner neighborhoods of Portland have been gentrified, with lower-income residents pushed further away from central services and employment opportunities to the edge of the city’s boundary. A steady influx of migrants leaving even higher-priced metropolitan areas, like Los Angeles and San Francisco, for the relative housing “bargain” of Portland and beyond, has contributed to the pressure on housing prices.

Hence, since 2011, the rental vacancy rate in Oregon has hovered between 3.9% and 4.9%, while the national average has gone from 9.5% to 7.1% in the same time period.¹ In 2014, the Bend metropolitan area had a vacancy rate of below 1 percent.² In 2015, the Portland-Vancouver-Hillsboro Metropolitan Statistical Area had either the highest or second-highest annualized rent growth in the country.³ Unsurprisingly, these market con-

---


³ Marc Straub, Multifamily Market Analysis, 10 CTR. FOR REAL ESTATE Q. REP. 54–64 (2016). Straub adds that the overall vacancy rate for rental housing in the Portland-Vancouver-Hillsboro MSA was 2.4% in 2015. Id. at 59.
strictions weigh most heavily on low and moderate income families. While many experts consider housing to be affordable if no more than 30% of income is allocated for that use, a quarter of Oregon renters spent more than 50% of their income on housing costs in 2015.4 By 2017, the statewide Fair Market Rent (FMR) for a non-luxury two-bedroom apartment was $1,028.5 At the state minimum wage of $10.25 per hour, two household workers would have to work at least 77 hours per week to afford that apartment.6 To afford a one-bedroom apartment at FMR, two household members earning the state minimum wage would have to work at least 63 hours per week between them.7 Due to comparatively lower incomes, many persons of color experience the lack of affordable housing more acutely in Oregon.8

This Article assesses the causes of the housing crisis in Oregon and some of the tools that might be used to fix it while situating the Oregon system of housing planning within the national context. Part I details the role that the federal government plays in the housing market, including by sustaining the home-mortgage market, as well as in providing public housing dollars and attempting to prevent some key forms of discrimination. Part I also highlights the limits of the federal government’s support for affordable housing and the extent to which these limits made Oregonians vulnerable to an affordability crisis. Part II details Oregon’s land-use planning system since the passage of the state’s iconic land-use law—still referred to as “Senate

---

5. Nat’l Low Income Hous. Coal. (NLIHC), Out of Reach 195 (2017) [hereinafter Out of Reach]. NLIHC ranked Oregon eighteenth highest among states in terms of “Housing Wage,” id., or “the estimated full-time hourly wage a household must earn to afford a decent rental . . . while spending no more than 30% of their income on housing costs.” Id. at 1.
6. Id. It should be noted that as of 2016, Oregon has a tiered minimum wage based on geography in an attempt to better mirror the varied costs of living throughout the state. $10.25 is the minimum wage for urban counties in the state, except for the Portland Metro area, which has an $11.25 minimum wage. The minimum wage in non-urban counties is $10. Oregon.gov, Oregon Minimum Wage Rate Summary, available at http://www.oregon.gov/boli/WHD/OMW/Pages/Minimum-Wage-Rate-Summary.aspx.
7. Out of Reach, supra note 5, at 195. The U.S. Department of Housing and Urban Development determines FMRs on an annual basis; they are intended to reflect the cost of shelter and utilities for middle-of-the-road (typically 40th percentile) apartment. Id. at 1.
8. The 2015 median income of African American households in Oregon was 57 percent of that of white, non-Latino households in the state; the median income of Native American and Alaska Native households was 62 percent of that of white, non-Latino households in the state; and the median income of Latino households was 80 percent of that of white, non-Latino households in the state. Per Capita Income (in 2015 Inflation Adjusted Dollars), Oregon, Social Explorer, supra note 4.
Bill 100” (SB 100)—in 1973.9 SB 100 established a Land Conservation and Development Commission (LCDC) to formulate and implement state policies through statewide planning goals.10 One of those goals—Goal 10—relates to housing,11 and Part II recounts its content, history, and implementation. Although Goal 10 is unique to Oregon, the state’s struggles to ensure the widespread availability of sufficient affordable housing are similar to the challenges faced in other states where zoning is delegated to local governments. Part III describes how housing conditions and challenges have evolved in Oregon since the passage of SB 100. Finally, Part IV explores potential policy and legal tools for addressing Oregon’s affordable housing crisis, including some recent high-profile initiatives debated by the state’s legislature that are part of the national conversation regarding affordable housing.

I. The Federal Role in Housing

Before the 20th century, the federal government played an instrumental role in securing land for private residences, primarily for citizens of European descent. Federal legislation like the Homestead Act facilitated the population of the West by white families, further aided by the federal government’s aggressive—and often rapacious—policies toward the American Indian populations originally occupying the land.12 With respect to the provision of housing qua housing, however, the federal government played almost no substantial role until the 20th century outside of special populations like prisoners, government workers, and military personnel.

By the first half of the 20th century, the American housing landscape was a mishmash of often poorly maintained urban tenements, boarding houses, single-occupancy hotels, self-built housing for laborers on the urban fringe, and rural farmhouses and associated structures.13 Until the middle part of the 20th century, most American households were renters.14 To purchase real property, buyers relied on either inheritances or substantial savings to cover the 50%-plus down payment that banks often required.15 Most banks required repayment of the balance within six to eight years.16 Savings and

---

16. Id.
loan associations, or “thrifts,” often offered more practical financing terms geared toward working-class and immigrant populations.17

The federal government’s first foray into civilian housing provision was during World War I when Congress created the United States Housing Corporation (USHC) to build worker housing near shipyards and arsenals.18 In the 1920s, the federal government offered its advice regarding the legal tool of zoning, with the Commerce Department promulgating a model zoning act that would form the basis for many state and local laws.19 Only after the Great Depression would the federal government begin to play a key role in the financing and provision of housing, as explained below.

A. Housing Finance

1. New Deal to the Bubble

The Depression saw a surge in home loan delinquencies and foreclosures.20 After some modest steps under President Herbert Hoover,21 President Franklin D. Roosevelt immediately sought to strengthen the federal role in preventing foreclosures after his landslide 1932 election victory.22 The overwhelmingly Democratic Congress elected on FDR’s coattails quickly established the Home Owners’ Loan Corporation (HOLC) designed to refinance mortgages in default to prevent foreclosure.23 In 1934, Congress created the Federal Housing Administration (FHA) to in-

17. Id.; see also It’s A WONDERFUL LIFE (Liberty Films, Inc. 1946) (Bailey Building & Loan provides loans that allow Italian immigrants to secure housing).
21. These included the creation of the Federal Home Loan Bank Board to charter and supervise federal savings and loans institutions as well as the Federal Home Loan Banks to provide liquidity for housing construction. Federal Home Loan Bank Act, Pub. L. No. 72-304, 47 Stat. 725 (1932); Garb, supra note 13; DAN IMMERMGLUCK, CREDIT TO THE COMMUNITY 36 (2004) (stating that Hoover advocated for the Federal Home Loan Bank Act to improve liquidity).
sure qualified mortgages. Both institutions played a key role in laying the foundation for the modern mortgage market by introducing new practices like smaller down payments and longer amortization periods. These changes had the effect of lowering interest rates and making housing more accessible to the American public. The FHA’s policies served as a template for the mortgage insurance program the U.S. Department of Veterans Affairs (VA) established after World War II for 16 million returning servicemen. The net effect of the FHA’s and VA’s policies, combined with the pre-existing mortgage interest tax deduction, was to make homeownership much more economically feasible and attractive. The homeownership rate among households jumped from the mid-40%’s in the 1930s to over 60% by the late 1950s. Despite their collective success at increasing the national homeownership rate, these agencies engaged in and even helped create discriminatory practices like “redlining” that hurt African Americans, in particular.


25. See Kenneth T. Jackson, Crabgrass Frontier: The Suburbanization of the United States 196–97 (1985)) (crediting HOLC with first introducing amortized mortgages with payments spread out over the life of the loan); id. at 204–05 (discussing the FHA’s success in making mortgages more attainable).

26. Id. at 205 (“Quite simply, it often became cheaper to buy than to rent.”).

27. Schwartz, supra note 14, at 73.


29. The FHA expressly incorporated segregation into its underwriting standards, encouraging or tolerating the use of racially restrictive covenants and effectively deeming predominantly African American neighborhoods too risky to warrant mortgage insurance. Schwartz, supra note 14, at 73; Richard Rothstein, The Color of Law 83–99 (2017) (detailing FHA support for racial covenants). Similar evidence exists with respect to the VA. See Leonard S. Rubinowitz & Elizabeth Trosman, Affirmative Action and the American Dream: Implementing Fair Housing Policies in Federal Homeownership Programs, 74 NW. U. L. REV. 491, 514 n.88 (1979) (stating that the VA made no attempt to stop lenders whose loans it insured from discriminating by race); U.S. Commission on Civil Rights, Federal Civil Rights Enforcement Effort: A Report 177 (1971) (describing VA’s failure to prevent discrimination); Kevin Fox Gotham, Race, Real Estate, and Uneven Development: The Kansas City Experience, 1900–2000, at 66 (2014) (quoting Kansas City-area mortgage bank chairman from 1934 to 1965 for proposition that the VA [and FHA] would not insure housing loans unless there was a racial covenant involved). The evidence regarding HOLCs role in redlining is more ambiguous. Compare Rothstein, supra at 64 (noting that HOLC initiated the practice of coloring a neighborhood red to connote high-risk of foreclosure, and that “[a] neighborhood earned a red color if African Americans lived in it, even if it was a solid middle-class neighborhood of single-family homes”); Jackson, supra note 25, at 197 (suggesting that HOLC “initiated the practice of ‘red lining’”), with Amy E. Hillier, Redlining and the Homeowners’ Loan Corporation,
To purchase FHA-insured mortgages, the New Deal Congress established the Federal National Mortgage Association, or “Fannie Mae,” as a semi-private corporation. Congress later established two more institutions to help undergird the secondary mortgage market: the Government National Mortgage Association (Ginnie Mae) in 1968, which acquires and securitizes FHA- and VA-insured mortgages and other mortgages for federally subsidized housing developments, as well as the Federal Home Loan Mortgage Corporation (Freddie Mac) in 1970, which bought up conventional (non-federally insured) home loans from the savings and loans institutions collectively known as “thrifts.”

