

ECONOMIC FAIR HOUSING ACT OF 2021

PARTIAL DRAFT BILL and COMMENTS

Equitable Housing Institute¹

Rev. ed., November 30, 2020

A BILL

To prohibit exclusionary housing practices comprehensively, throughout the United States, due to their discriminatory effects on minority group members and low- and moderate-income persons, their adverse effects on housing availability and affordability, on environmental protection, on commerce among the several states; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Economic Fair Housing Act of 2021.”

SECTION 2. EXCLUSIONARY HOUSING PRACTICES

The Fair Housing Act (FHA) (42 U.S.C. §§ 3601-3619) is amended by adding a new sec. 806-1 (to be codified at 42 U.S.C. § 3606-1), as follows:

Sec. 806-1. Exclusionary housing practices

It shall be unlawful to create or apply any law, policy, or other practice, that would have the effect or intent of restricting housing opportunities, without sufficient justification, so as to:

- (a) Deprive, or tend to deprive, any person—regardless of economic status--of the opportunity for suitable housing in the jurisdiction where the person:
 - (i) Works, or
 - (ii) Currently resides, or
 - (iii) Has a close family member residing, or
 - (iv) Has their current, primary support system; or so as to
- (b) Cause or contribute to the jurisdiction’s failure to provide its fair share of the regional housing needs; or so as to
- (c) Unnecessarily delay the opportunities described in this section.

¹ For information about the Institute (EHI), please see below, p. 18.

Comments:

Sec. 806-1 would be inserted after the other basic prohibitions on discriminatory housing practices in the FHA, which are found at Secs. 804-806 [42 U.S.C. §§3604-3606]. Violations of Sec. 806-1 would be subject to all the FHA's provisions that apply to discriminatory housing practices, including the full range of remedies in that statute.

Various terms used in proposed Sec. 806-1(a) are is defined below, in Sec. 806-1(c)—including “exclusionary housing practices,” “without sufficient justification,” “economic status,” “suitable housing,” “works,” and “regional housing needs.”

Performance-oriented standard

Subsection (a) attempts to define the prohibited actions in performance-oriented terms, similar to the current prohibitions in the FHA—rather than process-oriented (procedural) terms.² The performance-oriented approach informs people who create and/or apply housing-related rules, policies and other practices, as to what specific actions are unlawful.³ That approach also promotes individual accountability for discriminatory housing practices.

People who violate these prohibitions will be subject to the same, wide range of enforcement actions as the other FHA prohibitions, including enforcement by the U.S. Department of Housing and Urban Development (HUD), the U.S. Justice Department, and by persons harmed by those violations. Violators may be ordered to give full compensation to proven victims of those violations.

² For example, the first two prohibitions in the FHA state that (subject to limited exceptions), it shall be unlawful:

- (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
- (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. §§ 3604(a) and (b).

³ This new section applies broadly to both public and private parties that create or apply housing practices, with limited exceptions, such as the Fair Housing Act exemptions in Sec. 807 (for religious organizations and private clubs). Thus, for example, a homeowners' association that is legally permitted to create or enforce regulations, policies or practices that affects housing opportunities within its boundaries would be subject to the prohibitions in this Section.

Homeowners' associations and other private parties that create or apply housing practices may expect governmental housing agencies to provide them with guidance, in order to comply with fair housing law in situations not answered by the Economic Fair Housing Act's text. Such private parties generally maintain insurance that covers possible legal violations, and those parties are well advised to make sure it covers potential FHA liabilities.

That compensation may include the costs of required legal actions to correct those violations, as well as other monetary losses to the victims. Injunctions to prevent repeated housing discrimination by the violator(s) also may be issued, as appropriate. Without such remedies, low- and moderate-income people predictably will be unable to use the legal system effectively to have violations of their rights corrected.

The existing statutes that attempt to control exclusionary housing practices generally (all are state statutes) often do not define the prohibited actions, and none of them permit private lawsuits by victims of unlawful practices. Thus, those statutes provide less accountability and enforceability for discriminatory housing practices than the FHA.

Studies indicate that the FHA approach has been more successful in reducing residential isolation of different groups. Since the FHA was enacted in 1968, residential isolation by race (especially of Blacks from Whites) has been diminishing fairly steadily and substantially.⁴ By contrast, the sorting of Americans into different neighborhoods, based on income levels (“residential isolation by income”) has increased markedly since 1970, even in states with statutes that are intended to control the exclusionary housing practices that lead to that problem.

For example, one major study showed that the proportion of families in America’s large metropolitan areas who lived in predominantly “rich” or “poor” neighborhoods more than doubled, from 15 percent to 34 percent, between 1970 and 2012.⁵ Because most minority group members are on the lower end of the income and wealth spectrums, the sorting by income level undercuts attempts to reduce residential isolation of minority group members.⁶

Restrictive density zoning has become a major driver of residential segregation and isolation for low-income Blacks and Latinx Americans in metropolitan areas across the United

⁴ One major, recent study found a downward trend in residential isolation of Blacks from Whites, “though modest” (about 4.5 percent per decade), continuing fairly steadily from the 1970’s across the ensuing decades. Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 Soc. Forum 8 (2015), posted at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4808815/>; citing MASSEY, DOUGLAS S. AND DENTON, NANCY A. AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS, HARV. U. (1993). Another major study found “in 1980, the typical Black American lived in a census tract that was 58 percent Black; by 2010, that share dropped to 45 percent.” *The Rise of Residential Segregation by Income*, p. 12, Pew Research Center (August 1, 2012), posted at: <http://www.pewsocialtrends.org/2012/08/01/the-rise-of-residential-segregation-byincome/>.

