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Promoting housing affordability by removing regulatory barriers

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June 2018

Toward a better "stick" to combat exclusionary housing practices: reimbursing victims for full costs of violations, under RLUIPA

As we have reported, a virtual consensus has emerged recently—among housing policy experts, economists, and even Presidents of the United States—that land use regulations often include major, widespread barriers to housing affordability, and that they warrant serious reform. For more, please click on EMERGING CONSENSUS ON REGULATORY BARRIERS TO HOUSING AFFORDABILITY.)

The next frontier for consensus-building—and action—is the development of effective ways to eliminate those barriers (a/k/a "exclusionary housing practices"). Recent studies have concluded that the limited reform efforts to date, at the local, state and federal levels, have failed to solve the overall problem.

Among the needed reforms is an effective legislative approach, to control those barriers by statute. EHI is analyzing the state of the law and the lessons learned from previous reform efforts, in order to create a more effective approach. (EHI is the only national organization focused primarily on removing exclusionary housing practices, for the benefit of all low- and moderate-income Americans.)

One legislative approach that has substantially increased the ability of victims of exclusionary zoning to overcome it—albeit in a quite different context—is a federal statute that protects religious institutions from discriminatory land use practices. *Religious Land Use and Institutionalized Persons Act of 2000* ("*RLUIPA*"), 42 U.S.C. §§ 2000cc *et seq*.

There is general agreement among commentators that a key to RLUIPA's success is its provision for reimbursement of the full costs (including necessary legal expenses) of proven victims of exclusionary land use regulations. Other laws and judicial decisions that have prohibited such practices generally do not authorize reimbursement of the legal expenses of the victims.

An exception is the federal Fair Housing Act ("FHA"), which permits reimbursement of legal expenses to proven victims of exclusionary housing practices, where those victims are members of a protected minority group. (The FHA protects people from housing

discrimination based on their race, color, religion, sex, handicap, familial status, and national origin.)

However, the FHA is not designed to solve the overall problem of exclusionary housing practices. For example, though the FHA helps "level the playing field" for minority group members, the widespread housing shortages caused by exclusionary housing practices would keep the "playing field" seriously deficient, even if it were level. Residential segregation of Americans by income—which is largely due to exclusionary housing practices—has increased a great deal (and fairly steadily) over the last several decades, even though residential segregation by race has been declining with the help of the FHA.

Effective, new legislation at the state and/or federal level appears necessary to overcome exclusionary housing practices generally. Whatever legislative approach is taken, we recommend that it provide for the same kind of cost reimbursement for successful claimants that is allowed under RLUIPA.

This memorandum will summarize:

1. RLUIPA's land use provisions, and indications of their validity;
2. Views of commentators on the effects of RLUIPA's cost reimbursement provisions in land use cases,
3. Major cost reimbursements to RLUIPA land use claimants; and
4. Implications of RLUIPA for creation of more effective statutory provisions prohibiting exclusionary housing practices generally.

RLUIPA has proven to be a controversial statute in some ways.[1] This memorandum takes no position on the merits of RLUIPA's land use provisions. We only address RLUIPA's cost reimbursement provisions in land use cases, and the possible creation of similar provisions for use in other land use cases—those involving exclusionary housing practices.

1. RLUIPA's provisions and validity, regarding land use

RLUIPA generally prohibits a "land use regulation" that substantially burdens religious exercise, or that treats a religious assembly or institution on less than equal terms with a non-religious assembly or institution. 42 U.S.C. § 2000cc.[2]

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[1] We do not address in this memorandum the legal issues under RLUIPA generally—such as the interpretations of central terms such as "religious exercise" and "substantial burden," which have not been settled definitively by judicial rulings.