Over time banks came to replace thrifts as the primary residential mortgage lenders, a change that was accelerated by the collapse of thrifts in the late 1980s due to a combination of high interest rates, questionable deregulation, and some high-profile cases of corruption. In 1989, Congress bailed out many thrifts and simultaneously imposed new regulations that further reduced the thrifts’ role in the lending market. This contributed to a precipitous fall in multifamily housing starts from which the industry has never fully recovered. In recognition of thrifts’ receding role in lending for home purchases, Congress in 1992 established new oversight of Fannie Mae and Freddie Mac, which required HUD to set specific goals for their

---

29 J. Urb. Hist. 394, 397 (2003) (“A variety of evidence suggests that HOLC was not responsible for redlining.”), http://repository.upenn.edu/cgi/viewcontent.cgi?article=1002&context=cplan_papers.
30. Schwartz, supra note 14, at 75.
lending to low-income and underserved geographic areas. Some analysts blame HUD’s lending mandates at least in part for the subprime lending crisis that would ensue in the late 2000s, although the degree of culpability is hotly disputed. The net result of these post-New Deal federal programs was to make a primary mortgage market eminently possible, and the home-buying dream a reality, for millions of Americans. The home-owning percentage of American households would peak at just above 69% in 2005 before the bursting of the “housing bubble.” In Oregon, the peak hit 69% in 2004.

2. The Bubble Burst

A significant increase in subprime lending and mortgage securitization helped inflate housing prices in the mid-2000s. The bubble was slightly less pronounced, but still noticeable, in Oregon. In the Portland metro area, home prices rose more than 90% between 2000 and 2007. In late 2007, housing prices began declining nationwide in part due to rising delinquencies among subprime borrowers, a dynamic that led to a raft of foreclosures and billion-dollar losses on Wall Street. By 2009, the nation was knee-deep in its worst recession since the Great Depression. Housing

---


40. Schwartz, supra note 14, at 91.

prices declined precipitously in Oregon, although less so than in markets like Las Vegas or Miami.42 Central Oregon was hit particularly hard by the downturn.43 Foreclosure filings surged in Oregon, which at one point ranked third in the nation in the rate of such filings.44

In response to the bursting of the housing bubble, Congress passed housing legislation designed to stabilize Fannie Mae and Freddie Mac, allow for the refinancing of some subprime mortgages, and heighten regulation of the mortgage industry.45 In 2010, Congress created the Consumer Finance Protection Bureau (CFPB) and gave it authority to regulate mortgages.46 The CFPB has used this power to tighten eligibility standards and reduce subprime, “predatory” lending.47 As a result of tighter lending standards and lingering negative effects of the housing bubble’s burst, national homeownership in 2017 now stands just shy of 64%.48 Oregon’s homeownership rate as of 2016 was 62.6%.49

3. Federal Efforts to Combat Mortgage Discrimination

Sprinkled through the chronology of events presented above were additional federal efforts to bolster equality of access to home mortgage lending. In 1974, Congress enacted the Equal Credit Opportunity Act (ECOA) forbidding discrimination in lending on the basis of sex and marital status,50 which was expanded in 1976 to prohibit discrimination on the basis of race, color, religion, national origin, and age.51 In 1977, Congress passed

42. Id. For an excellent narrative of the lending and related practices that led to the Great Recession and their consequences, see The Big Short (Paramount Pictures 2015), which is a film adaptation of Michael Lewis, The Big Short: Inside the Doomsday Machine (2010).


48. U.S. Census Bureau, supra note 38.


the Community Reinvestment Act (CRA), which incentivizes banks and thrifts to lend money in areas that are underserved by conventional financial institutions.\textsuperscript{52} The CRA was designed to combat redlining and reduce racial inequities in access to conventional, lower-rate mortgages.\textsuperscript{53} Neither of these laws was a silver bullet, of course, but the CRA has led to increased lending to low-income and minority communities.\textsuperscript{54} Alternatively, some commentators and politicians blamed the CRA, along with HUD’s mandates on Fannie Mae and Freddie Mac, for contributing to the housing bubble of the 2000s;\textsuperscript{55} others flatly refute this account.\textsuperscript{56}

\textbf{B. Public Housing and Federal Assistance for Rental Housing}

In addition to greasing the wheels of the mortgage market for homebuyers, the federal government has played a significant role in the provision of rental housing. The pillars of federal involvement are financial assistance to public housing; housing choice vouchers (HCV, or Section 8);
project-based rental assistance; and the Low-Income Housing Tax Credit (LIHTC). Oregon relies on each of these tools in various proportions to provide affordable housing to its low-income population.

1. Public Housing

Despite the government’s efforts to make home ownership more attainable, in dense urban areas, many residents, particularly of lower income, could not afford to buy single-family homes. Condominiums as a legal form were not yet invented, and cooperatives emerged on a large-scale basis only in the 1930s and primarily in New York City.57 Hence, during the Depression the federal government stepped in to make rental housing more available and of higher quality in urban areas and beyond. Initially, the New Deal Public Works Administration (PWA) funded and built affordable housing projects.58 In 1937, Congress passed the Wagner-Steagall Housing Act, which provided federal funding for public housing construction but left administration of the program to local officials.59 The legislation made local participation optional, thus cementing the local control over land use established by zoning enabling acts that would eventually contribute to the problem of exclusionary zoning.60

57. The law underlying condominiums was either nonexistent or in flux until the Uniform Law Commission promulgated the Uniform Condominium Act in the 1970s. See Uniform Law Commission, Legislative Fact Sheet–Condominium Act, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Condominium%20Act (noting that the Act was promulgated initially in 1977); Julie D. Lawton, Unraveling the Legal Hybrid of Housing Cooperatives, 83 UMKC L. Rev. 117, 124 (2014) (“Condominium homeownership first arrived in the continental United States in the 1960s when Florida developers sought to capitalize on a Puerto Rican form of homeownership for Florida’s burgeoning retirement population.”) (citation omitted). In large cities like New York, the cooperative provided a more affordable form of unit ownership for lower- and middle-income residents. The first major projects emerged in the 1930s after the New York legislature passed the Limited Dividend Housing Companies Act of 1927. See Nat’l Coop. Law Ctr., A History of Housing Cooperatives at 2, http://nationalcooperativelawcenter.com/national-cooperative-law-center/the-history-of-housing-cooperatives/2/. In 1942, Congress changed the tax code to allow for the mortgage interest deduction for cooperatives as well, thus putting them on a par with more conventional real estate ownership. Id. at 3.


60. See A. Mechele Dickerson, Revitalizing Urban Cities: Linking the Past to the Present, 46 U. MEMPHIS L. Rev. 973, 982–83 (2016) (“Cities have used other methods, including exclusionary zoning laws, to keep public housing . . . out of higher-income neighborhoods.”).
Construction of public housing units accelerated with the passage of the Housing Act of 1949,\(^\text{61}\) growing from approximately 170,000 in 1949 to over a million by 1980,\(^\text{62}\) peaking at just over 1.4 million in 1990.\(^\text{63}\) Despite the lingering perception of public housing as tall high-rises, such structures account for only about 30% of the stock nationwide, with other forms including low-rise townhouses and row houses, midrise walk-up apartment buildings, semi-detached houses, and even single-family homes.\(^\text{64}\)

Today more than 3,000 local public housing authorities (PHAs) nationwide administer a total of 1.15 million units.\(^\text{65}\) Many are small authorities that operate 100 or fewer units.\(^\text{66}\) Oregon has 22 PHAs, which represent mostly counties (sometimes more than one when smaller counties combine together) and occasionally cities or city-county combinations.\(^\text{67}\) In total, Oregon’s PHAs provided 4,871 units as of August 2017.\(^\text{68}\) Hence, Oregon has only about 0.4% of the nation’s total public housing units, despite having about 1.25% of the nation's population.\(^\text{69}\)

Although public housing serves an undoubtedly crucial need, it has been beset by many problems since its inception, such as the concentration of poverty and deficient design, construction quality, and management of some projects.\(^\text{70}\) Already by the 1960s and 1970s, commentators began portraying public housing as an incubator of poverty, crime, and other social problems rather than as a source of stability or a step up the ladder of opportunity.\(^\text{71}\) The Republican takeover of Congress in 1994 gave critics of federal housing programs a prominent role in reshaping those policies, a perch


\(^{62}\) \textit{Schwartz, supra} note 14, at tbl. 6.1.

\(^{63}\) \textit{Id.}

\(^{64}\) \textit{Id.}


\(^{66}\) \textit{Id.}


\(^{68}\) Email from Laure Rawson of Portland HUD, Aug. 7, 2017 (on file with author).

\(^{69}\) These calculations include Puerto Rico and use 2016 U.S. Census estimates.

\(^{70}\) \textit{Schwartz, supra} note 14, at 167–76.

\(^{71}\) The televised implosion of the notorious Pruitt-Igoe housing complex in St. Louis in 1973 galvanized the simmering criticisms of public housing. \textit{See} Joseph Heathcott, \textit{Planning Note: Pruitt-Igoe and the Critique of Public Housing}, 78 J. Am. Planning Ass’n 450, 450 (2012) (noting that “accounts of high-rise public housing” from the 1960s and 1970s blamed “inept management, weak design, poor construction, or ungovernable tenants” for public housing’s failures); \textit{see also} Rothstein, \textit{supra} note 29, at 37 (explaining that the gradual exclusion of middle-income fam-
used to shift resources from expanding public housing toward merely preserving and redeveloping the existing stock.\textsuperscript{72} Congressional antipathy toward public housing culminated in the Faircloth Amendment of 1998, which effectively quashed the production of new public housing.\textsuperscript{73} 

Given Congress’s continued hostility to appropriating additional funding to renovate existing public housing, which is estimated to need $26 billion in capital repairs, HUD in 2012 sought and obtained congressional authorization for PHAs to convert some of their properties to Section 8 project-based contracts, which are discussed below; this conversion program is called “RAD” (Rental Assistance Demonstration).\textsuperscript{74} Home Forward—formerly known as the Housing Authority of Portland and the largest PHA in Oregon—has used RAD to convert several properties, containing hundreds of units, from public housing to project-based funding.\textsuperscript{75} Moreover, since 1999, Home Forward has operated as part of HUD’s pilot “moving to work” program, which allows the agency additional flexibility in allocating housing funds.\textsuperscript{76}

2. Tenant-based Vouchers—“Section 8”

Apart from public housing, the federal government funds the Housing Choice Voucher (HCV) program, frequently referred to as “Section 8,” which allows low-income, elderly, and disabled families to live in private housing paid for in part by a voucher administered by the local PHA.\textsuperscript{77} In total, HCV assists 2.2 million households and provides 41,568 units in Oregon.\textsuperscript{78} Oregon thus accounts for nearly 2% of the nation’s HCV inven-

\begin{itemize}
  \item SCHWARTZ, \textit{supra} note 14, at 164.
  \item Pub. L. No. 105-276, 112 Stat. 2461, § 519 (1998) (codified at 42 U.S.C. § 1437g (g)3(A) (2017)) (“Limitation on New Construction”). The Amendment only prohibited HUD funding for additional units, thus forcing PHAs to make up difference.
  \item Center on Budget and Policy Priorities (CBPP), Policy Basics: The Housing Choice Voucher Program, http://www.cbpp.org/research/housing/policy-
\end{itemize}
tory. Oregon is thus disproportionately weighted toward HCV and away from public housing.

