

December 2019

*[tech changes added 2020; table of contents added 2022]*

## **Toward a comprehensive ban on exclusionary housing practices**

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The virtual consensus that has emerged recently among housing policymakers, that major reform of land use regulations is needed to combat exclusionary zoning and other exclusionary housing practices, makes legal reform efforts a crucial, next step.<sup>1</sup> Among other things, those practices:

- Play a primary role in Americans' mounting problems with housing affordability
- Seriously aggravate the increasing residential isolation of Americans into "rich" and "poor" neighborhoods, and
- Interfere with interstate commerce and the nation's economic growth because, for example, their use in wealthier states adversely affects mobility and productivity among low- and moderate-income Americans in other states as well.

All those problems have increased dramatically in the last 50 years. In fact, even though residential isolation by race has declined slowly but steadily during that period (especially isolation of Blacks from Whites), residential isolation by income level has increased markedly.

Legislation that effectively bans economically exclusionary and discriminatory housing practices seems necessary, in order to give all low- and moderate-income Americans a fair chance to access suitable housing that they can afford. The Century Foundation recently proposed creation of a "new Economic Fair Housing Act," along those lines.<sup>2</sup> But, as yet, such discrimination is not barred by effective legal constraints.

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<sup>1</sup> See *Emerging Consensus on Regulatory Barriers to Housing Affordability*, EQUITABLE HOUSING INSTITUTE (Dec. 12, 2017), <https://www.equitablehousing.org/images/PDFs/Emerging-consensus-on-RBHAs.EHI-memo-final-2.pdf>.

<sup>2</sup> Richard D. Kahlenberg, *An Economic Fair Housing Act*, CENTURY FOUNDATION (Aug. 3, 2017), <https://tcf.org/content/report/economic-fair-housing-act/>. "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

This memorandum provides our initial suggestions for a statute that would ban economically exclusionary and discriminatory housing practices. Such a statute could be enacted by any state or by the federal government (in a slightly different form). The statute would expand protections against housing discrimination beyond those in the Federal Fair Housing Act (“FFHA”), the basic federal statute on the subject.<sup>3</sup> The FFHA does not address economic discrimination generally. Rather, it addresses discrimination based on race, color, religion, sex, handicap, familial status, and national origin.<sup>4</sup>

This report discusses the subject as follows:

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majority of Americans—of all races—who are excluded from resource-rich neighborhoods not merely by market forces, but also by government regulation...”

<sup>3</sup> 42 U.S.C. §§ 3601-3619 (Apr. 11, 1968, as amended).

<sup>4</sup> *Id.* §§ 3604(a), (c).

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## **I. Major, increasing problems caused by economically exclusionary housing practices**

This discussion builds on the Equitable Housing Institute’s (“EHI’s”) previous comments on the problems caused by economically exclusionary housing practices, in *Leveling the Playing Field for Victims of Exclusionary Housing Practices*.<sup>5</sup>

### **A. Proportion of American households with burdensome housing costs is much higher than 50 years ago**

Between the 1960s and 2016, the proportion of American rental households that paid more than 30 percent of their household income for housing (the standard definition of “housing cost burdened”) roughly doubled, from 23.8 percent to 47.5 percent.<sup>6</sup> About

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<sup>5</sup> *Leveling the Playing Field for Victims of Exclusionary Housing Practices*, EQUITABLE HOUSING INSTITUTE (hereinafter EHI) (June 2019), <https://www.equitablehousing.org/images/PDFs/PDFs--2018-/Attys-fees-in-housing-related-litigation-EHI-memo-final.pdf>.