[2] That provision states:

> **(a) Substantial burdens**
>
> **(1) General rule**. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including

The definition of "land use regulation" under RLUIPA is limited to a "zoning or landmarking law," or the application of such a law, that restricts the use or development of land for religious purposes. 42 U.S.C. § 2000cc-5(5).[3]

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a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which --

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms. No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination. No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits. No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

[3] That provision states:

> The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

A "zoning law" (most such laws are local government ordinances), defines the permitted uses for various areas of the jurisdiction (such as industrial, residential, and/or retail business uses), and permissible features of those uses (such as building height or density). *See, e.g., Bragdon v. Town of Vassalboro*, 780 A.2d 299, 302 (Me. SC, 2001). A "landmarking law" is one that officially designates a structure (such as a building) of unusual historical interest for preservation. *See generally, e.g.,* Merriam-Webster Law Dictionary (definition of "landmark"), available at:

To contest an alleged exclusionary land use regulation under RLUIPA, a claimant must have a property interest in the regulated land, or a contract or option to acquire such an interest.[4] The claimant may bring a lawsuit either in state or federal court. 42 U.S.C. §§ 2000cc-2, -5.[5]

The key provision for purposes of this Article is actually part of another civil rights statute. Under 42 U.S.C. § 1988(b),[6] where a RLUIPA claimant *other than the United States* prevails in the lawsuit, the court has discretion to award "a reasonable attorney's fee" as part of the claimant's reimbursable costs. Those costs would be paid by the government unit responsible for the violation.

The United States Supreme Court has not addressed the constitutionality of RLUIPA's land use provisions. However, the Court has upheld the constitutionality of RLUIPA's provisions regarding institutionalized persons. *Cutter v. Wilkinson*, 544 U.S. 709 (2005). The U.S. Courts of Appeals that have ruled on the constitutionality of RLUIPA's land use provisions have upheld them.[7]

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https://www.merriam-webster.com/dictionary/landmark#legalDictionary (last visited June 18, 2018).

[4] A person raising a claim or defense under RLUIPA is defined as a "claimant." 42 U.S.C. § 2000cc-5(1). Under the definition of "land use regulation," quoted above (note 2), a "claimant" must have "an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest."

[5] § 2000cc-2 states:

> (a) **Cause of action.** A person may assert a violation of this Act as a claim or defense in a judicial proceeding and *obtain appropriate relief against a government*. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.
>
> . . . .
>
> (c) **Full faith and credit.** Adjudication of a claim of a violation of section 2 [42 USCS § 2000cc] in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a *full and fair adjudication of that claim in the non-Federal forum*.

(Emphasis added)

[6] That provision states in pertinent part:

> In any action or proceeding to enforce a provision of . . . *the Religious Land Use and Institutionalized Persons Act of 2000*, . . . the court, in its discretion, may allow the *prevailing party, other than the United States, a reasonable attorney's fee as part of the costs*, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

[7] *See, e.g., Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 353-56 (2d Cir. 2007) (those provisions are valid exercise of federal commerce power, and are not inconsistent with

2. Views of commentators

Regardless whether they view RLUIPA favorably or unfavorably, commentators generally have concluded that:

- The statute has substantially increased the leverage of people who claim that exclusionary zoning has interfered with their religiously-motivated land use projects; and
- Reimbursement of the full costs unavoidably incurred by proven victims of exclusionary zoning is a key to increasing their leverage.

Law professors

Professors of law began noting RLUIPA's substantial effects on claimants' leverage in land use cases early on. In 2003, Prof. Alan Weinstein observed that RLUIPA had changed the rules of local land use in a fundamental way.[8] In 2006, Prof. Jeffrey Goldfien concluded that RLUIPA's cost reimbursement provisions help give religious land owners "an almost irresistible incentive" to assert claims under RLUIPA, if only to gain strategic leverage in the land use approval process.[9]

Then, in 2012, Prof. Weinstein reviewed the empirical evidence from RLUIPA's first decade.[10] According to Weinstein: "One aspect of the outcomes of RLUIPA litigation is of particular note: the award of, or a settlement providing for, very substantial damages and attorney fees in egregious cases."[11] He noted three million dollar recoveries by successful claimants. (See summary of those and other million dollar recoveries, in Part 3, below.)

Tenth Amendment and Establishment Clause of Constitution); *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978, 992-95 (9th Cir. 2006) (RLUIPA's land use provisions are valid exercise of Congressional power under Fourteenth Amendment); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1237-42 (11th Cir. 2004) (RLUIPA's equal-terms provision is valid exercise of power to enforce Fourteenth Amendment, and does not offend Tenth Amendment or Establishment Clause of Constitution), *cert denied*, 543 US 1146 (2005).