⁵ K. Bischoff & S. Reardon, *The Continuing Increase in Income Segregation, 2007–2012*, STANFORD CENTER FOR EDUCATION POLICY ANALYSIS 5–6, 17 (2016). The rate in smaller metropolitan areas more than doubled too, from 9.6 percent in 1970 to 21.6 percent in 2012, according to that study. *Id.*

⁶ Douglas S. Massey and Jacob S. Rugh, *Segregation in Post-Civil Rights America: Stalled Integration or End of the Segregated Century*, ANNALS AM. ACAD. POL. SOC. SCI 2 (Mar. 8, 2016) (Massey & Rugh), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3844132/>, <https://pubmed.ncbi.nlm.nih.gov/26966459/>. From 1970 to 2010, “the socioeconomic gap between Whites and minorities has widened, even as many minority members have moved into the middle class.” SONH 2018, *supra* note 6, at 16. “Minorities made up half of the nation’s low-wealth households in 2016, up from 39 percent in 1995. They also accounted for more than three-quarters of the growth in low-wealth households between 1995 and 2016.”

States.⁷ The metros where residential integration by race is ongoing are those where minority group members have higher incomes and do not face high levels of racism, and where there is little immigration and less restrictive density zoning.⁸

Remedies

The existing remedies under state statutes that address exclusionary housing practices appear insufficient to achieve general elimination of those practices. Some statutes allow a “builder’s remedy,” under which a developer that includes a sufficient number of affordable housing units in its development plan can challenge denial of the plan (or approval with unacceptable conditions, or lack of timely action on the plan) by the local government. However, no state statute permits people who are unable to secure suitable housing in a community, due to exclusionary housing practices, to take legal action to correct those practices.

The slow but steady progress in reducing residential isolation by race, since the FHA was enacted, compares very favorably with the rapidly increasing residential isolation by income that has occurred, even in states with statutes intended to combat that problem. In particular, by making it feasible for low- and moderate-income victims of unlawful housing practices to contest them, including through legal action, the FHA appears to have provided sufficient remedies to permit a slow, steady reduction in residential isolation by race. Fair Housing Associations have been a crucial part of that process.⁹

Fair share of regional housing needs

Under Sec. 806-1(b), even persons who have none of the contacts listed in subsection (a) with the jurisdiction at issue are entitled to seek housing opportunities there (including with government assistance, for example). Although such housing opportunities may not exist in

⁷ “Across all metropolitan areas, restrictive density zoning has emerged as a strong force producing segregation and isolation for both [Blacks and Latinx] and shifts toward integration are associated with higher minority socioeconomic status.” *Id.* at 14. “Limits on the density of residential construction in predominantly white communities drive up the cost of housing to make it unaffordable to low income, minority households. As result, the more restrictive the density zoning regime (the stricter the limits on residential density), the higher the level of racial segregation and the less the shift toward integration over time”). *Id.* at 2.

See generally, e.g., Equitable Housing Institute (EHI), *Toward a comprehensive ban on exclusionary housing practices*, pp. 5-6 (2019), https://www.equitablehousing.org/images/PDFs/PDFs--2018-/EHI-Toward-comprehensive-ban-tech_edits-10-2020.pdf.

⁸ “According to our analyses, those metropolitan areas that are integrating over time are those having relatively affluent and well-educated minority populations, low levels of anti-black and anti-Latino sentiment, low rates of immigration, and permissive regimes of density zoning.” Massey and Rugh at 13.

⁹ *2017 Fair Housing Trends Report: The Case for Fair Housing*, NATIONAL FAIR HOUSING ALLIANCE (NFHA) 50 (2018). In 2016, private fair housing organizations investigated 70 percent of the complaints filed nationwide—almost twice as many as those investigated by federal, state, and local government agencies combined. *Id.* Historically, 71 percent of the HUD cases in which a fair housing organization is a complainant or co-complainant result in conciliation or a finding of reasonable cause to believe that unlawful discrimination occurred—whereas only 37 percent of cases not referred to HUD by fair housing organizations result in those favorable outcomes). *Id.* (citing *Study of the Fair Housing Initiatives Program*, DB Consulting Group, Inc., (May 2011)).

every case, the jurisdiction is not permitted to have housing practices that interfere with the achievement of its fair share of the region's housing needs. The "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution," and that right has been applied to an "indigent who desires to migrate, resettle, find a new job, and start a new life." *Shapiro v. Thompson*, 394 U.S. 618, 629, 631 (1969) (quoting *United States v. Guest*, 383 U.S. 745, 757-758 (1966)).

The issues involved in determining what constitutes a jurisdiction's fair share of regional housing needs can be quite complex.¹⁰ Thus, Sec. 806-1(a) mentions several categories of persons who are specifically protected from exclusionary housing barriers in the jurisdiction. However, each jurisdiction also is prohibited from maintaining regulatory barriers to achieving its fair share of the region's housing needs. That share presumably includes people who have no current contacts with the jurisdiction, but for whom private and/or public entities are willing to build or preserve housing.

Generally, housing supply can be expanded to accommodate all the people covered by this section by building *up*, if not *out*. A key to providing a sufficient supply of housing in the right places, in the United States and around the world, is ending unnecessary land-use restrictions.

By changing land-use rules, cities can significantly lower the amount of land used per housing unit, usually by adjusting the permitted floor-area ratio. . . . Developers then can construct more square meters of space for each square meter of land and can fill more demand for housing, particularly in areas close to transit stations where the infrastructure can support it.¹¹

No jurisdiction or housing provider should be entitled to maintain housing practices that tend to increase the difficulty, for a person covered by this section, without sufficient justification, to obtain a suitable housing opportunity at the earliest feasible time.