<sup>6</sup> *The State of the Nation’s Housing 2018* (“(hereinafter SONH 2018”),), JOINT CTR. FOR HOUSING STUD. OF HARV. U., 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), <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.”

half of those households (11.0 million) had “severe” cost burdens in 2016—that is, they paid more than 50 percent of their household income for housing.<sup>7</sup>

Most severely cost-burdened households are in the bottom quartile of income.<sup>8</sup> Between 2001 and 2016, funds that households in that quartile had to pay for other basic needs declined from \$730 to just \$590 per month, in inflation-adjusted dollars.<sup>9</sup> Families with children need several times that amount to cover essential non-housing expenses, even in the most affordable metropolitan areas.<sup>10</sup>

The median rent payment in the United States rose 61 percent between 1960 and 2016, while the median income among renters grew only 5 percent (adjusted for inflation).<sup>11</sup> Most low- and moderate-income American households rent their housing, and about 36 percent of U.S. households are renters.<sup>12</sup>

Furthermore, there is a “powerful connection between homelessness and access to housing people can afford,” according to the U.S. Inter-Agency Council on Homelessness (“USICH”).<sup>13</sup> A recent report by that agency cites research sponsored by online real estate database company Zillow that concludes: “Communities where people spend more

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<sup>7</sup> See SONH 2018, *supra* note 6, at 5, 30.

<sup>8</sup> *The State of the Nation’s Housing 2019* (hereinafter SONH 2019), JOINT CTR. FOR HOUSING STUD. OF HARV. U., 5 (2019) (about 90 percent of households with severe housing cost burdens have incomes of less than \$30,000, and those households constitute a little less than one-quarter of American households).

<sup>9</sup> See SONH 2018, *supra* note 6.

<sup>10</sup> *Id.* at 31 (citing Economic Policy Institute’s estimate that families with children need at least \$2,700 per month even in the most affordable metros.) “In sharp contrast, households in the highest quartile saw their incomes climb significantly in 2001–2016 while their monthly housing costs increased only \$20, leaving \$10,600 each month for all other expenses.” *Id.*

<sup>11</sup> See, *More U.S. households are renting than at any point in 50 years*, PEW RESEARCH CENTER (Jul. 19, 2017).

<sup>12</sup> *Id.* (as of 2016, there were about 43.3 million rental households and 75 million owner-occupied households). See also SONH 2018 *supra* note 6, at 25 (there was a net increase of about 1.1 million owner-occupied units in 2017, and a net reduction of 180,000 rental households).

<sup>13</sup> *The Importance of Housing Affordability and Stability for Preventing and Ending Homelessness*, UNITED STATES INTERAGENCY COUNCIL ON HOMELESSNESS 1 (May 2019). (“When housing costs are more affordable and housing opportunities are more readily available, there is a lower likelihood of households becoming homeless, and households who do become homeless can exit homelessness more quickly and with greater likelihood of sustaining that housing long-term.”)

than 32 percent of their income on rent can expect a more rapid increase in homelessness.”<sup>14</sup>

Zillow’s data, collected from 386 American housing markets, indicates that as rent burdens in a community increase from 32 percent to 50 percent of household income, the incidence of homelessness roughly doubles, from about 0.25 percent to more than 0.5 percent of the population.<sup>15</sup> The U.S. Conference of Mayors’ annual reports on hunger and homelessness, issued from 1987 through 2016, regularly found the shortage of affordable housing to be the leading cause—or at least one of the leading causes—of homelessness, based on data from the participating cities.<sup>16</sup>

The rapid loss of low-rent housing, due largely to lagging housing production resulting from exclusionary housing practices, increases the risk of homelessness for low-income Americans.<sup>17</sup> The people at greatest risk of homelessness generally are renter households with incomes at or below the poverty line, or 30 percent of the area median income (AMI), whichever is greater (“extremely low-income” households).

Extremely low-income renter households in the U.S. face a shortage of seven million affordable and available rental homes. Only 37 affordable and available homes exist for every 100 extremely low-income renter households.<sup>18</sup>

Although there have been “notable reductions in homelessness over the past decade,” in 2018 homelessness edged up 0.3 percent overall to 552,830—based on HUD’s annual

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<sup>14</sup> Chris Glynn & Alexander Casey, *Homelessness Rises Faster Where Rent Exceeds a Third of Income* (Dec. 11, 2018); posted at: <https://www.zillow.com/research/homelessness-rent-affordability-22247/>.