[8] Alan C. Weinstein, *Recent Developments Concerning RLUIPA*, in *Current Trends and Practical Strategies in Land Use Law and Zoning* 1, 11 (Patricia E. Salkin ed., 2004) ("Undeniably, local government is being sent a message that RLUIPA has 'changed the rules' in a fundamental way"). Weinstein was (and still is) a Professor of Law at Cleveland-Marshall College of Law.

[9] Jeffrey H. Goldfien, *Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes*, 2006 J. Disp. Resol. 435, 447 (2006). Goldfien was an Adjunct Professor at the University of California, Hastings College of Law.

[10] Alan C. Weinstein, *The Effect of RLUIPA's Land Use Provisions on Local Governments*, 39 Fordham Urb. L.J. 1221 (2012).

[11] Weinstein (2012) at 1240.

Weinstein found that the prospect of reimbursement of attorney's fees for a successful claim gives local officials good reason to believe that RLUIPA claimants will be able to find representation by private attorneys.[12] Based on the limited information he collected, Weinstein concluded that "the cost RLUIPA undoubtedly imposes on local governments is the price to be paid for insuring against the discriminatory or arbitrary application of land use regulations[.]"[13]

In November 2017, Weinstein was quoted by *The Atlantic* magazine as stating that local governments—especially the smaller and less wealthy ones—"can feel blind-sided when RLUIPA issues come up." [14] They "barely have the money to maintain fire and safety forces," he said, "let alone run their land-use regulatory program."[15]

Without specifically mentioning the statute's cost-shifting provisions, Prof. Douglas Laycock and Luke W. Goodrich praised the effects of RLUIPA, and defended it against its critics, in 2012 law review article.[16]

> Since 2000, RLUIPA has become a pillar of civil rights protection for churches. Churches have litigated numerous cases to favorable judgment. Many more have settled. The Department of Justice (DOJ) has filed numerous cases challenging outright discrimination against churches. And RLUIPA has been uniformly and repeatedly upheld against constitutional challenge.[17]

Prof. Laycock had been a leading proponent of the creation of RLUIPA. Goodrich was Deputy General Counsel of the Becket Fund for Religious Liberty, which represents religious claimants under the statute.

In a 2016 law review article, Prof. Zachary Bray stated that "the most practically significant aspect of [RLUIPA] may be the discretion it affords courts to award prevailing religious claimants their attorneys' fees."[18] Given the dim view he took of

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[12] Weinstein (2012) at 1238-39.

[13] Weinstein (2012) at 1247.

[14] Emma Green, *The Quiet Religious-Freedom Fight That Is Remaking America*, The Atlantic, Nov. 5, 2017 (*The Atlantic")*.*The Atlantic* (Nov. 5, 2017).

[15] Adam Smith, a lawyer for Deschutes County, Oregon, alsoconfirmed that cash-strapped, risk-averse local governments can also be spooked by potentially expensive RLUIPA challenges. *The Atlantic* (Nov. 5, 2017).

[16] Douglas Laycock & Luke W. Goodrich, *RLUIPA: Necessary, Modest, and Under-Enforced*, 39 Fordham Urb. L.J. 1021 (2012).

[17] Laycock & Goodrich at 1023 (footnote omitted).

[18] Zachary Bray, *RLUIPA and the Limits of Religious Institutionalism*, 2016 Utah L. Rev. 41, 67 (2016). Bray was then an Assistant Professor at the University of Houston Law Center. (He later became an Associate Professor at the University of Kentucky College Of Law.)