HCV and other voucher programs give voucher holders more choice regarding where to live, although this choice can be highly constrained by rental prices, the availability of eligible properties, and housing discrimination, including discrimination against the use of HCVs where legal, as it was in Oregon until 2014. Before 2014, it was commonplace for Oregon landlords to discriminate blatantly against Section 8 recipients, especially in their advertisements. While such discrimination is now illegal in Oregon, the effectiveness of the prohibition remains in question. Moreover, rising post-Recession rents in Portland and beyond made it more difficult for Section 8 recipients to use their vouchers to afford market rents. In 2016, in response to skyrocketing rents, Home Forward drastically increased the amount its Section 8 recipients can spend on rent, invoking an authority known as “exception rents.”

Despite its shortcomings, compared to public housing, a much smaller percentage of HCV users live in economically distressed neighborhoods. HCV has been less effective, however, in combating residential racial segregation. Another advantage of vouchers as compared to public housing is that they are generally less expensive per unit. On the other hand, in ad-

---

79. SCHWARTZ, supra note 14, at 260. For a complete list of those states and localities that protect source of income from discrimination in housing, see Poverty & Race Research Action Council, Expanding Choice: Practical Strategies for Building a Successful Housing Mobility Program at 1–2, http://www.prrrac.org/pdf/AppendixB.pdf (Aug. 2017) (listing twelve states and numerous cities/counties in other states with such protections). In the vast majority of jurisdictions outside of Oregon, however, discrimination against HCV recipients remains legal.


83. SCHWARTZ, supra note 14, at 260.


85. SCHWARTZ, supra note 14, at 260.
dition to being of limited use in tight housing markets, vouchers are also not as useful for residents with special needs like large families, elderly, and disabled. Finally, just as Congress has underfunded public housing, the vast majority of PHAs have long voucher waitlists that are often closed to new applicants. Home Forward, for instance, last opened its wait list in September 2016, and only for five days; prior to that its wait list had been closed since 2012. Hence, as the Oregon housing market has heated up, money for the HCV program has not increased sufficiently.

3. Project-Based Vouchers and Rental Assistance

In addition to tenant-based vouchers, the HCV program also includes “project-based” vouchers (PBV), which are vouchers attached to a specific unit whose owner contracts with the local PHA to rent to low-income families. As of 2016, the PBV component of HCV served 140,000 households, constituting less than 7% of HCV recipients. In Oregon there are approximately 2,500 PBV units, with Home Forward accounting for 2,100 of these. Hence, in Oregon, PBV accounts for about 6% of the HCV housing stock.

Outside of the HCV system, the federal government also funds “project-based rental assistance” (PBRA), which assists 1.2 million households or 2 million persons. Unlike PBV, HUD directly administers PBRA rather than local PHAs. A majority of PBRA beneficiaries are elderly or disabled. PBRAs are subject to 20-year terms and many such projects’ terms have expired or are expiring soon. In Oregon, there are 9,708 PBRA housing units as of December 2017. Public housing, HCV, and PBRA constitute about

86. Id.
88. CBPP, supra note 78.
90. Email from Laure Rawson of Portland HUD, Dec. 15, 2017 (on file with author)
92. Id. at 3.
90% of the total households receiving federal rental assistance, with other, more specialized programs making up the remaining 10%.96

Through all of these rental assistance programs, the federal government makes rental housing more affordable for approximately 10 million people or 5 million households nationally.97 While this might seem like a large number, it is barely more than 3% of the nation’s population, about 4% of all households, and about 11% of renter households.98 By way of comparison, in 2015 approximately 32 million American households claimed the mortgage interest tax deduction.99 Moreover, the mortgage interest tax deduction directly costs the federal treasury more than $70 billion annually,100 whereas the total outlay for public housing and rental assistance was approximately $45 billion in 2014.101

Focusing on Oregon, there are approximately 56,000 public housing, HCV, and PBRA units in the state, out of a total of about 1.7 million hous-

---

97. Id. (noting that 10 million receive assistance); NLIHC, supra note 78 (noting that 4.8 million households receive assistance).
100. Will Fischer & Chye-Ching Huang, Mortgage Interest Deduction Is Ripe for Reform, CBPP, http://www.cbpp.org/research/mortgage-interest-deduction-is-ripe-for-reform (revised June 25, 2013) (noting that mortgage interest tax deduction costs “at least $70 billion a year”). At the time of this Article’s editing, Congress passed a bill, which President Trump signed on December 22, 2017, that reduces the amount of debt eligible for the mortgage interest tax deduction from $1 million to $750,000. H.R. 1, 115th Cong. (2017), § 11043. This change will undoubtedly reduce to some extent the total “cost” of the mortgage interest tax deduction.
101. Cong. Budget Office, Federal Housing Assistance for Low-Income Households, at 2 (Sept. 2015), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/50782-lowincomehousing-onecolumn.pdf (noting that in 2014 the federal government spent $18 billion on HCV, $12 billion on PBRA, $7 billion on public housing, and about $8 billion “for other housing programs”). This figure does not include LIHTC, discussed in Section I.B.4, infra, which was estimated to cost $7 billion in 2014. Id.
ing units. Thus, it can be inferred that about 3% of Oregon households receive some direct federal rental assistance. By contrast, over half a million, or about 27%, of all Oregon households claimed the mortgage interest tax deduction in 2015. Per household affected, the mortgage interest tax deduction—approximately $2,000—costs less than public housing and vouchers—approximately $9,400. But critics note that many households receiving the deduction are high income.

4. Low-Income Housing Tax Credit

The final significant way in which the federal government subsidizes affordable rental housing is through the low-income housing tax credit (LIHTC), a creation of the 1986 Tax Reform Act. The LIHTC allows investors in qualified rental properties to reduce their federal income taxes for ten years by somewhere between 4% and 9%. When initially created, the program required participants to guarantee 15 years of affordability; in 1990, that threshold was increased to 30 years. The federal government allocates credits to state agencies that administer the program in turn and may require even higher compliance periods, which in Oregon is now 60 years. The Oregon Housing and Community Services division (OHCS) administers the state’s LIHTC program. In 2016, Oregon was allocated $9.4 million in LIHTC credits.

102. For total housing units, see U.S. Census Bureau, Quick Facts: Oregon, https://www.census.gov/quickfacts/OR (last visited Dec. 4, 2017) (estimate of housing units as of July 2016).


104. See Fischer & Huang, supra note 100 (noting that, based on 2012 data, 77% of the benefits of the mortgage interest tax deduction went to households with an income greater than $100,000, and 35% went to households with incomes about $200,000); see also Henry J. Aaron, Shelters and Subsidies: Who Benefits from Federal Housing Policies? 53–60 (1972). Fischer and Huang also note that close to half of homeowners with mortgages, mostly those with lower or middle incomes, receive no benefit from the mortgage interest tax deduction. Fischer & Huang, supra note 100.


106. Schwartz, supra note 14, at 137.


110. See, e.g., 2016 Oregon QAP, supra note 107.
Since its inception, LIHTC has assisted in the development of more than 2.6 million housing units. Only 31-years old, the program helps fund twice as many units as public housing, which was established in the 1930s. In Oregon, LIHTC has funded the construction of about 650 projects, or almost 35,000 low-income housing units, from 1987 through 2015. Initial projects were subject only to a 15-year compliance period, so many might have been taken out of the program since their construction.

Just as with public housing, local communities ultimately control the placement of LIHTC projects through their zoning authority; as a result, such projects are “disproportionately built in majority nonwhite communities,” thus “helping to maintain entrenched racial divides” in housing. Further, notable instances of fraud in the program’s administration in South Florida have led journalists to question whether the program is adequately supervised. This cause for concern is buttressed by data indicating a decline in the number of LIHTC units built nationwide even as the total cost of the tax credit to the federal treasury has increased. Moreover,

111. Weiss, supra note 108, at 525.
112. Id. Of course, Congress kneecapped public housing in 1998 with the Faircloth Amendment. See supra note 73.
113. These data were obtained and sorted from HUD’s online LIHTC database. See https://lihtc.huduser.gov/; see also Oregon Sec’y of State Audit Report, OHCS: Critical Improvements Needed to Help Ensure Preservation of Affordable Housing for Low-Income Oregonians, at 7 (Dec. 2016), http://sos.oregon.gov/audits/Documents/2016-31.pdf (“In Oregon, 38,783 rental units were created or preserved” by LIHTC from its inception through 2014).
115. John Eligon et al., Program to Spur Low-Income Housing Is Keeping Cities Segregated, N.Y. TIMES, July 2, 2017, https://www.nytimes.com/2017/07/02/us/federal-housing-assistance-urban-racial-divides.html. Indeed, allegations of segregation in LIHTC project siting were front-and-center in a recent, high-profile Supreme Court case in which the Court held that the federal Fair Housing Act permitted disparate-impact claims against the state agency responsible for administering LIHTC. Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmtyys. Project, 135 S. Ct. 2507 (2015). This case is discussed further below; see infra note 139 and accompanying text.
117. Sullivan, supra note 116 (observing decline from 70,220 LIHTC housing units in 1997 to 58,735 in 2014).
the changes to the tax code passed by Congress in late 2017 will likely reduce significantly the production of affordable housing under LIHTC.118

C. Federal Efforts to Combat Housing Discrimination

Discrimination in the sale and rental of housing was rampant until at least the mid-twentieth century. Although Congress passed the Civil Rights Act of 1866 in the wake of the Civil War to ensure that “all citizens . . . have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property,”119 the judiciary interpreted this injunction as applying to state action only, thus neutering the law’s practical effect on rampant private discrimination.120 The first stirrings of antidiscrimination enforcement with respect to real property at the federal level came from the federal judiciary interpreting the Fourteenth Amendment. In the 1917 case of Buchanan v. Warley, the U.S. Supreme Court invalidated a Louisville ordinance that forbade blacks from living on majority-white blocks and vice versa.121 With racial zoning illegal, white, Christian homeowners of northern European extraction increased their reliance on privately enforced restrictive covenants to perpetuate residential discrimination against blacks, Asians, Jews, and others.122 In 1948, however, in the landmark case of Shelley v. Kraemer, the U.S. Supreme Court held that the enforcement of restrictive covenants by state courts violated the Equal Protection Clause.123

Private use of covenants and other forms of housing discrimination persisted after Shelley although some local and state jurisdictions passed laws limiting discrimination in housing on the basis of race, religion, and national origin.124 The Oregon legislature passed a fair housing law in 1957 that pro-