<sup>15</sup> *Id.*

<sup>16</sup> *See, e.g., 2016 Status Report on Hunger & Homelessness*, U.S. CONFERENCE OF MAYORS (Dec. 2016) (“Nearly all surveyed city officials identified the need for more mainstream housing assistance and more affordable housing as the most needed and currently insufficiently resourced tool to reduce homelessness”), <https://endhomelessness.atavist.com/mayorsreport2016>. *See also, e.g., 2015 Status Report on Hunger & Homelessness*, U.S. CONFERENCE OF MAYORS, 2, 13 (lack of affordable housing was cited as the leading cause of homelessness by far among families with children and among unaccompanied individuals).

The Mayors’ reports studied many of the nation’s largest cities, but it was noted that those cities “do not constitute a representative sample of U.S. cities, and the data reported reflect only the experience of the cities responding to the survey.” *2016 Status Report on Hunger & Homelessness*, U.S. CONFERENCE OF MAYORS (Dec. 2016). However: “For the most part, homelessness in the U.S. overall looks relatively similar to homelessness in the study cities, but there was great variation amongst and between cities.” *Id.*

<sup>17</sup> *See* SONH 2019, *supra* note 8, at 29. “In 2016–2017 alone, the stock of units renting for less than \$800 fell by 1 million or 4.9 percent. Moreover, the number of units in this rent range decreased every year since 2011, bringing the total net decline to four million (17 percent).”

<sup>18</sup> *The Gap: A Shortage of Affordable Homes*, NATIONAL LOW INCOME HOUSING COALITION, 1 (Mar. 2019).

one-day (“point-in-time”) survey.<sup>19</sup> “While the number of people in shelters (65 percent of the homeless population) dropped slightly, the number of unsheltered homeless people rose by 2.3 percent.”<sup>20</sup>

American homeowners also experienced housing price increases far greater than typical income increases, between 1960 and 2016. The median home value increased 112 percent during that period, while median income for owners rose only 50 percent.<sup>21</sup>

### **B. Residential isolation by income has increased dramatically, while residential isolation by race has been declining**

The sorting of Americans into different neighborhoods, based on income levels (“residential isolation by income”) has increased markedly since 1970. A rigorous, recent study by the Stanford University Center for Education Policy Analysis found that the percentage of families in America’s large metropolitan areas who lived in predominantly “rich” or “poor” neighborhoods more than doubled between 1970 and 2012.<sup>22</sup>

The increase was fairly steady, from 15 percent to 34 percent of the overall population of those metros, during that period.<sup>23</sup> There also was a significant, and fairly steady,

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<sup>19</sup> SONH 2019, *supra* note 8, at 5. “According to HUD’s annual point-in-time counts, the number of people experiencing homelessness fell by 87,000 from 2008 to 2018 and by some 38,000 in the last five of those years. This progress reflects an expansion of permanent supportive housing and the widespread adoption of the ‘housing first’ model that provides housing without preconditions for changes in behavior. The improvements have been most evident among populations that have received targeted efforts and resources—veterans, families, and the chronically homeless.” *Id.* at 34.

<sup>20</sup> *Id.* at 5.

<sup>21</sup> SONH 2018, *supra* note 6, at 5 (the divergence of housing costs and household incomes was fairly steady during that period, for both renters and homeowners, with the most dramatic changes occurring in the 2000s.) “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.*

<sup>22</sup> K. Bischoff & S. Reardon, *The Continuing Increase in Income Segregation, 2007–2012*, STANFORD CENTER FOR EDUCATION POLICY ANALYSIS 5 (2016). (The percentage who lived in predominantly “middle-income” neighborhoods declined about a 24 percent between 1970 and 2012 (from 85 percent to 66 percent of the residents of those metros). Those large metros are home to roughly 65 percent of the total U.S. population. K. Bischoff & S. Reardon, *Residential Segregation by Income, 1970-2009*, STANFORD CENTER FOR EDUCATION POLICY ANALYSIS 7 (2014).