RLUIPA, he regretted the "incredible leverage its attorneys' fee component provides to religious claimants."[19]

RLUIPA litigators

In a 2005 book, Marci Hamilton, a leading RLUIPA defense (government-side) litigator, wrote that "the specter of having to pay both sides' fees could break the community bank . . . . Local authorities fold like a house of cards, regardless of the merits of either side's position."[20] Other RLUIPA defense litigators have written comparable conclusions.[21]

In a 2013 law review article, Daniel Dalton—a leading RLUIPA litigator on behalf of religious organizations—stated that many municipalities across the country believe "it is more beneficial" to them and their taxpayers to settle such lawsuits "rather than engage in protracted, unpredictable litigation that risks an even larger monetary loss."[22] He noted several recent court decisions and settlements in which claimants recovered between $250,000 and $2.3 million. (See summary of those and other million dollar recoveries, in Part 3, below.)

Student law review articles

Generally, the student articles analyzing RLUIPA have reached the same conclusions. A 2006 student law review article found that in the few cases reported to that time, relating to "auxiliary uses" sought by churches for their land, local governments had shown "a tendency to acquiesce to the threat of a RLUIPA-based challenge rather than take on the religious institution that issued it."[23] A 2009 student law review article concerning

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[19] Bray at 46.

[20] MARCI HAMILTON, GOD VS. THE GAVEL 98 (2005).

[21] In a 2009 book, land use attorney Dwight H. Merriam, another prominent RLUIPA defense litigator, warned local governments that the "stakes are high" in RLUIPA litigation, largely because "there is the potential for money damages (although this remains uncertain); and attorneys' fees can be awarded even if the matter is resolved short of trial." Dwight H. Merriam, *How Local Government Can Nip RLUIPA Claims in the Bud*, in *RLUIPA Reader: Religious Land Uses, Zoning, and the Courts* 113, 114 (Michael S. Giaimo & Lora A. Lucero eds., 2009).

In 2014, Evan J. Seeman, an attorney in Merriam's firm, wrote that "what municipalities may fear most of all … is the potential financial impact of an RLUIPA loss" potentially reaching "millions of dollars," which can lead local governments "to cave to the demands of religious institutions." Evan J. Seeman, *RLUIPA Defense Tactics: How to Avoid & Defend Against RLUIPA Claims*, Zoning & Plan. L. Rep., p. 1, 1 (Dec. 2014).

[22] Daniel P. Dalton, *The Religious Land Use and Institutionalized Persons Act—Recent Decisions and Developments*, 45 Urban Lawyer 741, 764 (2013).

[23] Sara C. Galvan, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 Yale L. & Pol'y Rev. 207, 231 (2006). An

RLUIPA's impact in New Jersey found: "RLUIPA's attorney fee clause may have the single most significant impact on the outcome of zoning disputes between religious land owners and municipalities."[24]

One student law review article (from 2010) was contrarian, contending that RLUIPA "has failed to significantly benefit religious plaintiffs."[25] However, the author acknowledged: "It is likely that both opponents and proponents of RLUIPA would dispute my contention . . . ."[26] That article acknowledged that "it is undeniable that religious entities have won notable RLUIPA victories," and that "there are indeed documented stories of governments settling or succumbing to the demands of religious land owners in order to avoid RLUIPA litigation."[27]

3. Examples of major reimbursements to RLUIPA claimants

Among the largest cost reimbursement awards under RLUIPA to date are the following:

"auxiliary use" (or "accessory use") is a non-worship use affiliated with a religious institution, such as a residential use (homeless shelter, retirement home, etc.), hospital, health maintenance organization, transportation company, and/or a great variety of other non-worship uses. *See id.* at 207-08 and nn. 1-7.

[24] Andrew M. Englander, *Note, God and Land in the Garden State: The Impact of the Religious Land Use and Institutionalized Persons Act in New Jersey*, 61 Rutgers L. Rev. 753, 765 (2009).

> The success that RLUIPA plaintiffs have achieved in New Jersey federal court is pressuring local governments—faced with the prospect of having to pay both their own legal fees, as well as those of their adversaries—into cutting their losses. It thus appears that RLUIPA has brought about a change in the legal environment in New Jersey beyond the confines of the courtroom.

Englander at 782.

[25] Bram Alden, *Reconsidering RLUIPA: Do Religious Land Use Protections Really Benefit Religious Land Users?* 57 UCLA L. Rev. 1779, 1804 (2010).

[26] Alden at 1804.

