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Can the vast range of regulatory barriers to housing opportunity be deterred by an Economic Fair Housing Act (EFHA)?

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Local governments have a wide array of land use tools that have been used to prevent needed housing development. The result is a mounting crisis of housing shortages and hyperinflation in housing costs. “Home prices and rents have soared nationwide, including in places where housing affordability had long been taken for granted.”¹

The crisis is not just a product of recent challenges such as the COVID-19 pandemic, the dramatic, recent upturn in interest rates, or the mortgage meltdown that precipitated the Great Recession of 2007-2009. Although each of those problems have contributed to the crisis, the widespread undersupply of housing and resulting loss of housing affordability, due to escalating housing costs, have been mounting problems for more than 40 years.

The proposed Economic Fair Housing Act (EFHA) would ban economically discriminatory governmental practices—exclusionary zoning and other exclusionary, housing practices—that act as barriers to an adequate supply of suitable housing in American communities. One major question about the EFHA is whether it would become a futile “whack-a-mole” game, because there is such a variety of alternative tactics that local governments can use to unduly limit housing production.

The EFHA would be able to overcome the full range of those regulatory barriers, however, because it would ban them generically, regardless of their specific features. There already are federal and state statutes that prohibit government from creating or applying any sort of practice that has disparate impacts based on race or certain other non-economic characteristics, and that is not strictly necessary.

The federal Fair Housing Act is one example of such a statute. The EFHA could be an amendment to it, adding one more prohibited factor to it—economically discriminatory governmental practices. The EFHA also could be enacted at the state level.

¹ See, e.g., Emily Badger and Eve Washington, *The Housing Shortage Isn't Just a Coastal Crisis Anymore*, NY Times (July 14, 2022), posted at: <https://www.nytimes.com/2022/07/14/upshot/housing-shortage-us.html>.

Studies confirm that since the federal Fair Housing Act became law in 1968, racial isolation in housing has decreased substantially and fairly steadily. By contrast, there has been a rapid increase in residential isolation of Americans by income level over the same period. Economically discriminatory barriers are not regulated by the Fair Housing Act, except to the extent that they have a demonstrable, disparate impact based on race or other, non-economic protected characteristic.

Enacting the EFHA predictably would lead to reversal of the chronic hyperinflation in housing costs. It also would alleviate the disparate impacts of those barriers on minority group members and low- and moderate-income Americans generally.

A crisis several decades in the making

Local governments have greatly expanded their use of restrictive land use tools in the last 40 to 50 years, with the (often unintended) result of creating barriers to housing opportunity for low- and moderate-income people. Among the tools that can have unnecessarily discriminatory effects on low- and moderate-income people are:

- zoning regulations,
- growth controls (such as housing production moratoriums, growth caps, and phasing schedules)
- building and housing code requirements,
- subdivision controls,
- development-related fees (such as for capital facilities, and development impacts, as well as for plan reviews, permits and inspections),
- development exactions (such as the required dedication of land to the public, the construction or maintenance of public infrastructure, or the provision of public services, as implicit conditions of approval of a housing development),
- unnecessary delays and impediments to obtaining “ministerial” permits (those that government must grant when certain objective criteria are met), and
- undue administrative burdens on affordable housing management.

Major studies have confirmed that the increasing land-use restrictions on housing development are the likely cause of housing production lagging increasingly behind job creation in wealthy, urban areas over the last 40 to 50 years.² The natural result is housing cost inflation.

For example, between the 1960s and 2016, the proportion of American rental households that are considered “housing cost burdened” roughly doubled, from 23.8 percent to 47.5

² See generally, e.g., Equitable Housing Institute (EHI), *Toward a comprehensive ban on exclusionary housing practices*, pp. 8-9 (2019) (discussing Ganong-Shoag and Hsieh-Moretti studies), posted at: https://www.equitablehousing.org/images/PDFs/PDFs--2018-/EHI-Toward-comprehensive-ban-tech_edits-10-2020.pdf. Freddie Mac recently estimated that housing production nationwide has fallen 3.8 million units behind household formation. Badger and Washington, *supra* n. 1. “Up For Growth, a Washington-based policy and research group focused on the housing shortage, says that the deficit doubled from 2012 to 2019.” *Id.*

percent.³ (That is, those households paid more than 30 percent of their household income for housing costs.) About half of those households (11.0 million) were considered “severely housing cost burdened” by 2016 (they paid at least 50 percent of their household income for housing costs).⁴

American homeowners also experienced housing price increases at a much higher rate than their typical income increase, between 1960 and 2016. The median home value increased 112 percent during that period, while median income for owners rose only 50 percent.⁵ Housing costs and household incomes diverged fairly steadily during that period, for both renters and homeowners, although the biggest divergence was during the 2000s.⁶