<sup>23</sup> Bischoff & Reardon (2016), *supra* note 22, at 5–6, 17.

increase in residential isolation by income in smaller metropolitan areas during that period, according to the study.<sup>24</sup>

A 2012 study by the Pew Research Center, using a somewhat different methodology, found that the proportion of lower-income American households living in majority lower-income tracts increased to 28 percent in 2010, compared to only 23 percent in 1980 (a 22 percent increase).<sup>25</sup>

By contrast, residential isolation by race (especially of Blacks from Whites) generally has been diminishing for several decades. The 2012 Pew Research Center 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.”<sup>26</sup> Another major study also found a downward trend in residential isolation of Blacks from Whites, “though modest” (about 4.5 percent per decade), which continued steadily from the 1970’s across the ensuing decades, dropping from a value of 78 percent in 1970 to 60 percent in 2010.<sup>27</sup>

Racial isolation in housing (especially of Blacks and Whites) still is considered more prevalent than isolation by income level.<sup>28</sup> However, the sharp increase in residential isolation by income undercuts attempts to reduce residential isolation of minority groups,

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<sup>24</sup> *Id.* (In those smaller metros, according to the study, the percentage of families who lived in predominantly “rich” or “poor” neighborhoods, as opposed to middle-income neighborhoods, rose from 9.6 percent in 1970 to 21.6 percent in 2012.)

<sup>25</sup> *The Rise of Residential Segregation by Income*, p. 12, PEW RESEARCH CENTER (August 1, 2012), <http://www.pewsocialtrends.org/2012/08/01/the-rise-of-residential-segregation-by-income/>.

<sup>26</sup> *Id.* “However, residential segregation of Hispanic and Asian Americans may not have decreased—in part because the populations of these two minority groups have grown during this period [1980 to 2010], thereby creating larger pools for potential ethnic and racial clustering. In 1980, the typical Hispanic resided in a tract that was 38 percent Hispanic (compared with 45 percent in 2010) and the typical Asian or Pacific Islander resided in a tract that was 19 percent Asian or Pacific Islander (compared with 21 percent in 2010.” *Id.* at 14.

As to the growth of those minority groups—the African-American population increased only from 11.7 percent to 12.6 percent of the nation’s population (about a 7.7 percent increase) during that 30-year period. By contrast, the proportion who identified as Hispanic (of any race) increased about 166 percent, from 6.4 percent to 17 percent of the nation’s population during that period; and the portion who identified as Asian increased 233 percent, from 1.5 percent to 5 percent of the overall population. *Id.*

<sup>27</sup> Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 SOC. FORUM 8 (2015), citing Massey, Douglas S. and Denton, Nancy A. *American Apartheid: Segregation and the Making of the Underclass*, Harv. U. (1993), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4808815/>.

<sup>28</sup> See PEW RESEARCH CENTER 2012, *supra* note 25, at 14. “In 2010, 42% of Blacks lived in a census tract that was majority Black, compared with 28% of low-income households living in a majority low-income tract and 18% of upper-income households living in a majority upper-income tract.”

because most members of those groups are on the lower end of the income and wealth spectrums.<sup>29</sup>

### **C. Economically exclusionary housing practices interfere increasingly with interstate commerce and economic growth, as well as housing affordability in all 50 states**

A recent, landmark study by Profs. Peter Ganong and Daniel Shoag indicates that a century-long trend of convergence in the average incomes of people from different States of the Union has slowed considerably since about 1980.<sup>30</sup> Evidence presented in that study shows that between 1980 to 2010:

- The tremendous housing cost escalation in wealthier states was responsible for slowing the migration of workers from other states, thus impeding the convergence in per-capita incomes among the states;<sup>31</sup>
- The new-era land-use restrictions on housing development in high-income areas of wealthier states are the likely cause of that escalation, because they inhibit the construction of new housing;<sup>32</sup>
- Most “low-skill” workers (low-paid workers generally) who moved to a different state during that period, moved *away* from states where average wages are higher, due to the prohibitive cost of housing in high-wage areas;<sup>33</sup> and
- That reverse, interstate movement led to increased hourly wage inequality of approximately 8% between 1980 and 2010—whereas during the previous, forty-year period, moving from a low-wage state to a high-wage state continued to be a major way for poorer workers to raise their incomes.<sup>34</sup>

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<sup>29</sup> 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), <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.”

<sup>30</sup> Peter Ganong & Daniel Shoag, *Why has regional income convergence in the US declined?* 102 JOURNAL OF URBAN ECONOMICS 76–90 (2017).

<sup>31</sup> *Id.* at 76 (“The convergence rate from 1990 to 2010 was less than half the historical norm, and in the period leading up to the Great Recession there was virtually no convergence at all.”)

<sup>32</sup> *Id.* at 78-79. By contrast: “When the local housing supply is unconstrained, workers of all skill types will choose to move to the more productive location”—that is the one with better economic opportunities. *Id.* at 78.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 79.



Thus, the Ganong-Shoag study indicates that hyperinflation in housing costs in the wealthier states since 1980 has had adverse, interstate effects on American workers and the American economy overall.

Another major, recent study confirms that land-use restrictions are a significant drag on American economic growth:<sup>35</sup>

The creeping web of these regulations has smothered wage and gross domestic product growth in American cities by a stunning 50 percent over the past 50 years. Without these regulations, our research shows, the United States economy today would be 9 percent bigger—which would mean, for the average American worker, an additional \$6,775 in annual income.<sup>36</sup>

Thus, interstate commerce (commerce among different states) has been adversely affected by exclusionary housing practices. That problem warrants a nationwide, federal solution.<sup>37</sup>

## **II. Statutes addressing certain exclusionary housing practices**

One apparent reason for the rapid increase in residential isolation by income level, during a period in which residential segregation by race has been declining overall, is that legal protections against racial discrimination in housing are much stronger than those against exclusionary housing practices generally. Under federal civil rights statutes such as the FFHA, discrimination based on race and other specific categories subjects the violators to strong sanctions.

First, we will summarize provisions of the FFHA and relevant experience under it. Next, we will summarize provisions of state statutes that address certain exclusionary housing practices, and experience under them.

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<sup>35</sup> Chang-Tai Hsieh and Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11 AMER. ECON. JOURNAL: MACROECONOMICS, 1–39 (2019).

<sup>36</sup> Chang-Tai Hsieh and Enrico Moretti, *How Local Housing Regulations Smother the U.S. Economy*, NEW YORK TIMES (Sept. 6, 2017).

<sup>37</sup> “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). *See, e.g. Interstate Effects of Regulatory Barriers*, EHI (2017), <https://www.equitablehousing.org/42-organization/154-interstate-effects-of-rbhas.html>.

## A. Federal Fair Housing Act (FFHA)

The FFHA is a major federal civil rights law<sup>38</sup> containing provisions that prohibit housing discrimination based on race, color, religion, sex, handicap, familial status, and/or national origin. As discussed above, studies show that since creation of the FFHA, racial isolation in housing—notably of Blacks from Whites—has decreased slowly but steadily.

The United States Supreme Court recently held that the FFHA generally prohibits housing practices that have a “disparate impact” (disproportionate, adverse effect) on members of protected minority groups, regardless of the intent behind those practices.<sup>39</sup> Thus, the FFHA may be used by low- and moderate-income victims of economically exclusionary housing practices if they are members of a protected minority group and can prove that the practice in question has a “disparate impact” on them. However, the FFHA is not designed to solve the general problem of economically exclusionary housing practices.