120. Civil Rights Cases, 109 U.S. 3 (1883).
121. 245 U.S. 60 (1917). Racial zoning schemes became quite popular in the South and “border states” in the 1910s after Baltimore was the first to enact such a regime. Rothstein, supra note 29, at 44–45.
122. Antero Pietila, Not In My Neighborhood 48–49 (2010) (describing the use of covenants to exclude blacks, Jews, Asians, Irish, and others); Gotham, supra note 29, at 38–39 (describing the rise of racial and other restrictive covenants in the second decade of the twentieth century as the “primary mechanism used by the emerging real estate industry to create and maintain racially segregated neighborhoods”).
124. Paul Diller, The City and the Private Right of Action, 64 STAN. L. REV. 1109, 1146 & n.170 (2012) (citing early municipal civil rights ordinances). The California legislature, for instance, passed the Rumford Fair Housing Act in 1963, prohibiting discrimination in the rental and sale of housing of more than four units on the basis
hibited discrimination in publicly subsidized housing; two years later the law was extended to prohibit discrimination by any person who, “as a business enterprise,” sells, leases or rents real property. 125 At the federal level, the push for a fair housing law was perhaps the toughest challenge of the 1960s civil rights movement, culminating in the passage of the Federal Fair Housing Act (FFHA) only after Martin Luther King, Jr.’s assassination in 1968. 126

The FFHA prohibited discrimination in the sale, rental, or advertising of real property on the basis of race, color, religion, or national origin, 127 with exceptions such as the “Mrs. Murphy” exclusion for live-in landlords or landladies leasing out four or fewer units. 128 In 1974, Congress added sex to the list of protected classes under the FFHA. 129 In 1988, Congress strengthened enforcement of the FFHA through the Fair Housing Amendments Act (FHAA). 130 The FHAA also expanded the coverage of the FFHA to include familial status and disabled individuals. 131


128. Pub. L. No. 90–284, § 803 (codified as amended at 42 U.S.C. § 3603(b)(2) (2017) (live-in landlord with four or fewer units)). The Act also excepts “the sale or rental of [a] single-family house shall . . . if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604(c) of this title.” Id. § 3603(b)(1).


130. Pub. L. No. 100-430, 102 Stat. 1619, 1625, § 8 (“Enforcement Changes”); ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW & LITIGATION § 4:5 (West 2017) (explaining how the 1988 FHAA strengthened the FFHA’s three primary enforcement mechanisms); id. § 23:1 (discussing enforcement in more detail); see also Hannah-Jones, supra note 126 (explaining how compromises in passing the 1968 law included weak enforcement mechanisms).

HUD has historically enforced the FFHA nationwide although it may delegate enforcement authority to state agencies that enforce “substantially equivalent” fair housing laws. From 2008 to 2016, HUD delegated enforcement to Oregon’s Bureau of Labor and Industries (BOLI), certifying it as enforcing “substantially equivalent” state fair housing laws. At BOLI’s request in 2015, the Oregon legislature granted BOLI discretion in how it responds to FFHA complaints, a move that HUD deemed to make Oregon law no longer “substantially equivalent” to federal enforcement procedure. Hence, in 2016, HUD ended BOLI’s enforcement contract. As a result, HUD employees supervised by the Seattle regional office now investigate discrimination complaints under the FFHA in Oregon.

Since its inception, the FFHA has included language that requires “[a]ll executive departments and agencies . . . [to] administer their programs relating to housing and urban development . . . in a manner affirmatively to further the purposes of this subchapter.” Grant programs administered by HUD, consistent with this requirement and other federal laws, require that participants certify, as a condition of receiving federal funds, that they will affirmatively further fair housing (AFFH). In 2015, the Obama administration sought to breathe new life into the AFFH requirement by promulgating a rule that requires recipient jurisdictions to engage in a more robust assessment of fair housing issues in their communities than required under prior regulations. A Supreme Court decision issued shortly before the rule’s issuance bolstered its legal standing by holding that the FFHA can be read to prohibit policies that have a disparate impact, not

133. 2015 Or. Laws ch. 609 (SB 380) (codified at OR. REV. STAT. § 659A.845 (2015) (changing commissioner “shall” prepare formal charges to “may” after finding of substantial evidence and failure to conciliate); see also Multifamily NW, 2016 Legislative Update (noting that it is “unclear how HUD will react” to the 2015 legislative changes giving “prosecutorial discretion” to BOLI).
135. See Multifamily NW, supra note 133; BOLI Brief: Technical Fixes to Maintain HUD Substantial Equivalency Status (SB 58 & SB 59), http://library.state.or.us/repository/2009/200905151103515/index.pdf (last visited Dec. 5, 2017) (noting that if BOLI cannot enforce federal fair housing law, HUD’s office in Seattle will investigate claims, resulting in longer waiting times and reduced accessibility for the complainants and respondents).
137. GPO at 42274, citing statutes.
just a discriminatory intent. In Oregon, Clackamas County was the first to complete its assessment of fair housing (AFH) under the new AFFH rule in 2016. In January 2018, the Trump administration announced a delay in the AFFH rule’s implementation, allowing those jurisdictions next in line until October 2020 or later to complete their required AFHs.

In sum, the federal government’s attempts at direct production of housing were short-lived. Instead, it settled on providing the financial means (e.g., grants, loans, rental supplements, and tax credits) for private, local public, and nonprofit sectors to produce rental housing for households of modest means. However, the amount of resources for low-income subsidized housing provided by the federal government has never been sufficient to meet the need. Historically, the federal government’s commitment to civil rights in housing has wavered over time, typically varying with the administration in power and the national mood. These conditions present a challenging environment for state and local governments to provide adequately for the housing needs of their residents. For Oregon, in particular, housing has become more unaffordable as federal funding has continued to prove insufficient to meeting the nation’s low-income housing needs.

II. Housing in Oregon: Planning and Land Use Regulation

Oregon’s modern land use system was created in the 1970s and 1980s. At that time, faced with the federal government’s failure to provide sufficient housing funds, states pondered how to address the housing needs of low-income residents. These residents often pay a disproportionate amount of their income on housing costs, live in substandard conditions, or survive without housing at all. A state must decide whether to leave housing to the “market” (distorted as it may be by real estate and zoning practices), incentivize affordable housing only, or take up the gap between what the market will provide and what is needed. At least since the 1920s, land use and zoning, matters critical to housing production, had been pri-

140. Clackamas AFH, supra note 134. The timing of Clackamas County’s AFH report was due to its timeline for completing a “Consolidated Plan” every five years. See Letter from Richard Swift, Director, Clackamas Cnty., Health, Hous., & Human Servs., to Bd. of County Comm’rs, at 4 (Sept. 15, 2016), http://www.clackamas.us/bcc/documents/businesspackets/bcc20160915.pdf (noting that the county would be among the first twenty-two jurisdictions in the nation to submit an AFH under the new AFFH rule).
marily a local matter, including in Oregon. As they reconsidered the state’s land-use policies in the 1970s and early 1980s, Oregon’s policymakers examined whether zoning could be a tool to both create conditions in which affordable housing can be created when subsidies are available and to nudge the private market to produce housing for households of modest means as well as the more lucrative upper end of the market.

This Part tells the story of how Oregon addressed these challenges through SB 100 in 1973 and beyond. Oregon’s land use system now contains unique housing requirements and expectations for state, regional, and local governments, and private parties. Unlike the practice in most states, which continue to delegate land use regulatory powers to local governments with few or no requirements, SB 100 established a long-standing system of state policy obligations to further multiple objectives.

Space does not allow a full presentation of the Oregon planning system here. Suffice it to say that in 1973 Oregon established the Land Conservation and Development Commission (LCDC), staffed by the Department of Land Conservation and Development (DLCD), to perform several functions:

(1) The adoption and revision of state land use policies (“Goals”) that are binding on regional and local (city and county) governments, which must incorporate those policies into their plans, and which in turn govern all non-federal public and private land use activities. This function also includes the adoption of binding administrative rules that detail goal requirements.

(2) The review of regional and local plans and regulations to assure those goals have been incorporated into those binding plans and a continuing review of amendments to those plans and regu-
tions, either on a periodic basis\textsuperscript{149} or as individual amendments are adopted locally, again to assure goal compliance.\textsuperscript{150}

(3) The power to enforce, thereby requiring local governments to adopt and apply plans and to undertake actions to carry out the goals.\textsuperscript{151}

In addition to these policy-making and administrative bodies, Oregon also provides for a unique system of review of most land use decisions through the Oregon Land Use Board of Appeals (LUBA), which has jurisdiction to review almost all regional and local land use decisions and some decisions by state agencies.\textsuperscript{152}

\textbf{A. Goal 10: Housing}

Housing is one of nineteen statewide planning goals and is set out in the appendix.\textsuperscript{153} The goal was adopted in 1974 as one of the original statewide planning goals and has been amended over time. However, the history of Goal 10 is more nuanced. SB 100 required that LCDC adopt statewide planning goals by the end of 1974.\textsuperscript{154} By December 1974, three drafts of those goals were proposed.\textsuperscript{155} None of those drafts contained a housing goal until about six weeks before the deadline when Betty Niven, the Chair of the State Housing Council,\textsuperscript{156} proposed a separate housing goal:\textsuperscript{157}

To ensure that fulfilling the other goals of the statewide land use plan will not unreasonably impact the supply of modestly priced housing.\textsuperscript{158}

\textsuperscript{149}. Id. § 197.628 to .646.
\textsuperscript{150}. Id. § 197.610 to .625.
\textsuperscript{151}. Id. § 197.319 to .335.
\textsuperscript{154}. Sec. 33, Ch. 80, Or. Laws 1973.
\textsuperscript{155}. LCDC Goal Adoption Files (1974) (on file with authors).
\textsuperscript{156}. The Oregon Housing Council was created in 1971 to provide a conduit for federal housing funds, primarily from the federal Department of Housing and Urban Development (HUD). The role of the Council and Division in general, and Niven in particular, is found in an unpublished paper by two academics from Portland State University, André Tremoulet & Sy Adler, \textit{Unlikely Alliance: How Oregon Addressed Exclusionary Zoning in the 1970s} (2010) (on file with authors).
\textsuperscript{157}. Betty Niven, Chair, Oregon State Housing Council, Memorandum to Land Conservation and Development Commission, dated November 26, 1974, entitled “Proposal for a statewide planning goal as an element in the statewide land use goals and guidelines” (on file with authors). The Oregon State Homebuilders Association also advocated for a separate housing goal at that hearing. See testimony of Fred VanNatta, Executive Director, Oregon State Homebuilders Association.
\textsuperscript{158}. Id. The language was not completely accurate, as there was no “statewide land use plan” envisioned by SB 100. Eventually, environmental organizations and others agreed on the need for a housing goal. Tremoulet and Adler note:
Niven advanced the idea that housing should have an equal status among the goals and that “modestly priced housing” should be a state policy objective. While Niven succeeded in convincing LCDC to adopt a statewide housing goal, it was the language and approach of another key stakeholder, the Oregon State Homebuilder’s Association, which provided the foundation of the goal’s approach and standards.