¹⁰ See, e.g., *Mount Laurel II*, 456 A.2d at 436 (the basic, underlying social problem addressed in that litigation—fairly sharing regional housing needs among the various jurisdictions in the same region of the state (New Jersey)—could be "far better addressed by administrative action than litigation"). However, the administrative approach tried in New Jersey—the Council on Affordable Housing ("COAH")—became so mired in controversy that both the state legislature and the Governor eventually tried to abolish it. See, in re *N.J.A.C. 5:96 & 5:97*, 110 A.3d 31, 42-43 (N.J. 2015). The New Jersey Supreme Court has returned the responsibility for overseeing compliance with fair share requirements to the judicial branch, as of 2015. *Id.*; see, e.g., Alan C. Weinstein, *Reflections on the Persistence of Racial Segregation in Housing*, 45 CAP. U. L. REV. 59, 70 (2017).

¹¹ McKinsey Global Institute, *A blueprint for addressing the global affordable housing challenge*, p. 10 (October 2014) ("McKinsey *Blueprint*"), posted at: http://www.mckinsey.com/insights/urbanization/tackling_the_worlds_affordable_housing_challenge.

Note: Covid-19 and density

The pandemic has seen many city-dwellers (mostly wealthier ones) move to less densely populated areas.¹² That trend could lead to reduced redevelopment in urban areas for years.¹³ However: “Some of the world’s most heavily settled spaces — Hong Kong, Seoul, Singapore — have proved to be the most formidable at containing Covid-19. In the U.S., small towns in Georgia and Louisiana suffer along with New York City.”¹⁴

A Wall Street Journal analysis found that, across the country, the virus has spread more widely in places with the most crowded households, not necessarily places with the largest or densest populations. Remote, rural hamlets where extended families live under the same roof have turned deadlier than some of the densest blocks of Manhattan or Chicago, the analysis found.¹⁵

An April study of the pandemic in New York City found that “areas with higher numbers of confirmed COVID-19 cases have lower population density, yet they do have higher rates of overcrowding at the household level.”¹⁶

The scientific literature supports the broad supposition that infectious disease spreads more easily in densely populated urban environments But epidemiologists say that airborne infectious disease spreads at a more fine-grained

¹² In particular: “Gateway metros have experienced a mass exodus of residents during the pandemic. In some cases, young workers who are drawn to these urban cities for the lifestyle have left as service jobs have dried up and entertainment venues remain closed. Some office workers have relocated to the nearby suburbs, since they work from home and no longer need to be close to their places of employment. Some can no longer afford the extraordinarily high rents” Yardi Matrix Bulletin, *Multifamily Absorption Resumes After COVID-19 Slump: How Durable Is Demand?* (Oct. 2020). See also, e.g., Anthony Flint, *The Destiny of Density*, LINCOLN INSTITUTE OF LAND POLICY (June 24, 2020), posted at: <https://www.lincolninst.edu/publications/articles/2020-06-destiny-density-affordability-equity-effects-of-insidious-virus>. Flint points out that, by contrast to the mobility of wealthy city-dwellers, Lower-income workers in service jobs— disproportionately in communities of color— cannot work from home or afford not to work.)

¹³ Flint, *supra* n. 12.

¹⁴ Samuel Kling, *Is the City Itself the Problem?*, CityLab (April 20, 2020), posted at: <https://www.citylab.com/perspective/2020/04/coronavirus-cases-urban-density-suburbs-health-parks-cities/610210/>. Kling is Global Cities Fellow at the Chicago Council on Global Affairs. “As Covid-19 enlarges the window of policy possibilities, city leaders should remember their problem is the virus, not urban life. They can improve their public health and transportation infrastructure by learning from the dense places that have managed to avoid the harshest impacts of the virus.”

¹⁵ Ian Lovett, *et. al.*, *COVID-19 Stalks Large Families in Rural America*, Wall Street Journal (June 7, 2020), posted at: <https://www.wsj.com/articles/covid-19-households-spread-coronavirus-families-navajo-california-second-wave-11591553896>.

¹⁶ *COVID-19 Cases in New York City, a Neighborhood-Level Analysis*, NYU FURMAN CENTER BLOG (April 10, 2020).

level, such as in crowded churches, military barracks, or homes shared by large families—[rather than] the city as a whole.¹⁷

“Historically, cities have responded to disease and disaster with affirmative measures: first responders and building codes after great fires, water and sewer infrastructure prompted by cholera, or tightened security to guard against international terrorism.”¹⁸ So, there is reason for optimism that American urban areas can build upward again after the pandemic—with improvements based on lessons learned from the pandemic—to help house all its urban populations suitably.¹⁹

Federal jurisdiction

This provision meets federal jurisdictional requirements on a number of Constitutional bases. For example:

- **Thirteenth Amendment.** It has been held consistently that the FHA is a valid exercise of congressional power under the Thirteenth Amendment, in order to eliminate badges and incidents of slavery.²⁰ This proposed addition to the FHA seeks to correct practices that have undermined the achievement of that goal, and that have not been effectively curbed through the FHA’s current tools.
- **Congress’ authority to regulate interstate commerce (Art. I, § 8).**²¹ Real estate sales and rentals unquestionably affect interstate commerce.²² The adverse

¹⁷ Flint, *supra* n. 12.

¹⁸ Flint, *supra* n.12 *See, e.g.*, FRANK SNOWDEN, EPIDEMICS AND SOCIETY, 195-200, YALE U. PRESS (2019) (secure water and sewer systems, created in response to epidemics of typhoid fever, gastroenteritis, and cholera, proved essential to combat those and other infectious diseases).

¹⁹ “While large cities are likely to struggle (with both their fiscal viability and private-sector activity) for several years, the COVID induced pause in their appeal is not likely to be permanent.” PwC & Urban Land Institute (ULI), *Emerging Trends in Real Estate*® 2021, p. 5 (2020).

