

Threading the Needle of Fair Housing Law in a Gentrifying City with a Legacy of Discrimination

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Introduction¹

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.²

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>).

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Government-Sponsored Segregation and the Chronic Affordable Housing Crisis in San Francisco

Federal fair housing law (FHA), which promotes “integrated ways of living,”³ 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.⁴ 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.⁵ 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.⁶ 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.⁷ 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

3. See *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525–26 (2015) (“The Court acknowledges the Fair Housing Act’s continuing role in moving the Nation toward a more integrated society.”).

4. See Marcia Rosen & Wendy Sullivan, *From Urban Renewal and Displacement to Economic Inclusion: San Francisco Affordable Housing Policy 1978–2012* (Poverty & Race Research Action Council and National Housing Law Project, Nov. 2012), available at: <http://www.prrac.org/pdf/SanFranAffHsing.pdf> (last visited Jan. 31, 2018); Letter from Edwin Lee, Mayor of San Francisco, to Julian Castro, Secretary, U.S. Dep’t of Housing & Urban Development, at 1 (Aug. 5, 2015) (on file with author).

5. RICHARD ROTHSTEIN, *COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017) (reviewed by J. William Callison, 26:1 J. AFFORDABLE HOUS. & CMty. DEV. L. 5 (2017)).

6. See Rosen & Sullivan, *supra* note 4.

7. Lee Letter, *supra* note 4, at 2.

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.*

9. See, e.g., *United States v. Housing Auth. of Chickasaw*, 504 F. Supp. 716 (S.D. Ala. 1980); Robert G. Schwemm, *The Community Preference Policy: An Unnecessary Barrier to Minorities’ Housing Rights* (NYU Furman Center, Nov. 2015), available at: <http://furmancenter.org/research/iri/essay/the-community-preference-policy-an-unnecessary-barrier-to-minorities-housin> (last visited Jan. 31, 2018).

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.

11. See, e.g., Richard Rothstein, *The Making of Ferguson: Public Policies at the Root of its Troubles* (Economic Policy Institute, Oct. 15, 2014), available at: <http://www.epi.org/files/2014/making-of-ferguson-final.pdf> (last visited Jan. 31, 2018); Anne Bellows & Michael Allen, *The Fair Housing Imperative to Address the Displacement Crisis*, CIVIL RIGHTS INSIDER (Winter 2018), available at: <http://www.fedbar.org/Image-Library/Sections-and-Divisions/Civil-Rights/Civil-Rights-Winter-2018>.

this view, displacement raises fair housing issues and a city's response to displacement is subject to fair housing analysis. Depending upon local conditions, funding availability, and other factors, affordable housing and community 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 develop affordable housing in suburban "high opportunity" areas. Fair housing 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 poverty or people of color. This conflict pits the value of providing persons protected 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 revitalize 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 disadvantaged communities and in high opportunity neighborhoods.¹³ Unfortunately, given the very limited subsidy available for affordable housing development, 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 affordable 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

aspx (last visited Jan. 18, 2018) (explaining displacement as raising fair housing issues).

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 Mobility Versus Place-Based Strategies*, in *THE FIGHT FOR FAIR HOUSING: CAUSES, CONSEQUENCES, 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 a New Approach to Housing Policy*, ENTERPRISE BLOG, available at: <https://www.enterprisecommunity.org/blog/2015/09/contributed-segregated-communities> (last visited Jan. 18, 2018); Elizabeth K. Julian, *Fair Housing and Community Development: A Time to Come Together*, 41 IND. L. REV. 555 (2007).

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 qualifications skew the location of affordable housing developments, and whether affordable 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 governmental 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.¹⁵ 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."¹⁶ 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.¹⁷ 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.¹⁸

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.¹⁹ They petitioned the San Francisco leadership to do something similar, i.e., establish a preference for residents of certain

15. For San Francisco's current preferences, see Lottery Preference Programs, San Francisco Mayor's Office of Housing, *available at*: <http://sfmohcd.org/lottery-preference-programs> (last visited Jan. 18, 2018).

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.

17. CAL. GOV'T CODE §§ 7060 et seq.

18. Ellis Act Displaced Emergency Assistance Ordinance, Ordinance 277-13 (2013).

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. Supervisory 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.

28. 24 C.F.R., part 200, Subpart M; Affirmative Fair Housing Marketing (AFHM) Plan—Multifamily Housing, form HUD-935.2A (2/2011), HUD Handbook 4350.3: Occupancy Requirements of Subsidized Multifamily Housing Programs (November 2013).

are informed and enabled to apply.²⁹ 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.³⁰

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.³¹ 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.³² 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.”³³ The letter also stated that the preference may also violate the FHA.³⁴ 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.³⁵ 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.³⁶ 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.³⁷ 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.”³⁸ The City Attorney’s let-

32. Lee Letter, *supra* note 4, at 1.

33. Velasquez Letter, *supra* note 10, at 1.

34. *Id.*

35. *Id.*

36. Lee Letter, *supra* note 4, at 1.

37. Letter from Dennis Herrera, San Francisco City Attorney, to Julian Castro, Secretary, and Helen Kanovsky, General Counsel, U.S. Department of Housing and Urban Development, at 1 (Aug. 25, 2015) (on file with author).

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."³⁹

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."⁴⁰ 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"⁴¹ 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.⁴² The policies included (1) "affordable housing is a scarce resource with limited availability in San Francisco,"⁴³ (2) "the city has a compelling need to provide relief for overcrowding and rent burdened households in these neighborhoods,"⁴⁴ 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."⁴⁵ 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."⁴⁶

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.⁴⁷ 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.⁴⁸ 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 preference⁴⁹ 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."⁵⁰

47. Ted Goldberg, *HUD Delays Decision on S.F. Anti-Gentrification Plan*, KQED NEWS, available at: <https://www.kqed.org/news/2016/09/09/hud-delays-decision-on-s-f-anti-gentrification-plan/> (last visited Jan. 18, 2018).

48. *Anti-Displacement Housing Preference and New Lottery Date for Willie B. Kennedy Apartments—October 5, 2016*, Tenderloin Neighborhood Development Corp. (on file with author).

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

51. Urban Displacement Project, *available at*: <http://www.urbandisplacement.org/policy-tools-2> (last visited Jan. 18, 2018); *Equitable Development Toolkit*, POLICY LINK, *available at*: <http://www.policylink.org/equity-tools/equitable-development-toolkit/about-toolkit> (last visited Jan. 18, 2018).

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

52. 80 Fed. Reg. 42272 et seq. (July 16, 2015). See, e.g., Bellows & Allen, *supra* note 11; Public Advocates and Mission Economic Development Agency, *Civil Rights Law & the Displacement Crisis in San Francisco's Mission District*, available at: http://www.publicadvocates.org/wp-content/uploads/fair_housing_framework_for_san_franciscos_mission_district-1.pdf (last visited Jan. 18, 2018) (emphasizing the duty San Francisco has to take affirmative actions to mitigate and prevent displacement that affects members of protected classes but not identifying or endorsing any specific action).

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).

54. Alana Semuels, *Has America Given Up on the Dream of Racial Integration?*, ATLANTIC, June 19, 2015, available at: <https://www.theatlantic.com/business/archive/2015/06/segregation-2015/396167/> (last visited Jan. 31, 2018).