B. The Early Days of the Oregon Housing-Land Use Relationship

While LCDC adopted a Goal that specified that buildable lands would be inventoried and plans would “encourage” needed housing at price ranges and rent levels and include flexibility of housing location, type and density,\(^\text{159}\) the Commission failed to elaborate on its expectations regarding the details of type and density, given the political sensitivities of that elaboration at the local level.\(^\text{160}\) Instead, LCDC initially left that discretion up to local governments; most of its efforts were aimed at providing suggestions and housing toolkits to assist local governments in meeting their housing responsibilities.\(^\text{161}\)

One of the key aspects of the early history of the Oregon land use planning program is the creation of an alliance among environmental activists, conventional and manufactured homebuilders, realtors, planners, and affordable housing advocates. They supported policies to facilitate residential development inside urban growth boundaries as necessary complements to regulations to preserve farm and forest lands outside them. 1000 Friends of Oregon, the land use watchdog group that emerged from the mix of environmental organizations, especially OEC, OSPIRG and NEDC in 1975, played a leadership role in establishing the alliance. 1000 Friends attorneys began meeting with building industry and related groups as well as local government planners in 1976 to highlight the ways in which LCDC’s Goal 10 could and should be used to expand the supply of affordable housing by transcending the limits set by exclusionary zoning practices.

Tremoulet & Adler, \textit{supra} note 156, at 10.

\(^\text{159}\) Statewide Planning Goal 10, \textit{Or. Admin. R.} § 660-0150-0000(10) (2017). This approach was, and is, unique among American states. By requiring all cities to “encourage” all housing types in its plans and land use regulations, Oregon effectively prohibited exclusionary zoning—for example, no city could designate all residential uses to be single family homes on large lots, a practice of local governments in many other states. Later legislation, rules, and court decisions gave greater specificity to the obligation, but requiring all communities to provide housing for all income levels was embedded in Goal 10 from the beginning.

\(^\text{160}\) Tremoulet & Adler, \textit{supra} note 156, at 9–10. These authors cite the concerns of housing advocates to local opposition to state-imposed housing obligations.

\(^\text{161}\) An example of this approach was a document entitled \textit{Housing Planning in Oregon} (1979) by Richard L. Ragatz Associates, Inc., funded jointly by LCDC and the State Housing Council. While helpful to local governments in a technical sense, \textit{Housing Planning in Oregon} failed to move the housing needle much locally.
An early key housing issue under the SB 100 regime concerned local regulations of manufactured, or “mobile” homes.162 In 1977, a Clackamas County prohibition on “trailer homes” was interpreted to include mobile homes.163 The Oregon Court of Appeals reversed that interpretation, finding it unsupportable.164 However, the Oregon Supreme Court, by a vote of four to three, upheld the county’s interpretation.165 The decision caused 1000 Friends of Oregon, a land use advocacy organization, to suggest that unreasonable exclusion of manufactured housing could violate Goal 10.166 Representatives of the manufactured housing industry redoubled their efforts to assure that its housing product would be treated equally with conventional housing.167 The discussions with DLCD staff had previously met with some success when the Commission approved a “policy paper” on housing in August 1978 stating:

Where a need has been shown for a particular type of housing, it should be permitted outright in some zones, although it may be a conditional use in other zones. Care should be taken to remove vague approval standards from zoning ordinances.168

so that it seemed will, rather than knowledge, was the problem. While there was no overtly racial bias present in the land use regulations of most Oregon communities, the typical approach for suburban areas was to have larger lot sizes that had the net effect of exclusion. See discussion on the evolution of the “St. Helens policy,” infra note 168.

162. Tremoulet & Adler, supra note 156, at 1.
163. Clackamas County Zoning Ordinance § 3.2. For the interpretation that deemed a mobile home to be a prohibited “trailer house,” see Clackamas County v. Dunham, 579 P.2d 223, 224–25 (Or. 1978).
165. Dunham, 579 P.2d at 223. In that same year, the Oregon Supreme Court also upheld the denial of a conditional use permit for a manufactured home in Anderson v. Peden, 587 P.2d 59 (Or. 1978).
166. Tremoulet & Adler, supra note 156, at 12.
167. Industry representatives met with the DLCD Director and had earlier caused legislation to be introduced to remove some of the local land use limitations and prohibitions affecting manufactured housing. Tremoulet & Adler, supra note 156, at 11–12.
168. Id. at 13. The authors also note a relatively obscure case before LCDC where this policy was applied, Seaman v. City of Durham, 1 LCDC 283, 289–90 (1978), which provided precedent for future LCDC actions. Seaman directly influenced the “fair share” and “least cost housing” principles that became the foundation of Oregon Housing Planning Law and found their way as well into the Mt. Laurel line of cases in New Jersey. Carl Abbott, Deborah A. Howe & Sy Adler, PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION 102–04 (1994) at 102–04. However, even before these policies were formalized in administrative rules, LCDC had a consistent body of precedent from the cases and plan acknowledgment proceedings that came before it as to regional fair share obligations, clear and objective standards for permitting and upzoning, and adequate inventories of buildable lands. 1000 Friends of Oregon v. City of Lake Oswego, 2 LCDC 138, 145–46 (1981).
However, LCDC had previously failed to adopt formally more detailed policies to carry out Goal 10. The legislature then passed legislation in 1981 that established specific housing obligations.\(^\text{169}\) Among other things, the legislation provided that:

1. Implementation and enforcement of comprehensive plans is deemed to be a matter of statewide concern;\(^\text{170}\)

2. The key terms “buildable lands” and “needed housing” were defined by statute;\(^\text{171}\) and

A further version of this precedent was adopted by LCDC and called the “St. Helens Policy,” as it originated in an acknowledgment of the City of St. Helens, Oregon. As set forth below, that document stated policy that would ultimately become part of Oregon’s “needed housing” legislation:

Where a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, housing types determined to meet that need shall be permitted in a zone or zones with sufficient buildable lands to satisfy that need. This policy shall not be construed as an infringement on a community’s prerogative to 1) set approval standards under which a particular housing type is permitted outright, 2) impose special conditions upon approval of a specific development proposal, or 3) establish approval procedures. However, approval standards, special conditions, and the procedures applicable to both 1) must be clear and objective and, 2) must not have the effect, either of themselves or cumulatively, of discouraging, such as through unreasonable cost or delay, the needed housing type.

Files of Land Conservation and Development Commission re: Statewide Planning Goal 10, Part V, References, #1, St. Helens Policy.


170. OR. REV. STAT. § 197.013. The purpose of this statute was to avoid “home rule” type arguments on the part of local governments. Beginning in 1980, the legislature had already begun to regulate the use of moratoria to limit residential or other construction (see id. § 197.505 to .540), so that preemption had already been asserted in the housing context.

171. Id. OR. REV. STAT. § 197.295(1) defined “buildable lands” as those lands in urban and urbanizable areas “that are suitable, available and necessary for residential uses,” including both vacant lands and developed land “likely to be redeveloped.” The starting point of housing obligations was a “buildable lands inventory” of those lands that could be built upon to be used as a basis for planning and zoning sufficient land to meet housing obligations under the goal and state legislation. Determining buildable lands is the first step in the housing process. OR. ADMIN. R. § 660-008-0010. For local governments in the Metro region, there is a specific calculus for determining buildable lands. See OR. ADMIN. R. § 660-007-0045.

On the other hand, with some exemptions for smaller jurisdictions, “needed housing” included those housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent lev-
3. Specific obligations on local government, including:
   a. Planning and zoning sufficient lands to fulfill demonstrated housing needs;\textsuperscript{172}
   b. Using clear and objective standards during the permit process for needed housing;\textsuperscript{173} and
   c. Utilizing uniform statewide placement standards for manufactured homes located outside manufactured home parks.\textsuperscript{174}

In 1983, the legislature continued to promote the inclusion of less costly housing types by outlawing city and county charter restrictions that prohibited attached, multifamily, and manufactured homes, as well as government-assisted housing.\textsuperscript{175} In addition, the legislature declared that certain mobile home or manufactured dwelling parks\textsuperscript{176} and farmworker housing\textsuperscript{177} were also “needed housing.” These obligations have now been reflected in the current version of Goal 10 and in the housing administrative rules adopted by LCDC to implement that goal.

C. Housing Administrative Rules

Oregon courts have consistently ruled that state agencies may not adopt binding policy in any other way but the adoption of administrative

\textsuperscript{172} Or. Rev. Stat. § 197.307(3) provides:

When a need has been shown for housing within an urban growth boundary at particular price ranges and rent levels, needed housing shall be permitted in one or more zoning districts or in zones described by some comprehensive plans as overlay zones with sufficient buildable land to satisfy that need.

\textsuperscript{173} Id. § 197.307(4) to (7). With some exceptions, clear and objective standards must be an applicant’s option, although local governments may also offer a “discretionary track,” perhaps with additional density.

\textsuperscript{174} Or. Rev. Stat. § 197.307(8). These standards include placement, minimum area, siding, and carports.

\textsuperscript{175} Following a successful state action to invalidate a charter requirement that restricted multifamily housing in Forest Grove in State v. City of Forest Grove, 9 Or LUBA 92 (1983), the legislature in that same year enacted the present Or. Rev. Stat. § 197.312(1), prohibiting this and similar local charter provisions. The legislature also added government-assisted housing to the list of needed housing. See id. § 197.303(1)(b) and 197.307(2).

\textsuperscript{176} Id. § 197.303(1)(c). The legislature has defined “manufactured dwelling park,” “manufactured dwelling,” and “mobile home park” in id. § 197.295(2), (4), and (5), respectively, to avoid ambiguity. The “needed housing” status requires that these uses comply with id. § 197.475 to .490. Id.

\textsuperscript{177} Id. § 197.303(1)(e). Or. Rev. Stat. § 197.307(1) terms the provision of farmworkers housing to be a matter of statewide concern and sets limits on local regulation of such housing.
rules. To assure that the needed housing legislation and Goal 10 would be implemented, LCDC adopted two sets of administrative rules that would have the force and effect of law to supersede the informal rules embodied in policy papers that had not formally been adopted by rule.

One set of rules was adopted in 1982 concerning overall interpretations of Goal 10. To assure that the housing needs of the citizens of the state were met, comprehensive plans for urban areas were required to allocate lands within urban growth boundaries (UGBs) for demonstrated housing needs by type and density range. Once sufficient lands were justified and designated in local comprehensive plans, rezoning those lands to the maximum ultimate residential densities must generally be undertaken.

178. Burke v. Children’s Servs. Div., 607 P.2d 141, 149 (Or. 1980) (holding that Division program may be terminated “only by proper promulgation of a rule to that effect”).