[27] Alden at 1805, 1808. Alden's basic arguments were: (1) that "it is likely that many, if not most, of these victories would have been achieved even in RLUIPA's absence;" (2) that "reports of local governments capitulating in the face of RLUIPA threats are surprisingly limited in number;" and (3) that RLUIPA claimants' "underwhelming" success rate in court probably would lead to fewer local government capitulations in the future. *Id.* at 1805, 1809.

However, Englander had reported that "throughout New Jersey there are well-documented examples of local zoning authorities acquiescing to the land use demands of religious organizations in the face of RLUIPA lawsuits." Englander also cited evidence that RLUIPA was influencing local governments to approve religious land use proposals without the filing of a lawsuit. Galvan had noted cases that illustrated the tendency she found for local governments to accommodate, rather than litigate against, churches who relied on RLUIPA. Galvan at 231-232 (discussing Greenwood Community Church (Denver, Colorado) and Christ Church(Rockaway Township, New Jersey).

- Bridgewater Township, New Jersey, settled protracted litigation with leaders of a proposed mosque in 2014, by agreeing to pay a total of $7.75 million—consisting of $5 million for alleged damages, costs and attorney's fees, plus $2.75 million to pay for a site for the mosque.[28] That is the current record settlement for a RLUIPA suit, according to Prof. Bray.[29]
- The Village of Mamaroneck, New York, was ordered to pay the claimants $4.75 million in damages, including over $3 million in attorney's fees, by the Second Circuit U.S. Court of Appeals (2008). [30]
- In *Reaching Hearts International, Inc. v. Prince George's County (Maryland),* following eight years of litigation, the court awarded the plaintiffs damages totaling $3.7 million.[31]
- In *International Church of Foursquare Gospel v. City of San Leandro, California*, The City of San Leandro, California agreed to pay $2.3 million to the International Church of the Foursquare Gospel to end the five-year litigation.[32]
- In *Hollywood Community Synagogue, Inc. v. City of Hollywood, Florida*,[33] city officials, after losing a RLUIPA challenge in U.S. District Court, agreed to a settlement that included paying $2 million to the RLUIPA plaintiff and having city officials attend religious sensitivity training.
- In *Rocky Mountain Christian Church v. Comm'rs of Boulder County, Colorado*, The U.S. Supreme Court's denial of Boulder's petition for certiorari left the County "to pay $1.5 million in legal fees for the Church, not to mention their own costs of seven years of litigation in this matter." [34]
- St. Michael, Minnesota paid $1,354,595 in damages to the Riverside Church (2017).[35]

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[28] Mike Deak, *Bridgewater, mosque settlement reaches $7.75 million*, MyCentralNJ, Dec. 2, 2014.

[29] Bray at 167, n. 139, citing Patricia Salkin, *N.J. Township Settles RLUIPA Lawsuit for Almost $ 8M*, Law of the Land Blog (Dec. 10, 2014), posted at: https://lawoftheland.wordpress.com/2014/12/10/nj-township-settles-rluipa-lawsuit-for-almost-8m/.

[30] *See generally* New York Zoning and Municipal Law Blog, Jan. 15, 2008. The underlying case was *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 352 (2d Cir. 2007) (noting the "arbitrary blindness to the facts" exhibited by village officials).

[31] Dalton (2013) at 757.

[32] Dalton (2013) at 763.

[33] 436 F. Supp. 2d 1325, 1337 (S.D. Fla. 2006) (finding that "[n]othing in the ordinance or its application prevents City officials from encouraging some places of worship while discouraging others through the arbitrary grant or denial of a Special Exception"). *See generally* Todd Wright, *Hollywood to Pay $2 Million to Synagogue*, Miami Herald, June 26, 2006.

[34] Patricia Salkin, *US Supreme Court Denies Cert in Colorado RLUIPA Case*, Law of the Land blog, posted at: https://lawoftheland.wordpress.com/2011/01/10/us-supreme-court-denies-cert-in-colorado-rluipa-case/.

[35] Evan Seeman, *Church Wins Free Speech Claim Over Zoning Ordinance and $1,354,595 in Damages*, June 14, 2017, posted at: https://www.rluipa-defense.com/2017/06/church-wins-free-speech-claim-over-zoning-ordinance-and-1354595-in-damages/.