The EFHA’s potential to reverse spiraling housing costs

The EFHA could be used to deter the full range of economically discriminatory regulatory barriers to housing opportunity. Courts have found a wide variety of zoning and non-zoning regulations to be in violation of the Fair Housing Act, where they caused disparate impacts based on race or other non-economic, protected characteristic. Among the zoning regulations found in violation are:

- A city's refusal to rezone land needed to erect housing for low- and moderate-income people who had been displaced by city freeway construction.⁷
- A town’s refusal to amend its zoning ordinance to allow moderately priced, multifamily rental construction outside the single area where most Black residents already lived.⁸
- A zoning ordinance that prohibited the construction of any new multi-family housing in a virtually all-White city, and that excluded a proposed low-income townhouse development there.⁹

³ JOINT CTR. FOR HOUSING STUD. OF HARV. U., *The State of the Nation’s Housing 2018* (“SONH 2018”), 5 (2018). *See also*, Whitney Airgood-Obrycki, *Even Fully-Employed and Moderate Income Households Struggle to Pay Rent*, JOINT CTR. FOR HOUSING STUD. OF HARV. U. (Jul. 5, 2018) (blog post), <https://www.jchs.harvard.edu/blog/even-fully-employed-and-moderate-income-households-struggle-to-pay-the-rent/>. “[S]ince 2001, the fastest growth in cost burden shares has been among moderate-income renters. For example, the share of cost-burdened renters making \$30,000-\$45,000 (in constant dollars) rose from 37 percent in 2001 to 50 percent in 2016. During the same time frame, the share of cost-burdened renters making \$45,000-\$75,000 nearly doubled from 12 percent to 23 percent.” *Id.*

⁴ *See* SONH 2018, *supra* note 3, at 5, 30. Most low- and moderate-income American households rent their housing, and more than one-third of U.S. households are renters. *See, e.g.*, Pew Research Center, *More U.S. households are renting than at any point in 50 years*, (Jul. 19, 2017) (as of 2016, there were about 43.3 million rental households and 75 million owner-occupied households).

⁵ SONH 2018, *supra* note 3, at 5.

⁶ *Id.* “Cost-burdened shares continue much higher among Black (45 percent) and Hispanic households (43 percent) than among Asian and other minority households (36 percent) or White households (27 percent).” *Id.* at 31. Even among households within the same income groups, larger shares of minorities than Whites are cost burdened. *Id.*

⁷ *Keith v. Volpe*, 858 F.2d 467, 472, 484 (9th Cir. 1988).

⁸ *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937-938 (2d Cir. 1988), *aff’d on other grounds sub nom., Town of Huntington, N.Y. v. Huntington Brach, N.A.A.C.P.*, 488 U.S. 15, 17 (1988).

Among the non-zoning regulations that courts have declared to be violations, to the extent that a disparate impact on people protected by the Fair Housing Act is proven, include:

- The distribution of federal low-income housing tax credits by a state housing agency.¹⁰
- A township's redevelopment plan for predominantly Black and low-income neighborhoods, involving demolition of a significant amount of the existing housing, removal of most of the residents, and new housing that was unaffordable to them.¹¹
- A city's Housing Authority's attempt to remove affordable housing units serving the majority African-American population, by prepaying an outstanding loan balance.¹²
- A city's plan that favored large apartments over smaller apartments, to the extent that it discriminated against Black residents without sufficient justification.¹³
- Numerous adverse actions taken by town officials against a charitable group home, such as: (1) denying tax exempt status to it, despite having granted tax exempt status to comparable group homes in the past; and (2) making harassing statements regarding that group home.¹⁴

Since the Fair Housing Act was enacted in 1968, residential isolation by race (especially of Blacks from Whites) has been diminishing substantially, and fairly steadily.¹⁵ By

⁹ *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1186 (8th Cir. 1974).

¹⁰ *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 526 (2015) (state housing agency would be in violation if it granted too many tax credits to developers for housing production in predominantly Black, inner-city areas, and too few tax credits to developers for housing production in predominantly White, suburban neighborhoods, causing disparate impact on Blacks or perpetuating segregated housing patterns, without sufficient justification; case remanded for further proceedings).

¹¹ *Mt. Holly Gardens Citizens in Action, Inc. v. Twp. of Mount Holly*, 658 F.3d 375, 382 (3d Cir. 2011), *cert. dismissed on other grounds*, 571 U.S. 1020 (2011) (case remanded for further proceedings).

¹² *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 733-734 (8th Cir. 2005).

¹³ *Broadway Triangle Cmty. Coal. v. Bloomberg*, 35 Misc. 3d 167, 173 (N.Y. Sup. Ct. 2011) (planned apartments allegedly favored White residents and Yiddish speakers over Black residents; preliminary injunction issued against implementation of plan).

¹⁴ *Gilead Cmty. Servs., Inc. v. Town of Cromwell*, 432 F. Supp. 3d 46, 68, 74, 78 (D. Conn. 2019).