The prohibitions in the FFHA are defined specifically, in some detail. For example, its first two prohibitions state that generally, 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.<sup>40</sup>

(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.<sup>41</sup>

Another strength of the statute is the wide range of enforcement methods and penalties violations of its requirements.<sup>42</sup> There are three methods of federal enforcement:

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<sup>38</sup> See, e.g., Mark D. Boveri, *Surveying the Law of Fee Awards under the Attorney's Fees Awards Act of 1976*, 59 NOTRE DAME L. REV. 1293, 1294 (1984).

<sup>39</sup> *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project (ICP)*, 135 S. Ct. 2507 (2015). There is no violation, however, if those practices have a legally justifiable purpose and are properly limited in scope. *Id.* at 2522–24.

<sup>40</sup> 42 U.S.C. § 3604(a).

<sup>41</sup> *Id.* § 3604 (b).

<sup>42</sup> See, e.g., Robert G. Schwemm, *The Future of Fair Housing Litigation*, 26 J. MARSHALL L. REV. 745 (1993).

complaints to the U.S. Department of Housing and Urban Development (“HUD”), lawsuits by the U.S. Department of Justice DOJ, and private lawsuits.<sup>43</sup>

A crucial remedy under the FFHA is the discretionary authority of judges to order reimbursement by the party responsible for unlawful discrimination, of the legal expenses incurred by proven victims. In addition, courts may award victims monetary damages, to compensate them for other losses due to the unlawful discrimination—and appropriate injunctions, to prevent repeated housing discrimination by the violator(s).

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. A broad overview of remedies under the FFHA follows.

### *HUD enforcement*

Any person who claims to have been the victim of a discriminatory housing practice may file a complaint with HUD, and HUD itself may initiate a complaint.<sup>44</sup> By law, HUD has 100 days after filing to determine whether "reasonable cause" exists to believe that a discriminatory housing practice has occurred.<sup>45</sup>

HUD may refer the case to DOJ if HUD determines that the issues require prompt judicial action. DOJ then is required to file a lawsuit seeking appropriate temporary or preliminary relief.<sup>46</sup> Cases involving a challenge to a local land-use law must be referred to DOJ.<sup>47</sup>

If HUD finds "reasonable cause," and if the case is not referred to DOJ or conciliated, HUD itself will issue a formal charge on behalf of the complainant.<sup>48</sup> At that point, either the complainant or the party complained about may choose to have the case decided by a

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<sup>43</sup> See 42 U.S.C. §§ 3610-3614. FFHA provisions apply to housing discrimination claims brought in state court as well as federal court. 42 U.S.C.A. § 3613(a)(1)(A).

<sup>44</sup> 42 U.S.C. § 3610(a)(1). (Complaints must be filed within one year of the events complained of.) Complaints that come from a state or locality with a fair housing law that is "substantially equivalent" to the FHAA must be referred to the appropriate state or local agency for handling. *Id.* § 3610(f).

<sup>45</sup> *Id.* § 3610(g)(1). An exception to the 100-day requirement is where "it is impracticable to do so." Also, during that 100-day period, HUD is directed to engage in conciliation efforts with the respondent and the complainant "to the extent feasible." *Id.* § 3610(b)(1).

<sup>46</sup> *Id.* § 3610(e)(1).

<sup>47</sup> *Id.* § 3610(g)(2)(C).