179. OR. ADMIN. R. § 660-008-0000(1) states the purpose of these rules:

The purpose of this division is to ensure opportunity for the provision of adequate numbers of needed housing units, the efficient use of buildable land within urban growth boundaries, and to provide greater certainty in the development process so as to reduce housing costs. This division is intended to provide standards for compliance with Goal 10 “Housing” and to implement ORS 197.303 through 197.307.

Id.

180. OR. ADMIN. R. § 660-008-0010 provides:

The mix and density of needed housing is determined in the housing needs projection. Sufficient buildable land shall be designated on the comprehensive plan map to satisfy housing needs by type and density range as determined in the housing needs projection. The local buildable lands inventory must document the amount of buildable land in each residential plan designation.

In turn, buildable lands that could be candidates for residential designation were described more in terms of what was excluded, i.e., land constrained by physical hazards or significant building constraints, or subject to protection under other goals.

The obligations were made complete by OR. ADMIN. R. § 660-008-0020(1) which requires:

Plan designations that allow or require residential uses shall be assigned to all buildable land.

... The plan designations assigned to buildable land shall be specific so as to accommodate the varying housing types and densities identified in the local housing needs projection.

For more on UGBs in Oregon’s land-use system, see infra notes 200–03 and accompanying text.

181. Id. OR. REV. STAT. § 660-008-0025 provides that the rezoning obligation may be deferred, but only if the plan contains a justification for the rezoning process and policies that explain how this process will be used to provide for needed housing and allows for rezoning under “clear and objective conditions.” Thus, deferral
In any event, there is a level of certainty that housing obligations will be met.\textsuperscript{182}

Another set of administrative rules, originally adopted in 1981,\textsuperscript{183} applied only to the Portland region and is commonly known as the Metropolitan Housing Rule. These rules applied more specific housing requirements to that region and dealt with conflicts with the more general rules.\textsuperscript{184} These rules require specific clear and objective approval standards and procedures for development of residential lands\textsuperscript{185} and contain a specific calculus to determine “buildable lands” on a regional basis.\textsuperscript{186} In addition, local governments within the Portland region were required to consider use of manufactured homes as part of their housing mix,\textsuperscript{187} to meet a specific requirement on a city-by-city basis for increased density depending on the city’s population and distance from the center of the region;\textsuperscript{188} and to achieve a general density mix so that half of new residential construction is multifamily or single-family attached.\textsuperscript{189} The Metropolitan Housing Rule also provides for regional coordination of these obligations by the regional government, Metro.\textsuperscript{190}

\textbf{D. Lethe and Phobos}

Goal 10, its implementing administrative rules, and Oregon’s needed housing legislation combine to provide significant potential for ascertain-
ing and meeting housing needs for homeowners and renters. The actual experience, however, has been more complicated. There has been significant litigation regarding the failure of local governments to apply clear and objective standards and procedures to needed housing.\textsuperscript{191} Another significant decision required a city to explain how it met its housing needs when it approved a large tract of residential land for a hospital.\textsuperscript{192} Still another found a city ordinance requiring landlord payments to manufactured home park homeowners in the event of park closure to be consistent with state housing policies.\textsuperscript{193} On the other hand, there have been disappointments for affordable housing advocates. In the Portland region, a local government undertaking a significant reduction in density was allowed to have that loss effectively deferred to a time when the regional urban growth boundary was to be re-examined.\textsuperscript{194} Other cases have turned on the scope of statutory obligations and the sequence of the needed housing process, rather than issues of principle.\textsuperscript{195}

While Oregon has done a decent job of prohibiting classical exclusionary zoning through its use of Goal 10,\textsuperscript{196} its administrative rules, and the needed housing statutes,\textsuperscript{197} those prohibitions do not affirmatively provide housing. Indeed, regulations by themselves do little to place additional housing on the ground.\textsuperscript{198} The laws are there to require local governments to plan and zone sufficient lands for sufficient numbers of affordable homes and provide the metrics for evaluating the sufficiency of their efforts. Why have these laws

\textsuperscript{191} Regarding the use of discretionary standards and interpretations that had the effect, intended or otherwise, of keeping people out, see, e.g., Rogue Valley Ass’n of Realtors v. City of Ashland, 970 P.2d 685 (Or. Ct. App.), \textit{review denied} 328 Or. 594 (1999) (ambiguous standards); Parkview Terrace Dev. LLC v. City of Grants Pass, 70 Or. LUBA 37 (2014) (code interpretations); Homebuilders Ass’n of Lane Cnty. v. City of Eugene, 41 Or. LUBA 370 (2002) (ambiguous standards); Multi/Tech Eng’g Servs. v. Josephine Cnty., 37 Or. LUBA 314 (1999) (manufactured housing park application); Creswell Court, LLC v. City of Creswell, 35 Or. LUBA 234 (1998) (manufactured housing park standards).

\textsuperscript{192} Jaqua v. City of Springfield, 91 P.3d 817 (Or. Ct. App. 2004).

\textsuperscript{193} Thunderbird Mobile Club LLC v. City of Wilsonville, 228 P.3d 650 (Or. Ct. App. 2010).


\textsuperscript{196} \textit{See supra} note 168 (discussing the “St. Helens policy”).

\textsuperscript{197} \textit{See discussion of the 1981 needed housing legislation at notes 168, 171, 175–77, and 180 and accompanying text, supra.}

\textsuperscript{198} Some do, however. In 2016, the Oregon Legislature authorized (in limited circumstances, however) the use of “inclusionary zoning,” i.e., the set aside of a certain number of housing units to be used for low or moderate-income housing. Ch. 59, Or. Laws, 2016.
not led to the production of enough housing affordable to households with low and moderate incomes? The Greek words *lethe* (forgetfulness) and *phobos* (fear) help describe the situation. There is forgetfulness of—or just willful ignorance toward—the situations in which lower-income people find themselves involved, the housing obligations we have imposed on ourselves including associated costs, and the need to meet these obligations in our own neighborhoods. There is the fear of change, of people different than ourselves, and of losing what we cherish in our surroundings. These fears make many residents resistant to change and unwilling to support public officials who seek to follow the law and their obligations. 199

As a final matter, it must be noted that one of the reasons frequently asserted for higher housing costs in Oregon—and the Portland metropolitan area in particular—is the UGBs established by SB 100’s land-use system.200 There is a voluminous economic and planning literature on this subject, and it is beyond the confines of this article, and its authors’ expertise, to engage

---

199. While LCDC has the power to direct local governments to meet the goals under OR. REV. STAT. §§ 197.319 to .335, it is often politically inconvenient for it to do so. Such enforcement may cause the loss of support for the state’s land use program from urban constituencies since remedies for noncompliance include state takeover of local programs and loss of state-shared revenues. *See also* Brad Schmidt, *Low-Cost Housing Shut Out Amid Riches of Lake Oswego and West Linn: Locked Out, Part 3*, OREGONIAN, June 5, 2012, http://www.oregonlive.com/portland/index.ssf/2012/06/amid_abundance_of_lake_oswego.html (noting that the Portland area’s regional government in charge of land-use planning, Metro, “could have flexed some muscle” in its allocation of millions in transportation funds to force wealthy suburbs to plan for more affordable housing, but failed to do so). Goal 14 requires urban areas to have a long-term land supply for urban expansion that is regularly reviewed, so that in a periodic review of the sufficiency of available housing lands, the perennial question for growing areas is whether to grow “up,” by increasing density or “out,” by expanding the UGB. For the Portland Metropolitan Region, Oregon law requires such reviews at least every six years. *See OR. REV. STAT. §§ 197.298 and .299 (2015).*

200. The notion of an urban growth boundary (UGB) is a product of LCDC’s Goal 14, Urbanization. *See OR. ADMIN. R. § 660-015-0000(14).* Goal 14 provides that UGBs “shall be established and maintained by cities, counties, and regional governments to provide land for urban development needs and to identify and separate urban and urbanizable land from rural land.” *Id.* The UGB must include all lands needed or projected to be needed for urban uses (including housing that meets the requirements of Goal 10) over a twenty-year period. All cities must adopt UGBs, but in the Portland region, the elected regional government, “Metro,” establishes the UGB. *Id.* For discussions of the dynamics and effectiveness of the Urbanization Goal, see Edward J. Sullivan, *Urbanization in Oregon: Goal 14 and the Urban Growth Boundary*, 47 URB. L. 165 (2015) (general description of the use of UGBs in Oregon), and Edward J. Sullivan, *Urban Growth Management in Portland, Oregon*, 93 OR. L. REV. 455 (2014) (focused discussion of UGB use in the Portland region).
with this literature in depth. Nonetheless, it is worth noting that while the evidence shows that UGBs raise land prices within the boundary, the evidence does not clearly show that UGBs raise housing prices therein if zoning permits sufficiently high degrees of density. Alternatively, even in metropolitan areas with no UGBs, housing prices may become extremely unaffordable due to zoning limits on density. This is because forces of agglomeration still drive employment and amenities to urban centers, and the transportation costs of reaching jobs and amenities there are significant. Hence, if the zoning codes within Oregon’s UGBs are permitting sufficiently dense housing, then the UGBs themselves should not be driving up housing costs. This dynamic reinforces the essential need for higher levels of residential density under the SB 100 system, particular when UGBs are not expanding.

III. The Evolution of Housing Conditions in Oregon Since 1974

The development and adoption of Goal 10 in late 1974 was in part a response to the housing conditions and challenges that existed at that time. But times change, and so has Oregon’s housing environment. This section examines three dimensions of the economic and social milieu of the mid-

201. For research on the UGB’s effect in Portland and Oregon, see, e.g., Daniel P. Bigelow & Andrew J. Plantinga, Town Mouse and Country Mouse: Effects of Urban Growth Controls on Equilibrium Sorting and Land Prices, 65 REGIONAL SCI. & URB. ECON. 104 (2017) (finding that UGBs in the Willamette Valley increase housing prices outside of UGBs but offer other benefits such as the preservation of open space); Myung-Jin Jun, The Effects of Portland’s Urban Growth Boundary on Housing Prices, 72 J. AM. PLANNING ASS’N 239 (2006) (finding no increase in housing prices for residences within the UGB and citing other research on Portland). For research on UGB’s effects elsewhere, see, e.g., Shishir Mathir, Impact of Urban Growth Boundary on Housing and Land Prices: Evidence from King County, Washington, 29 HOUS. STUDIES 128 (2014) (concluding that when UGBs are implemented in conjunction with planning processes, they do not necessarily increase housing prices); Seong-Hoon Cho et al., Urban Growth Boundary and Housing Prices: The Case of Knox County, Tennessee, 38 REV. REGIONAL STUDIES 29 (2008) (finding that after the imposition of a UGB, home prices within it are higher than those without, everything being equal).