¹⁵ 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-by-income/>. (That reduction was about 22% over 30 years, a figure roughly consistent with the other studies.)

contrast, residential isolation by income (the stratification of Americans' residences into different neighborhoods, based on income levels) has increased markedly since 1970.¹⁶ One major study indicates that the proportion of families in America's large metropolitan areas who live in predominantly "rich" or "poor" neighborhoods more than doubled, from 15 percent to 34 percent, between 1970 and 2012.¹⁷

All of the prominent statutes that are focused on removing certain economically discriminatory regulatory housing barriers are in states that continue to have above-average housing affordability problems.¹⁸ Because minority families constitute most of the nation's low-income families, residential isolation by income level undercuts attempts to reduce residential isolation of minority group members.¹⁹

See also, e.g., Robert G. Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 Case W. Res. L. Rev. 573, 580 (2020), posted at: <https://scholarlycommons.law.case.edu/caselrev/vol70/iss3/4> ("Using the 100-point dissimilarity index as a measure (with 100 indicating total segregation and 0 indicating a randomly distributed population by race), census figures show that the black–white segregation score for all of the nation's metropolitan areas in 1970 was 79; 73 in 1980; 67 in 1990; 64 in 2000; and 59 in 2010"), citing JOHN R. LOGAN & BRIAN J. STULTS, *THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS* 4 (2011).

¹⁶ *See generally, e.g.* EHI, *Toward a Comprehensive Ban on Exclusionary Housing Practices* ("EHI 2019"), 13-32 (2019), posted at: https://www.equitablehousing.org/images/PDFs/PDFs--2021-/EHI_Toward-comprehensive-ban-tech-edits_1-2022.pdf.

¹⁷ 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.* *See also, e.g.,* 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), posted at: <https://pubmed.ncbi.nlm.nih.gov/26966459/>.

"Across all metropolitan areas, restrictive density zoning has emerged as a strong force producing segregation and isolation for both [Black- and Hispanic-Americans] 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 [a] 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., EHI 2019, *supra* n. 16, at 6-8.

¹⁸ *Id.* at 38. Substantial increases in residential isolation by income have occurred even in states with such statutes. Unlike the EFHA, none of those statutes contains a comprehensive ban on economically discriminatory regulatory barriers, and none has the strong enforcement provisions of the Fair Housing Act. *Id.*

¹⁹ "[N]on-White racial and ethnic groups are overrepresented among low-income families (relative to all families)." Wildsmith, E., & Alvira-Hammond, M., *Data on families with low incomes across America can inform two-generation approaches* 13 (Child Trends 2023), posted at: <https://doi.org/10.56417/1147h453i>. "[F]amilies in which all parents (i.e., single parents, or both parents in married or cohabiting families) are non-Hispanic White (34%) and those with Hispanic parents (33%) make up the largest percentage of families in households with low income. This is followed by parents who identify as non-Hispanic Black (21%), families with parents of different race or ethnic identities (of the groups specified here) from one another (7%), and non-Hispanic parents who identify as some other race/ethnicity not previously listed (e.g., Hispanic, White, Black) (6%)."

Conclusions

The EFHA could be used to control effectively the vast range of regulatory barriers to housing opportunity. There already are federal and state statutes that prohibit government from creating or applying any practice that has a disparate impact based on race or certain other non-economic characteristics, and that is not strictly necessary to achieve a valid governmental purpose.

An example is the federal Fair Housing Act. A federal EFHA would be an amendment to that statute and would simply add another prohibited factor—regulations that make suitable housing unaffordable and that are not strictly necessary to achieve a valid governmental purpose. An EFHA also could be enacted at the state level.

The EFHA will reverse the increasing use of economically discriminatory, housing-related regulations, and their disparate impacts on low- and moderate-income Americans, including a disproportionate share of minority group members. By doing so, the EFHA predictably will lead to reversal of the mounting crisis of hyperinflation in housing costs.

Studies confirm that the federal Fair Housing Act has gone hand-in-hand with a substantial, and fairly steady, decrease in residential isolation by race. That decrease has been slowed a great deal, however, by unjustified economic barriers that result from many zoning and other housing-related regulations. Those ever-increasing regulatory barriers are the primary cause of the mounting crisis of undersupply of housing, and resulting hyperinflation in housing costs, across the United States.

Suitable housing that low- and moderate-income people can afford has become unavailable to tens of millions of American households over the past 40 to 50 years. Minority group members have been disproportionately impacted, because most of them are on the lower end of the income and wealth spectrums. The EFHA predictably would reverse those trends. The time has come to enact the EFHA.

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From 1970 to 2010, “the socioeconomic gap between Whites and minorities has widened, even as many minority members have moved into the middle class.” Massey & Rugh, *supra* n. 17, at 2. “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.” SONH 2018, *supra* note 3, at 16.