- In *Academy of Our Lady of Peace [OLP] v. City of San Diego*, a jury found in favor of OLP in 2012 and awarded it more than $1.1 million in damages.[36]

4. Implications of RLUIPA for creation of more effective statutory provisions prohibiting exclusionary housing practices generally

The same kind of full reimbursement for successful claimants that is allowed under RLUIPA arguably should be allowed to low- and moderate-income victims of exclusionary housing practices. Without such reimbursement, low- and moderate-income people generally will continue being unable financially to challenge those practices effectively.

Many zoning jurisdictions—especially those in wealthy areas—have tremendous financial and legal resources which allow them to fend off lawsuits by generating and enormous costs and delays. Even if a landowner or housing developer were inclined to bring a challenge to exclusionary housing practices, there generally are insufficient financial incentives to make such a challenge economically sensible.

With the exception of the federal Fair Housing Act (FHA), 42 USC §§ 3601-3619, the existing statutes that target exclusionary housing practices generally do not provide for substantial cost reimbursement to successful claimants. [37] There is no federal statute that expressly prohibits housing discrimination based on a person's wealth or lack of it.

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[36] Daniel P. Dalton, *The Religious Land Use and Institutionalized Persons Act—Recent Decisions and Developments*, 45 Urban Lawyer 741, 749 (2013).

[37] Statutes that target exclusionary housing practices that discriminate based on people's incomes, rather than on minority-group status, generally have not allowed reimbursement of legal expenses to victims. Most of those statutes laws are state laws. Examples are:

- Massachusetts—*Comprehensive Permit Law*, Mass. Gen. Laws Ann., Ch. 40B, §§ 20-23 (enacted 1969)
- California—*Housing Element Law*, Cal. Gov't Code §§ 65580, 65583.1 et seq (enacted 1971)
- Oregon—*Comprehensive Land Use Planning*, Or. Rev. Stat. 197.312 (enacted 1973)
- New Jersey—New Jersey Fair Housing Act, N. J. Rev. Stat. §§ 52:27D 301-29 (enacted 1985)
- Connecticut—*Affordable Housing Land Use Appeals Procedure*, Conn. Gen. Stat. § 8-30g (enacted 1989)
- Rhode Island—Low and Moderate Income Housing Act, R.I. Gen. Laws § 45-53-1 (enacted 1991)
- Illinois—*Affordable Housing Planning and Appeal Act*, 310 Ill. Comp. Stat. 67/1-60, Sec. 67/30(b) (enacted 2004)
- New Hampshire—*Workforce Housing*, N.H. Rev. Stat. § 674:58-61 (enacted 2008).

The FHA may be used where an exclusionary housing practice has a demonstrable "disparate impact" on a minority group or individual in a protected category. 42 USC § 3613(c)(2)[38] The protected categories are race, color, religion, sex, handicap, familial status, and national origin. Because the FHA permits reimbursement of legal costs to proven victims, it appears that maximum use should be made of the FHA when it is available.

However, the FHA is not designed to solve the overall problem of exclusionary housing practices. For example:

- Residential segregation by income, which is largely due to exclusionary housing practices, has increased a great deal—and fairly steadily—during the last few decades, while residential segregation by race has declined.[39] Exclusionary housing practices have undermined the FHA's effort to combat discrimination against protected minority groups.
- The FHA aims to help "level the playing field" for minority group members, but the housing shortages that are caused by exclusionary housing practices would cause the "playing field" to remain very deficient, even if it were "level."
- In many situations it will be difficult to prove that an exclusionary housing policy that is neutral on its face has a disparate impact on a minority-group member. Proving a disparate impact on minority-group members may be a daunting task, often requiring a sophisticated analysis of statistics that would not be necessary to establish an economically exclusionary housing practice.[40]

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[38] That provision states: "In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person."

The U.S. Supreme Court held recently that the FHA prohibits housing practices that have a "disparate impact" (disproportionately adverse effect) on members of minority groups—if those practices do not have a justifiable purpose and properly limited scope. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project (ICP)*, 135 S. Ct. 2507 (2015).