²⁰ *E.g.*, *Williams v. Matthews Co.*, 499 F.2d 819, 825 (8th Cir.), *cert. denied*, 419 U.S. 1021, 1027 (1974); *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).

²¹ “Congress shall have power [to] regulate commerce . . . among the several States.” U.S. Const. art. I, § 8, cl. 3. Commerce among the several States means “commerce which concerns more states than one.” *Gibbons v. Ogden*, 22 U.S. 1, 194 (1824).

²² *See Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1034 (11th Cir. 1992) (“Congress had ample evidence before it, and was adequately aware, that its exercise of power under the Fair Housing Act was supported by the Commerce Clause”). Real estate rentals “unquestionably” affect interstate commerce. *Russell v. United States*, 471 U.S. 858, 862 (1985) (federal arson statute was valid as applied to a single rental apartment building).

“Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce.” *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 245 (1980) (federal antitrust lawsuit permitted to challenge local brokerage practices).

effects of exclusionary housing practices on interstate commerce have been documented by recent economic studies.²³

- **Freedom to travel:** As mentioned, all Americans—regardless of economic status—have a Constitutional right to resettle in a different state (as well as a different part of the same state) to find a new job and pursue a better life.²⁴ Exclusionary housing practices interfere with that right.

Sec. 806-1(b)

- (b) The opportunity for suitable housing shall include, but not be limited to, housing as close as feasible—consistent with sound planning—to where the person works, currently resides, has a close family member residing, or where the person’s primary support system is located in the jurisdiction. The opportunity for suitable housing shall be provided without discrimination based on:
- (i) the nature or amount of the person’s financial assets, source of funds, payment or income, from any lawful source; and
 - (ii) any other personal status that is legally protected from housing discrimination.

Comments

Importance to environment of housing as close as feasible to jobs

Housing opportunities “as close as feasible” to people’s jobs are crucial to reducing development sprawl and its enormous costs for Americans and their environment. Among the major problems caused by housing shortages near employment hubs are increased traffic congestion, commuting times, transportation costs, loss of open space, harm to wildlife—and even a contribution to global climate change.

²³ One landmark study shows that hyperinflation in housing costs in the wealthier states since 1980 has had adverse effects on the upward mobility of American workers in other states, and on the American economy overall. Peter Ganong & Daniel Shoag. *Why has regional income convergence in the US declined?* 102 JOURNAL OF URBAN ECONOMICS 76–90 (2017).

Another major study confirms that exclusionary housing practices at the local level are a significant drag on American economic growth. Chang-Tai Hsieh and Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AMER. ECON. JOURNAL: MACROECONOMICS, 1–39 (2019).

²⁴ *Shapiro v. Thompson*, 394 U.S. at 629, 631 (1969), quoted above, p. 5. Among the Constitutional provisions cited in support of that right—in addition to the Commerce Clause—are the Privileges and Immunities Clauses of Art. IV, Sec. 2, and the Fourteenth Amendment. (Art. IV, § 2 states in pertinent part: “The citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States.” The Fourteenth Amendment states in pertinent part: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”)

“The problem is larger than ever. In 2017, congestion caused urban Americans to travel an extra 8.8 billion hours and purchase an extra 3.3 billion gallons of fuel for a congestion cost of \$166 billion.”²⁵ Total travel delays annually for Americans, due to traffic congestion, rose almost five-fold from 1982 to 2017.²⁶

Furthermore, the overall cost of traffic congestion to Americans rose almost 1,200 percent from 1982 to 2017, to \$179 billion in constant 2017 dollars.²⁷ “The average auto commuter spends 54 hours in congestion and wastes 21 gallons of fuel due to congestion at a cost of \$1,080 in wasted time and fuel.”²⁸

Development sprawl costs the United States more than \$1 trillion a year overall, according to a recent study, “because it can increase per capita land consumption up to 80 percent and car use by up to 60 percent. Together these outcomes create social costs that amount to \$626 billion a year for people living in sprawling areas and \$400 billion for those outside of them, the report estimates.”²⁹

Scientists have concluded that it is very likely that greenhouse gas emissions due to increased road traffic have contributed to global climate change.³⁰ Also, as “more land has been paved over to make way for development, leaving less green space to absorb rainwater and chemical runoff, soil erosion and water pollution have also increased.”³¹ And most experts

²⁵ 2019 Urban Mobility Report, *Texas A&M Transportation Institute* 1 (August 2019), posted at: <https://static.tti.tamu.edu/tti.tamu.edu/documents/mobility-report-2019.pdf>. “Trucks account for \$20 billion (11 percent) of the cost, a bigger share than their 7 percent of traffic.” *Id.*

²⁶ *Id.* at 1 and Exh. 1.

²⁷ *Id.*, Exh. 1.

²⁸ *Id.*

²⁹ Tanvi Misra, *How Much Sprawl Costs America*, *Bloomberg CityLab* (March 24, 2015), citing LSE Cities and Victoria Transport Policy Institute, *Analysis of Public Policies That Unintentionally Encourage and Subsidize Urban Sprawl* (March 2015), posted at <https://newclimateconomy.report/workingpapers/wp-content/uploads/sites/5/2016/04/public-policies-encourage-sprawl-nce-report.pdf>.

³⁰ Michael M. Maya, *Transportation Planning and the Prevention of Urban Sprawl*, 83 N.Y.U. L. Rev. 879, 884 (2008); see also Intergovernmental Panel on Climate Change, *Climate Change 2007: Synthesis Report* 5 (2007), available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf. In 2011 there were “56 billion pounds of additional carbon dioxide (CO₂) greenhouse gas released into the atmosphere during urban congested conditions (equivalent to the liftoff weight of over 12,400 Space Shuttles with all fuel tanks full).”