202. E.g., Mathir, supra note 201.

1970s in Oregon and the Western Region and considers how they changed over time and the implications for Goal 10. The dimensions include Oregon’s population, its expectations and preferences for housing, and the share of income used to pay for it. Where appropriate, Oregon data are compared to their national counterparts.

A. Population Dynamics

In the four decades between 1975 and 2015, Oregon experienced population growth, increasing racial and ethnic diversity, and shrinking household size. These factors play a role in the quantity and types of housing Oregon communities require to meet the needs of current and future households.

Oregon’s annual population growth has steadily outpaced the nation’s since 1950, despite the efforts of those, like Tom McCall, governor from 1967 to 1975, to urge those from out of state to visit but not stay. In the seven decades since 1950, Oregon’s population increased by 2.5 times, while the nation’s population slightly more than doubled. Oregon’s population count on April 1, 2010, was 3,831,074, and the state is expected to reach 4.3 million by 2020. Measured differently, Oregon’s rank of population by state increased from 32 (of 48) in 1950 to 27 (of 50) in 2010. During this time period, the state’s population became significantly more urban than rural.

A major component of population growth in Oregon has been net in-migration to the state during periods of economic expansion. During the 1980s, an economic recession combined with restrictions on timber harvests led to a period of net out-migration, particularly from rural areas of the state. In the next decade, however, net migration accounted for nearly three-fourths of the population change, but declined to 51% during the recession of the 2000s. According to the Oregon Office of Economic Analysis, migration is expected to account for more than two-thirds


206. OEA, supra note 204, at 1–2.

207. Id. at 1. Indeed, as of 2017, the state’s population is estimated to be 4.14 million. See Portland State University, Population Estimates and Reports (click on “Download Excel file” under “Preliminary Population Estimates, July 1, 2017”), https://www.pdx.edu/prc/population-reports-estimates.

208. These numbers are based on historical U.S. Census data.

209. See Portland State University, Population Research Center, Regions: Urban and Rural Population, http://roadto4million.research.pdx.edu/roadto4million/urban-and-rural-population/urban-and-rural-population (last visited Dec. 6, 2017) (showing that in 1950 Oregon’s rural population exceeded its urban population, but by 2010 the urban population was more than four times the rural population).
of the state’s population growth from 2010 to 2020. Figure 2 depicts the role of net migration as a component of Oregon’s population growth.

Net migration has been a robust contributor to recent population growth in the Portland metro region in particular. From 1980 through the present, Portland has been a key destination for young, college-educated adults, ranking consistently among the top eight cities for this component of population change. Presumably, not all these young people have come to Portland to “retire.” Indeed, this influx into the state’s largest metropolitan region has set the stage for rising incomes and rising housing prices, as well as gentrification and displacement of existing lower income residents.

In-migration has been accompanied by growth in racial and economic diversity. As Figure 3 below shows, Oregon’s growth in the share of population who identified as being any race other than white closely paralleled that of the U.S. from 1970 through 2015. While both the nation and the state became more diverse over those four and a half decades,

210. OEA, supra note 204, at 5.
212. PORTLANDIA episode 1 (2011).
Oregon went from very little racial diversity to more than five times its 1970 share of people of color by 2015. Currently, Oregon’s second largest racial group after white is two or more races (4.1%), followed by Asian (4.0%). In contrast, the nation’s second largest racial group is African American or Black (12.6%), followed by Asian (5.1%).

Oregon and the United States have also experienced a growth in the Latino population. As Figure 4 below shows, the share of Oregon’s population who identified as being Latino or Hispanic increased more than sevenfold from 1970 to 2015. By 2015, one in eight Oregonians identified as Latino. Children and young adults with larger-than-average family sizes form a large share of the Latino population in Oregon. Thus, Latinos have contributed to population growth not only through migration but also through a relatively higher birthrate. Planning for adequate housing (particularly rental housing) for this young and growing population of larger families is one of the factors that should be considered by Oregon’s jurisdictions. Moreover, given its demographic profile in Oregon, the Latino population is particularly susceptible to familial status discrimination, on top of any ethnic discrimination in housing it may experience.

Despite the growth in Oregon’s Latino population, the state’s average household size has decreased over the last 40 years. As Figure 5 shows,

---

the average size of a household in Oregon went from 2.94 persons in 1970

**Figure 3**

*Share of Population That Identifies with a Race Other Than White, 1970–2015*


**Figure 4**

*Share of Population that Identifies as Latino or Hispanic, 1970–2015*

to 2.47 persons in 2010,\textsuperscript{214} a decrease of 16%. Oregon’s shrinking household size mirrored that of the nation. Smaller average household size suggests a need for smaller housing units. Not surprisingly, the share of households with children under 18 years of age in Oregon decreased as well, from 37.8% in 1980 to 29.4% in 2015.\textsuperscript{215}

In summary, since 1970 Oregon’s population has changed in ways that have implications for housing. The population has doubled and grown more diverse, and average household size has shrunk. To accommodate these changes, the kinds of housing that was built in the last four decades should have included options such as the following:

- Smaller houses for smaller households
- Flexible living arrangements for multigenerational households
- Larger rental units for young families
- Live-work spaces to capture the entrepreneurial talents of immigrants and long-term residents
- In places where economic displacement is an issue, opportunities for long-term residents to remain in their communities.

But, as the next section explains, those needs were largely unmet by the kinds of new housing that was built in Oregon since the 1970s.

\textbf{B. Housing Changes}

As in the rest of America, Oregonians’ tastes and expectations in housing changed substantially over the past four decades. In general, the trend has been toward the construction of larger single-family detached homes with features intended to provide higher levels of comfort and privacy. These features likely contribute increases in the cost of new housing built for sale. This section analyzes changes in housing built between 1975 and 2015, using data for the West as a proxy for Oregon-specific data, because historical information about Oregon is not consistently available for the period studied.\textsuperscript{216}

\textsuperscript{214} Average Household Size, 1970-2010, Oregon, Social Explorer, supra note 4.

\textsuperscript{215} Family Type by Presence and Age of Own Children Under 18, 1970–2010, Oregon, Social Explorer, supra note 4.

\textsuperscript{216} The West Region of the U.S. Census Bureau consists of the Pacific Division (Washington, Oregon, California, Hawaii, and Alaska) and the Mountain Division (Arizona, Colorado, Idaho, New Mexico, Montana, Utah, Nevada, and Wyoming). U.S. Census Bureau, Census Regions and Divisions of the United States, https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf (last visited Dec. 6, 2017). Indeed, the lack of Oregon-specific housing data has been a source of frustration to the Oregon Home Builders Association and others for years. See email from Jon Chandler, CEO, Oregon Home Builders Ass’n, Dec. 11, 2017 (on file with authors) (noting that there is no central repository of housing data in Oregon, including the number of building permits issued, and that
In the West, the median size of a new single-family home built for sale in 1975 was 1,490 square feet. By 2015, the median size of a new single-family home was more than one and a half times as large, at 2,446 square feet. The figure below shows a trend towards larger homes over the 40-year period.

Evidence also suggests that new single-family homes tended to incorporate more costly features over time. For example, the share of new homes built with air conditioning in the West rose from 30% in 1975 to 79% in 2015.217 Similarly, the share of new houses with two and a half bathrooms or more nearly quadrupled, growing from 20% in 1975 to 78% in 2015.218 Increasing the number of bathrooms drives up the cost of constructing a new home, because bathrooms are typically the second most costly room to build per square foot, after a kitchen.

Oregon’s single-family homes have become more spacious and more luxurious since the adoption of Goal 10, despite shrinking household sizes. Regardless of what local jurisdictions planned for, this outcome draws into question whether the full range of housing types that met the needs of existing and future residents were being constructed. It appears that the homebuilding industry focused production on the market at the

---

218. Id. (click on “Bathrooms” data).
more spacious and luxurious end of the spectrum, and that planning efforts at the state and local level did not change that tendency sufficiently.

C. Housing Affordability

Goal 10 also requires that jurisdictions adopt plans that “encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households” as Goal 10 provides.219 Thus, changes in housing affordability are an important measure of the success of Goal 10. This section examines the affordability of rental and owner-occupied housing in Oregon from 1970 to the present.

A rule of thumb is that renters are considered housing cost-burdened if they spend 30% or more of their gross monthly income for housing costs. In actuality, households with extremely low incomes cannot afford to spend even 30% of their income on housing costs because if they did, they would not have enough income remaining for other essentials like food and clothing. Nevertheless, because it is a commonly accepted standard, Figure 7 depicts the growing share of Oregon renters who were housing cost-burdened from 1970 through 2015. In 1970, approximately 32% of renters were housing cost-burdened; by 2015, slightly more than half were.

From 2000 to 2015, the share of Oregon renting households considered to be severely housing cost-burdened because they spent 50% or more of

219. See Appendix.
their income on housing costs rose from one in five to more than one in four. Similar data on severe housing cost burden were not available for earlier decades.

Not surprisingly, the cost of owning a home rose as well. In 1970, the average value of an owner-occupied home was 1.6 times the average family income in Oregon.\(^{220}\) In 2015, the median value of an owner-occupied home was 2.9 times the average family income in Oregon.\(^{221}\) Figure 8 shows that the median sales price for a new home in the West Region was both higher than that of the United States and more volatile over time.

Thus, it appears that, on average, both rental and owner-occupied housing became significantly less affordable since the adoption of Goal 10. The harshest impact of the lack of affordability fell on those who could afford it least, including households with extremely low incomes, communities of color, older adults on fixed incomes, and people with disabilities who face limited accessible housing options.

---

\(^{220}\) Median House Value for All Owner-Occupied Units, Oregon, 1970, Social Explorer, supra note 4; Median Household Income, Oregon 1970, Social Explorer, supra note 4.

\(^{221}\) Median House Value for All Owner-Occupied Units, Oregon, 2015 (5-Year Estimates), Social Explorer, supra note 4; Median Household Income, Oregon, 2015 (5-Year Estimates), Social Explorer, supra note 4.
Until 2016, Oregon jurisdictions were prohibited from limiting the cost of housing, whether through rent control or mandatory inclusionary zoning.222 The principal tools that they had at their disposal were land use and zoning controls, including ensuring that there was a sufficient quantity of multifamily-zoned land and for smaller homes on smaller lots. Communities could also offer financial and other incentives, but, as of 1990, a voter-approved amendment to the Oregon Constitution called Measure 5 limited real estate property tax increases and constrained the budgets of cities and counties. Nevertheless, planners, housing providers, and advocates continued to look for solutions. It is to those ideas that this article now turns.