[39] A major, recent study finds that the percentage of families in America's large metropolitan areas who lived in predominantly "rich" or "poor" neighborhoods (as opposed to middle-income neighborhoods), rose fairly steadily, from 15% in 1970 to 34% in 2012. (K. Bischoff and S. Reardon, *The Continuing Increase in Income Segregation, 2007–2012*, Stanford Center for Education Policy Analysis, 2016.) That study also finds a significant, and fairly steady, increase in income segregation in housing in smaller metropolitan areas.

By contrast, residential segregation by race (of blacks from whites) has been falling for several decades. *See generally, e.g.*, Richard Fry and Paul Taylor, *The Rise of Residential Segregation by Income*, 2 (Pew Research Center, August 1, 2012), posted at: http://www.pewsocialtrends.org/2012/08/01/the-rise-of-residential-segregation-by-income/. Residential segregation by race remains more pervasive in America than residential segregation by income, however. *Id.* at 2.

[40] Approximately 43 percent of the 47 million Americans living in poverty are identified as "White alone, not Hispanic or Latino." American Community Survey, 2012-2016 5-Year Estimates, Poverty status in the past 12 months (Table S1701). Those persons generally would

EHI believes that effective, new legislation at the state and/or federal level will be necessary to minimize exclusionary housing practices. One new legislative approach has been suggested recently by Century Foundation Senior Fellow Richard D. Kahlenberg:

> To complete the unfinished business of the civil rights movement—and to address rising segregation by income—we need a new set of policies to update the 1968 [federal Fair Housing Act]. Such a new Economic Fair Housing Act would help the vast majority of Americans—of all races—who are excluded from resource-rich neighborhoods not merely by market forces, but also by government regulation. This new Economic Fair Housing Act would curtail government zoning policies that discriminate based on economic status. In its strongest form, it would entirely ban unnecessary exclusionary zoning at the local level. In the alternative, it could impose a penalty on municipalities that insist on maintaining discriminatory zoning, either by withholding infrastructure funds or limiting the tax deduction that homeowners can take for mortgage interest.

Richard D. Kahlenberg, *An Economic Fair Housing Act* (Century Foundation, August 3, 2017), posted at: https://tcf.org/content/report/economic-fair-housing-act/. Whatever legislative approach is taken, we recommend that it provide for the same kind of reimbursement for successful claimants that is allowed under RLUIPA.

CONCLUSIONS

There is general agreement among commentators that RLUIPA's provisions permitting reimbursement to successful claimants of the full costs (including attorney's fees) needed to prove their case have had important effects. Those provisions have increased substantially the ability of religious organizations to pursue, and prevail on exclusionary zoning claims.

By contrast, existing laws that attempt to protect low- and moderate-income people from exclusionary housing practices generally have no comparable cost reimbursement provisions. Without such cost reimbursement for meritorious claims, the funding such people would need to challenge such practices legally are beyond the means of low- and moderate-income Americans.

The federal Fair Housing Act (FHA) can be quite helpful where an exclusionary housing practice has a demonstrable "disparate impact" on a minority group or individual based on race, color, religion, sex, handicap, familial status, and national origin. Because the FHA permits reimbursement of legal costs to proven victims, it appears that maximum use should be made of the FHA in those situations.

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not likely have standing to claim housing discrimination based on their race or color (although some might claim discrimination based on their religion, sex, handicap, familial status, or national origin).

However, the FHA is not designed to solve the overall problem of exclusionary housing practices. Although the FHA helps "level the playing field" for minority group members, the widespread housing shortages caused by exclusionary housing practices would keep the "playing field" seriously deficient, even if it were level. Residential segregation of Americans by income, which is due largely to exclusionary housing practices, has increased a great deal (and fairly steadily) during the last several decades despite the FHA—even though residential segregation by race has been declining.

It appears that effective, new legislation at the state and/or federal level will be necessary to minimize exclusionary housing practices. Whatever legislative approach is taken, we recommend that it provide for the same kind of cost reimbursement for successful claimants that is allowed under RLUIPA.