³¹ Michael M. Maya, *Transportation Planning and the Prevention of Urban Sprawl*, 83 N.Y.U. L. Rev. 879, 884 (2008). Ultimately, suburban development consumes agricultural land and green spaces. See also generally Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 Cornell L. Rev. 158, 161 (2001) (referencing Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 Hastings W.-Nw. J. Envtl. L. & Pol’y 137, 141 (1999) (“Another of sprawl’s distinguishing traits is its consumption of exurban agricultural and other frail lands in abundance, since these are the types of land found at the periphery of development”).

recognize sprawling development “as the primary factor in the destruction of natural habitats and wildlife and reductions in the abundance and diversity of bird species.”³²

The reasonable places for housing opportunities today must include places as close as feasible to where the job are (consistent with sound planning). Some jobs are moving closer to where workers live—most notably through increased work from home, especially since the Covid-19 pandemic began.³³ However, low-income workers, who are disproportionately people of color, are less likely to work from home. More of them must commute to service, manufacturing, and other fixed-site jobs daily.³⁴ Also, a much higher proportion of low-income families with children live in overcrowded and/or substandard housing.³⁵

Importance of prohibiting “source of income” discrimination

The FHA still allows housing providers to discriminate against people who rely on Section 8 vouchers and other forms of governmental assistance. A leading authority on the FHA concludes:

Such source-of-income discrimination not only undercuts the federal government’s principal housing-assistance program, but it also disproportionately harms racial minorities and other FHA-protected groups. A growing number of states and localities have now addressed this problem by amending their fair-housing laws to ban source-of-income discrimination. The time has come for Congress to do the same.³⁶

³² Jeremy R. Meredith, *Sprawl and the New Urbanist Solution*, 89 Va. L. Rev. 447, 447 (2003) (referencing Bradley C. Karkkainen, *Biodiversity and Land*, 83 Cornell L. Rev. 1, 7 & n.24 (1997)).

³³ The overall impact of work from home (WFH) on total demand for office space is unclear, “with experts’ forecasts ranging from minimal impact (WFH) reductions offset by lower density) to an overall decline in office space demand of 10 to 15 percent.” PwC & Urban Land Institute (ULI), *Emerging Trends in Real Estate*® 2021, p. 8 (2020). The future for office workers may look more like a consultant’s flexible job schedule, with meetings at a central office on 3 days of the week and WFH 2 days a week. Yardi Matrix, *Industrial and Office National Outlook*, p. 61 (Presentation, Nov. 5, 2020).

³⁴ See, e.g., Richard A. Oppel Jr., et al., *The Fullest Look Yet at the Racial Inequity of Coronavirus*, N.Y. TIMES (July 5, 2020), [https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html?action=click&module=Top%20Stories&pgtype=Homepage&utm_source=NLIHC+All+Subscribers&utm_campaign=3243309e04-DHRC-7.8.2020&utm_medium=email&utm_term=0_e090383b5e-3243309e04-293283349&ct=t\(DHRC-7.8.2020-update\)](https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html?action=click&module=Top%20Stories&pgtype=Homepage&utm_source=NLIHC+All+Subscribers&utm_campaign=3243309e04-DHRC-7.8.2020&utm_medium=email&utm_term=0_e090383b5e-3243309e04-293283349&ct=t(DHRC-7.8.2020-update))

³⁵ See, e.g., HUD, *Evidence Matters: Housing’s and Neighborhoods’ Role in Shaping Children’s Future*, pp. at 3-4, 7 and Figure 1 (Fall 2014) (“HUD 2014”) (rates of inadequate and overcrowded housing for low-income children were about twice as high as for the overall population), posted at: http://www.huduser.org/portal/periodicals/em/EM_Newsletter_fall_2014.pdf). See also, e.g., EHI, *How Exclusionary Housing Policies Impact Children’s Health, Education, and General Development*, 3-4, 6 (2015), posted at https://www.equitablehousing.org/images/PDFs/PDFs--2018-/EHI_CHILDRENS_DEVELOPMENT_XHPs-final-rev-10-2020.pdf.

³⁶ Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 Case-W. Res. L. Rev. 573, 648 (2020).

“By 2020, seventeen states and over seventy localities had enacted housing laws that ban some form of source-of-income discrimination.”³⁷ Proposed Sec. 806-1(b)(i) would ban source-of-income discrimination in housing. Because a few courts have interpreted particular state or local laws banning source-of-income discrimination as not applying to Section 8 vouchers, on the grounds that vouchers are not “income” to the tenant, we have included the terms “funds” and “payment” as well.³⁸

Sec. 806-1(c)

- (c) For the purposes of this section, the terms below shall have the following meanings:
- (iii) “As close as feasible” means land or structures that are reasonably available for a suitable residence for a person—to the extent consistent with sound planning; including locations that would minimize the person’s commuting time to and from the person’s primary job or other primary means of support.
 - (iv) “Close family members” include the following persons, by birth or adoption: parents, grandparents and other direct, living ancestors; children, grandchildren, and other living descendants; siblings, first cousins, and the other, closest living cousin with whom the person has a mutually agreeable housing opportunity.
 - (v) “Commute-sheds” are areas from which a substantial number of people commute to a specific location—including from places beyond that location’s metropolitan and micropolitan areas (if any). The jurisdiction’s fair share of regional housing needs is not increased by the fact that some other area of the region is *not* providing its fair share of those needs.
 - (vi) “Discrimination” means discriminatory effect or intent, based on the nature or amount of a person’s financial assets, or source of payment or income, derived from any lawful source, as well as any other prohibited basis of discrimination, such as race, color, religion, sex, handicap, familial status, and/or national origin. “Family members” include parents, children, other direct ancestors and descendants (by birth, marriage, or adoption).