IV. Conclusion: The Search for Solutions

Goal 10 poses two interrelated planning challenges for local comprehensive plans and implementing codes: to provide for housing of a variety of types, densities, and locations, and to provide for housing that Oregon households can afford. Within the last decade, urban planners have redoubled their efforts to increase the variety of housing types in Oregon communities. Nationally, there has been a movement to reclaim and sti-

---

222. While rent control remains prohibited by state law, see Or. Rev. Stat. § 91.225 (2017), the ban on inclusionary zoning at the local level was relaxed in 2016. See supra note 198.
mulate the production of “missing middle” housing—housing somewhere between traditional single-family detached suburban homes and large apartment complexes—that used to be built in American cities before the rise of middle-class suburbs after World War II. These include housing types such as duplexes, triplexes, four-plexes, multiplexes, bungalow courts, courtyard apartments, townhouses, and live/work housing. As cities such as Bend and Portland have updated their comprehensive plans and codes, they have incorporated some of these options into the mix, although not to the extent necessary to make a significant dent in the housing affordability problem.

Because Oregon jurisdictions have a history of zoning a large share of their residential land for single-family housing, there is an urgency to increase the housing options permitted outright in single-family zones. The challenge is to do this while preserving the character of the built environment in established neighborhoods, thus reducing community resistance. In 2016, three departments of the state government collaborated to develop a guide for local jurisdictions on incorporating cottage clusters, in-


224. There is still a long way to go. As a prominent Oregon housing advocate stated recently:

Fully 90% of Portland’s residential land supply TODAY is zoned for SF [single-family], detached homes. A large percentage of Bend’s housing stock is in CC&Rs with restrictive covenants disallowing smaller lots, ADUs, etc. . . . Almost 2/3 of Medford’s residential zoning [are] SF detached. . . . In Grants Pass in 2016, zero MF [multifamily] units and only a few duplexes were built. Yet 2/3 of Oregon households (and of Portland’s and of the US) consist of 1–2 persons. We have a long-term structural mis-match between zoning and housing needs. It did not happen overnight—it has been with us since the 1950s. But population growth and falling incomes relative to housing costs have exacerbated this. We have a lot of catch-up to do. Portland’s Residential Infill Project—a fairly modest attempt to get more missing middle housing built—is not yet adopted (more than a year overdue) amidst some intense opposition, mostly from wealthier neighborhoods. Several Eugene neighborhoods are pushing hard against ADUs, missing middle housing, etc. There are many more such examples. There is a strong NIMBY element in many Oregon cities.

Personal communication of Mary Kyle McCurdy, Policy Director, 1000 Friends of Oregon, Dec. 23, 2017 (on file with authors).
ternal division of larger homes, corner duplexes, and accessory dwelling units into single-family neighborhoods.225

In the Portland region and elsewhere in the state, there has been a strong interest in accessory dwelling units (ADUs), whether mobile or set in place.226 Since 2010, the City of Portland has waived permit fees for ADUs, helping to spur a dramatic increase in their production.227 Multnomah County, which includes most of Portland and some other jurisdictions, has embarked on an innovative project to incentivize property owners to add ADUs to house homeless people.228 Clackamas County, adjacent to Multnomah and the third most populous in the state with more than 400,000 people, has recently embarked on an effort to amend its zoning code to allow for transitional shelters for homeless people on land currently zoned industrial.229 The 2017 Oregon legislature, responding to the state’s housing challenges, approved Senate Bill 1051, which requires that, as of July 2018, cities with populations of at least 2,500 and counties with a population of at least 15,000 allow at least one ADU for every lot that allows a detached single-family dwelling.230 The law also shortens the timeline for approval for certain affordable, multifamily developments, and expands the “needed housing” definition to more clearly include affordable housing.231 These and similar measures represent efforts to increase the variety and types of housing units available in Oregon communities. However, it is unclear whether these efforts will result in the production of housing that is also lower-cost upon completion.

One of the principal ways that a community’s inventory of lower-cost housing grows is through a process known as filtering. Filtering is the gradual decrease in the relative cost of housing as it ages.232 Older hous-

226. For more on the challenges and opportunities presented by ADUs, see generally John Infranca, Housing Changing Households, 25 STAN. L. & POL’Y REV. 53 (2014).
230. 2017 Or. Laws ch. 745 (SB 1051), § 6 (amending OR. REV. STAT. § 197.312).
231. Id. §§ 1, 4 (with the latter amending the definition of “needed housing” in OR. REV. STAT. § 197.303).
ing is sometimes “revitalized” through a major influx of capital to make it more appealing to contemporary households by incorporating modern features while maintaining its historic character. However, some units, typically those with fewer historic features or initially built as less expensive housing, may continue to be maintained and repaired for habitability, but not be fully renovated and upgraded. This housing stock might become more affordable over time relative to newer units being built. When this happens, these units are said to have filtered. Owner-occupied housing typically takes longer to filter than rental housing. The market-driven process of filtering alone does not create a sufficient supply of housing affordable to Oregon households with low incomes.

Besides filtering, other methods of increasing a community’s low-cost housing supply when the private market is not producing it on its own are through the development of rent- or price-controlled subsidized units and through inclusionary zoning. Since the removal of the statewide preemption on inclusionary zoning by the Oregon legislature in 2016, the only jurisdiction to adopt it (as of early 2018) was the City of Portland. Portland engaged in months of study and careful calibration of requirements and incentives to decrease the risk to the cost of housing overall by discouraging new development or by driving up the price of the market rate units. As of February 2017, new developments applying for permits with 20 or more units in Portland were required to set aside 20% of the units for households earning at or below 80% of median, which in 2016 was $58,650 for a family of four. As of September 2017, the City of Portland had approved its first three developments under the new ordinance, resulting in 23 new units affordable to households earning 60% to 80% of area median income in projects totaling 170 units in three highly sought-after neighborhoods. The Oregon legislature has also authorized cities to impose an “excise tax” on new construction for promotion of affordable housing. It is too soon to evaluate the effectiveness of either the Oregon inclu-

233. Id.
234. Id.
237. Inclusionary zoning and the excise tax is authorized by ch. 59, Or. Laws 2016 (enrolled SB 1533) and were described as follows:
tionary zoning mechanism or the excise tax at this point, except to note that both are more likely to be used in the Portland region.

Advocates continue to identify and lobby for new state sources of funding for subsidized housing. In 2009, the Oregon State Legislature created a new revenue stream for affordable housing based on document recording fees. However, a major obstacle to maximizing the use of state and federal resources remains the cost to produce subsidized housing. In addition to the usual development costs, developers building subsidized housing incur additional costs related to cobbling together multiple layers of subsidy and meeting the procurement, design, reporting, and other requirements of multiple funders.238

In the most recent long session of the state legislature, from January to July 2017, various efforts to promote and preserve affordable housing—rent control, prohibition of no-cause evictions, preempting the use of historic districts as an exclusionary tool, and limiting the mortgage interest deduction—all failed to become law despite one-party (Democratic) control of the legislature and governor’s office. The legislature, however, did pass legislation to promote preservation of affordable housing by providing opportunity to purchase and right of first refusal (in certain cases) when publicly supported affordable housing is at risk of flipping to market rate.239 Thus, housing affordability remains a major challenge for the state. As recently as 2016, OHCS determined that there was a statewide shortage of at least 100,000 units affordable to households with incomes at or below 30% of median.240 This problem is not unique to Oregon. However, as long as the economy is robust and Oregon continues to attract well-educated

This bill authorizes city and county use of inclusionary zoning to require that up to 20% of units in multifamily housing developments of at least 20 units be sold or rented at affordable rates, if the jurisdiction also offers developers certain incentives. The bill also requires a city or county that implements inclusionary zoning to provide the options for developers to pay an in-lieu fee. The bill also lifts the general preemption on city and county authority to impose new local construction excise taxes (which had previously been scheduled to sunset in 2018), subject to certain requirements to use the revenue for housing programs and incentives. . . .


workers and households with wealth, it is likely that having a sufficient supply of affordable housing will remain an elusive goal.

As this article is written in the fall of 2017, it appears unlikely that large amounts of new federal funds will be directed towards housing. Nor does it appear that new initiatives in civil rights enforcement will be undertaken—indeed, current funding is likely to be reduced. Moreover, while public agencies may affect the housing market, those agencies generally do not build housing, especially not in their regulatory capacities. For the present and the foreseeable future, it will be the private sector that invests, funds, and builds that housing. Oregon law has dealt with some aspects of the problem by providing tools that prevent many de jure instruments associated with exclusionary zoning. For instance, state law discourages large lot sizes, vague and discretionary local zoning criteria, and unfair local zoning procedures. On the flip side, state law promotes pro-affordability practices through the use of housing metrics and the review of local land use regulations and actions for conformity with state housing policy. But these efforts, while they create the circumstances under which housing, including affordable housing, has planning support, do not guarantee any housing will be built. However, binding review of local housing obligations is altogether tepid and often depends on objections raised by housing advocates, if done at all, and enforcement through litigation is virtually nonexistent. Moreover, although the state provides some direct financial support for affordable housing, the amount is far less than necessary; indeed, for the recent biennium of 2017–19, the legislature increased state funding to the state’s main housing agency, OHCS, but this increase was offset somewhat by reductions in other funds to the agency. And while Oregon may be better than most, or even the best, at creating those conditions, that is not an especially high bar.


The future is likely to look a lot like the present in Oregon housing policy—a mixture of requirements and incentives to encourage the private sector to build housing. Thus, the binding plan and zoning designations, the prohibition on vague standards, the requirements for a regional approach towards housing obligations, the favorable treatment of most housing decisions on review, combined with use of urban renewal and housing authority measures, public agency bonding powers, coordinated infrastructure, and political pressure allow Oregon the room to experiment and innovate. While that might not be the silver bullet that housing advocates desire, it may be all that is possible at the moment.
Appendix: Oregon Statewide Planning Goal 10, Housing

As revised over the years, the Oregon housing goal now provides:

To provide for the housing needs of citizens of the state.

Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of needed housing units at price ranges and rent levels which are commensurate with the financial capabilities of Oregon households and allow for flexibility of housing location, type and density.

Buildable Lands—refers to lands in urban and urbanizable areas that are suitable, available and necessary for residential use.

Government-Assisted Housing—means housing that is financed in whole or part by either a federal or state housing agency or a local housing authority as defined in ORS 456.005 to 456.720, or housing that is occupied by a tenant or tenants who benefit from rent supplements or housing vouchers provided by either a federal or state housing agency or a local housing authority.

Household—refers to one or more persons occupying a single housing unit.

Manufactured Homes—means structures with a Department of Housing and Urban Development (HUD) label certifying that the structure is constructed in accordance with the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 USC 5401 et seq.), as amended on August 22, 1981.

Needed Housing Units—means housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels. On and after the beginning of the first periodic review of a local government’s acknowledged comprehensive plan, “needed housing units” also includes government-assisted housing. For cities having populations larger than 2,500 people and counties having populations larger than 15,000 people, “needed housing units” also includes (but is not limited to) attached and detached single-family housing, multiple-family housing, and manufactured homes, whether occupied by owners or renters.