³⁷ *Id.* at 591.

³⁸ *See, e.g., Knapp v. Eagle Property Management Corp.*, 54 F.3d 1272 (7th Cir. 1995) (finding that Section 8 federal rent assistance vouchers were not “lawful source of income” within meaning of Wisconsin Open Housing Act provision prohibiting landlords from discriminating in housing on basis of lawful source of income). *See also Sabi v. Sterling*, 183 Cal. App. 4th 916 (2010) (California law did not change nature of Section 8 payments to a landlord, so as to include them in a tenant's source of income.)

- (vii) "Discriminatory housing practice" means an act that is unlawful under section 804, 805, 806, 806-1, or 818 of this title.
- (viii) "Economic status" means the person's income, financial assets or liabilities.³⁹ This section does not independently require the provision of housing at public expense. Rather, this section requires the elimination of all housing practices that increase the challenge of obtaining housing by other means, without sufficient justification, for any person covered by this section. A person's inability to pay (directly or indirectly) a reasonable amount toward rent or other living arrangements for a particular housing unit is sufficient justification for declining to assist that persons to obtain that housing unit.⁴⁰
- (ix) "Exclusionary housing practices" are zoning, housing and land use restrictions that function unfairly to exclude people from certain houses and neighborhoods without sufficient justification.
- (x) "Government official" includes an official of any governmental agency at any level of government, such as the federal, state, and local levels.
- (xi) "Policy" means a provision intended to guide action by a government entity or official, or other person acting under color of law, including—but not limited to—a provision of a government land use plan.
- (xii) "Practice" means an action or failure to act by an individual or group, under color of law, that tends to deprive any person of the housing opportunities protected by this statute.
- (xiii) "Primary support system" means the individual or group that provides the primary form of needed, personal assistance to the person.
- (xiv) "Regional housing needs" means the amounts and types of housing that would be necessary in the region of which the jurisdiction is a part, in order to house

³⁹ *Cf., e.g.*, 42 USCS § 5151(a) ("**Regulations for equitable and impartial relief operations.** The President shall issue, and may alter and amend, such regulations as may be necessary for the guidance of personnel carrying out Federal assistance functions at the site of a major disaster or emergency. Such regulations shall include provisions for insuring that the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or *economic status.*") (Emphasis added).

⁴⁰ "[L]andlords and other housing providers in FHA cases have always been perceived as having a legitimate interest in their tenants' ability to pay the rent or to meet other financial obligations." Schwemm, *supra* n. 35, at 576. "A separate issue is whether a landlord may require a certain minimum ratio of income to rent (e.g., that a tenant have wages or other income equal to at least three times the rent)." *Id.*, note 11.

suitably all the people who work, live, have a close family member living, or have their primary support system in, the region—or who would do so, in the absence of exclusionary housing practices. The jurisdiction’s region includes its: (1) Metropolitan Statistical Area, if any, based on U.S. Census Bureau standards; (2) Smaller, multi-jurisdictional Micropolitan Area(s), if any, based on U.S. Census Bureau standards;⁴¹ and (3) Commute-sheds for each portion of the jurisdiction.⁴²

- (xv) “Regulation” means a statute, ordinance, rule, binding plan provision, or other mandatory legal provision.
- (xvi) “Suitable housing” means housing reasonably suited to the person’s circumstances—including economic circumstances—and meeting applicable standards of health and safety. Housing is suitable if it is of the types, prices, sizes, conditions and locations appropriate for the people covered by this provision who live in the area, or who would live there in the absence of exclusionary housing practices.⁴³
- (xvii) “Without sufficient justification” means a governmental or private policies that is an artificial, arbitrary, and unnecessary barrier.⁴⁴ Practices that are necessary to achieve a valid governmental or private interest (as applicable) are sufficiently justified, unless the evidence shows that there is an available alternative practice that has less discriminatory effects and serves the legitimate needs of the entity involved.⁴⁵

⁴¹ See 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas, *Office Of Management and Budget*, 75 Fed. Reg. 37246 (June 28, 2010), as corrected, 75 Fed. Reg. 39052 (July 7, 2010) (“The general concept of a metropolitan statistical area is that of an area containing a large population nucleus and adjacent communities that have a high degree of integration with that nucleus. The concept of a micropolitan statistical area closely parallels that of the metropolitan statistical area, but a micropolitan statistical area features a smaller nucleus.” 75 Fed. Reg. at 37246.)

⁴² The relevant region has been described as “the region that contributes to the housing demand within the municipality.” *Mount Laurel II*, 456 A.2d 390, 415.

⁴³ See, e.g., American Planning Association (APA) Advisory Service Report No. 516, *Jobs-Housing Balance*, pp. 4, 35 (2003).

⁴⁴ Cf., *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project (ICP)*, 135 S. Ct. 2507, 2522 (2015) (under Fair Housing Act: “Disparate impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers,’ not the displacement of valid governmental policies”), quoting *Griggs v. Duke Power Co.*, 401 U. S. 424, 431 (1971).

⁴⁵ *ICP*, 135 S. Ct. at 2518, quoting *Ricci v. DeStefano*, 557 U. S. 557, 578 (2009).

(xviii) “Works” means being gainfully employed in one or more jobs, or having been within the past five years and currently seeking employment. The place where the person works is where they primarily report outside the home in the course of their gainful employment, or where they primarily reported their most recent, gainful employment within the past five years. If their primary occupation is as a student in an institution of higher education that offers in-person instruction, where the person works means where the person’s school is located.

Comments:

“Exclusionary housing practices”

Those practices include all legal (“regulatory”) restrictions and private actions that have the effect of excluding a person from certain houses or neighborhoods without sufficient justification. All of those practices undermine the purpose of the FHA, which “was enacted to eradicate discriminatory practices within a sector of our Nation’s economy.” *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project (ICP)*, 135 S. Ct. 2507, 2521 (2015) (citing 42 U.S.C. § 3601, which states: “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States”).

Housing practices that exclude a person from a house or neighborhood are only unlawful if they are “without sufficient justification.” As the Supreme Court stated in *ICP*, “zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification . . . reside at the heartland of” unlawfully discriminatory housing practices under the FHA.⁴⁶

As with the disparate racial impacts of the state regulations at issue in *ICP*, liability under the proposed Sec. 806-1 mandates the “removal of artificial, arbitrary, and unnecessary barriers,” not the displacement of valid policies.⁴⁷ Thus, a person alleging an exclusionary housing practice (“plaintiff”) has the initial burden of proving that a challenged practice caused, or predictably will cause, a discriminatory effect.

If a plaintiff makes that showing, the burden shifts to the person(s) responsible for the practice (“defendant”) to prove that it is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests. If the defendant makes its showing, the plaintiff still can prevail

⁴⁶ *ICP*, 135 S. Ct. at 2521-22.

⁴⁷ *ICP*, 135 S. Ct. at 2522, citing *Griggs v. Duke Power Co.*, 401 U. S. 424, 431 (1971). In *ICP*, the Supreme Court essentially adopted the statement of those elements in the rule issued by HUD in 2013 regarding disparate impact cases. See *ICP*, 135 S.Ct. at 2514-15 (discussing HUD, *Implementation of the Fair Housing Act’s Discriminatory Effects Standard: Final Rule*, 78 Fed. Reg. 11460 (2013) (codified at 24 CFR § 100.500)). HUD’s formulation involves the same kind of burden-shifting approach the Court has formulated for other anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 (equal employment opportunity). See 24 CFR §§ 100.500(c)(1)-(c)(3) (description of burdens of proof in Fair Housing Act disparate impact cases).

upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect.

Among the common exclusionary housing practices are exclusionary zoning regulations by local governments. Exclusionary zoning has been defined as “land use control regulations which . . . tend to exclude persons of low or moderate income from the zoning municipality.”⁴⁸

Exclusionary zoning regulations often require unnecessarily large lot sizes, setbacks for buildings, front yard areas, lot widths, and setbacks for parking; and regulations prohibiting, or placing unnecessary restrictions on, accessory (“in-law”) apartments and multifamily housing, including rental apartments and attached condominiums.⁴⁹ Federal commissions created under both Democratic and Republican Presidents have confirmed that local zoning ordinances often pose major barriers to affordable housing development.⁵⁰

Numerous governmental housing-related policies other than exclusionary zoning have similar effects. For example, local governments sometimes impose moratoria or caps on new housing, even where the zoning permits such developments, and where the need for affordable housing is great.⁵¹ Local governments also sometimes refuse to transfer available land for affordable housing development. High land costs are a major impediment to affordable housing projects and often result from overly-restrictive land-use policies.⁵²

Also, often local governments burden affordable housing developments with:

- unnecessarily high property taxes, fees, and/or exactions;⁵³

⁴⁸ *Suffolk Housing Services v. Town of Brookhaven*, 397 N.Y.S.2d 302, 306 (Sup. Ct. 1977) (citing 2 ANDERSON, AMERICAN LAW OF ZONING § 8.02 (2d ed.)), *aff’d as modified*, 405 N.Y.S.2d 302 (App. Div. 1978).

⁴⁹ See Jane M. Swift, *Overcoming Barriers to Development in Massachusetts* 4 (2001), available at <http://bgc.pioneerinstitute.org/overcoming-barriers-to-housing-development-in-massachusetts/> (emphasis added). “In Massachusetts, developed land now has less than half the population density (4.97 persons per acre) [that] it had in 1950 (11.19 persons per acre). Between 1950 and 1990, the amount of developed land increased at a rate greater than six times population growth. One of the reasons for this precipitous drop in density is the imposition of regulatory barriers that require significantly more land to build a unit of housing.”

⁵⁰ *E.g.*, William A. Fischel, *Does the American Way of Zoning Cause the Suburbs of Metropolitan Areas to Be Too Spread Out?* 151, in ALAN ALTSHULER, *ET AL.*, GOVERNANCE AND OPPORTUNITY IN METROPOLITAN AMERICA (National Academies Press, 1999, posted at: <https://www.nap.edu/read/6038/chapter/9>).

⁵¹ See, *e.g.*, Edward L. Glaeser, *et al.*, *Regulation and the Rise of Housing Prices in Greater Boston* 6 (2006).

⁵² See, *e.g.*, Richard M. Haughey, *Workforce Housing: Barriers, Solutions, and Model Programs* 5 (Urban Land Inst. 2002), posted at: http://18.215.191.197/wp-content/uploads/ULI_Workforce_Housing.pdf.

⁵³ A study of development impact fees in more than 100 jurisdictions nationwide found that in the year 2000, the average total of impact fees per single-family home was \$10,141. *Development Impact Fees: Best Practices* 14, Planning and Research, Inc. (2002) (prepared for Maricopa Association of Governments) (“Maricopa Study”), available at http://www.mag.maricopa.gov/pdf/cms_resource/Development-Impact-Fees.pdf (citing James C. Nicholas, *National Average Impact Fees* (Holland Law Center, University of Florida at Gainesville, 2000)). That study covered the most common

- costly, high-end building and housing code requirements that are unnecessary for health and safety;⁵⁴
- gentrified subdivision controls in addition to state requirements;⁵⁵
- unnecessarily tortuous, protracted site plan and permit processes;⁵⁶ and
- over-regulation of affordable housing property management.⁵⁷

Because affordable housing developments are low-profit or nonprofit enterprises, such exclusionary governmental housing practices have a substantial negative impact on the

capital facilities funded in part through those impact fees – namely, water and sewer facilities, roads, parks, public safety, and schools.

In some areas, development impact fees are much higher. A California government survey found that, as of 1999, fees accounted for an average of ten percent of the median price of new single-family homes in the California localities studied *Id.* at 22 (citing California Department of Housing and Community Development (2000)).

⁵⁴ “Overly strict building codes have inhibited the construction and rehabilitation of low-cost housing. Housing codes have encouraged abandonment.” Michael Carliner, *Homelessness: A Housing Problem?*, in *THE HOMELESS IN CONTEMPORARY SOCIETY* 127 (Richard D. Bingham, *et al.*, eds., 1987); *quoted in* RICHARD W. WHITE, JR., *RUDE AWAKENINGS: WHAT THE HOMELESS CRISIS TELLS US* 144-55 (1992). Building codes “often include provisions that add time and expense but do not improve the quality or safety of construction.” Richard M. Haughey, *Workforce Housing: Barriers, Solutions, and Model Programs* 9 (Urban Land Inst. 2002), available at http://18.215.191.197/wp-content/uploads/ULI_Workforce_Housing.pdf.

⁵⁵ In Massachusetts, for example, local planning boards have adopted regulations prescribing in new subdivisions the standards for turnarounds and dead end streets, underground distribution systems for utility services including electrical and telephone services, police and fire alarm boxes and any similar municipal equipment, and street lighting. Planning board regulations can also include standards for the orientation of new streets, lots, and buildings; building set-back requirements from property lines; limitations on the type, height and placement of vegetation; and restrictive covenants protecting solar access that are not inconsistent with existing local bylaws or ordinances. Gov. Jane M. Swift, *Overcoming Barriers to Development in Massachusetts* 5 (2001), available at <http://bgc.pioneerinstitute.org/overcoming-barriers-to-housing-development-in-massachusetts/> (emphasis added). (Swift was Governor of Massachusetts at that time). “In some instances, these powers are used to impinge on areas technically beyond the municipality’s jurisdiction and in so doing raise the cost of development by imposing additional standards.” *Id.*

⁵⁶ The building permit process “tends to be lengthy and expensive, adding time and costs to the development process and thus making it harder for developers to produce affordable housing.” *Haughey, supra* n. 53. Those who develop affordable housing are even more affected than market-rate developers by delays in, and expenses of, permit procedures, because their projects have a smaller profit margin and encounter more public opposition from NIMBY (not-in-my-backyard) forces. *Id.*

⁵⁷ Subsidized affordable housing units have “become increasingly difficult to manage because of bureaucratic rules and regulations and because of the red tape inherent to the various types of housing.” Brian Rogal, *Affording Affordable Housing* 2 (J. of Property Mgt., Nov. 1, 2006). Such difficulties affect how much affordable housing nonprofits and other developers are willing to undertake. “[M]any developers say the financial landscape for affordable housing has changed drastically--inadvertently multiplying the number of inspections real estate managers need to pass.” *Id.* at 6.

production and retention of affordable housing. They artificially inflate rents and sales prices, making many neighborhoods beyond the means of many working Americans. As mentioned, exclusionary housing practices have greatly increased residential segregation of rich and poor neighborhoods, and thus the isolation of low-income people, most of whom are minority group members, in poor neighborhoods.

Sec. 806-1(d)

(d) Sec. 802(f) of the Fair Housing Act, 42 U.S.C. §3602(f), is hereby amended to read:

"Discriminatory housing practice" means an act that is unlawful under section 804, 805, 806, 806-1, or 818 of this title."

Comment:

This provision makes explicit that actions made unlawful under this section 806-1 are subject to all the same remedies and other provisions of the Fair Housing Act as the other discriminatory housing practices.

ABOUT THE INSTITUTE

The Equitable Housing Institute (EHI) is a national, nonprofit organization whose primary mission is to remove exclusionary housing practices that adversely affect low- and moderate-income Americans.

EHI is drafting model state or federal legislation to prohibit exclusionary housing practices comprehensively. EHI's initial report on the subject, *Toward a comprehensive ban on exclusionary housing practices* (Dec. 2019)—is posted on its website at: https://www.equitablehousing.org/images/PDFs/PDFs--2018-/EHI-Toward-comprehensive-ban-tech_edits-10-2020.pdf. EHI's many other reports (also available on its website) address subjects such as:

- The importance of achieving a healthy balance of jobs and housing in American communities, and common misconceptions about what constitutes that “balance.”
- Links between exclusionary housing practices and the increased problems that many low-income children face with health, education, and other developmental issues.
- Congressional authority to prohibit unwarranted state and local regulatory restrictions on housing supply, because of their adverse effects on interstate commerce.
- Statewide legislative efforts, in numerous states across America, to control exclusionary housing practices.

In addition, EHI plays a hands-on role in promoting production of housing units affordable to low- and moderate-income people in its local area—the Washington, DC, region. During EHI's first 10 years (beginning in 2008), more than 27,000 housing units were added to existing plans or proposals by local government agencies in Northern Virginia communities where EHI had advocated for more housing. More than 3,000 of those added units would be affordable to low- and moderate-income people and set aside for them.

“[A]s the nation has grown richer, it seems to be increasingly difficult to be poor, and . . . the lack of affordable housing is a really important component to that. I tremendously admire [EHI] for the part you are playing in this fight.” Prof. George A. Akerlof, Nobel Laureate in Economics

“With its detailed research on housing law, and its ability to help municipalities take a hard look at their assumptions and priorities, EHI has an important role to play in the fight for fair housing.”—Inside Philanthropy

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