<sup>48</sup> *Id.* § 3610(g)(2)(A).

federal district court.<sup>49</sup> In that event, the complainant will be represented by DOJ and may receive actual and punitive damages, as well as appropriate equitable relief.<sup>50</sup>

If the case remains at HUD, it will be prosecuted by a HUD attorney before a HUD-appointed administrative law judge (ALJ). The case must be tried within 120 days after the charge was filed, and the ALJ is required to decide the case within 60 days after the hearing.<sup>51</sup> The ALJ may award actual damages to the complainant, civil penalties of up to \$50,000 to the government, injunctive relief, and attorney's fees.<sup>52</sup> ALJ decisions are subject to review by the Secretary of HUD and ultimately by the federal courts of appeal.<sup>53</sup>

### ***DOJ enforcement***

When the U.S. Attorney General has “reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title”—or that the denial to any group of persons of rights granted by the FFHA “raises an issue of general public importance”—DOJ may commence a civil action in any appropriate United States district court.<sup>54</sup>

DOJ also may file a civil action on referral from HUD of a discriminatory housing practice or breach of a conciliation agreement.<sup>55</sup> A variety of strong remedies are provided where DOJ proves its case—including a permanent or temporary injunction, restraining order, civil monetary penalties, and money damages for the victims, as well as a reasonable attorney’s fee and reimbursement of other costs to those victims.<sup>56</sup>

DOJ also may intervene in private lawsuits under the FFHA, if the Attorney General certifies that the case is "of general public importance."<sup>57</sup> Conversely, an aggrieved person may intervene in a "pattern or practice" suit brought by DOJ and may obtain any relief in such a case that would be available in a private suit by that person (described below).<sup>58</sup>

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<sup>49</sup> *Id.* § 3612(a).

<sup>50</sup> *Id.* § 3612(g).

<sup>51</sup> *Id.* §§ 3612 (g)(1)-(2).

<sup>52</sup> *Id.* § 3612(g)(3).

<sup>53</sup> *Id.* §§ 3612(h)-(i).

<sup>54</sup> *Id.* § 3614(a).

<sup>55</sup> *Id.* § 3614(b).

<sup>56</sup> *Id.* § 3614(d).

<sup>57</sup> *Id.* § 3613(e).

<sup>58</sup> *Id.* § 3614(e).

### *Private lawsuits*

Private citizens also may take their cases directly to court without pursuing the HUD and DOJ procedures.<sup>59</sup> Private enforcement is a crucial means of combating housing discrimination. According to the National Fair Housing Alliance:

- 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;<sup>60</sup> and
- 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.<sup>61</sup>

As mentioned, a crucial remedy under the FFHA (and other federal anti-discrimination statutes) is the discretionary authority of HUD and the courts to order reimbursement, by the party responsible for unlawful discrimination, of the legal expenses of proven victims.<sup>62</sup> Low- and moderate-income people whose rights are violated in that way cannot be expected to bear the often enormous costs of litigation to have those violations corrected.<sup>63</sup>

Also, “if the court finds that a discriminatory housing practice has occurred or is about to occur,” the court may award to the private plaintiff:

[A]ctual and punitive damages, and [generally, any appropriate] permanent or temporary injunction, temporary restraining order, or other

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<sup>59</sup> *Id.* §§ 3613(a)(1)-(3) Such lawsuits may be brought for up to two years—and that period does not include the time when a complaint or charge about the same matters was pending before HUD. A private party may also file both a HUD complaint and a private lawsuit. In these circumstances, the first of those actions to reach a hearing will control.

<sup>60</sup> *2017 Fair Housing Trends Report: The Case for Fair Housing*, NATIONAL FAIR HOUSING ALLIANCE (NFHA) 50 (2018) (percentages add up to more than 100 percent, because some complaints receive multiple investigations).

<sup>61</sup> *Id.* (citing *Study of the Fair Housing Initiatives Program*, DB Consulting Group, Inc., (May 2011)).

<sup>62</sup> 42 U.S.C. §§ 3612(p), 3613(c)(2), 3614(d)(2).

<sup>63</sup> Attorney’s fees alone can run into the millions of dollars in federal civil rights litigation. *See, Making Challenges to Exclusionary Housing Practices Feasible – The Role of Attorney’s Fees Awards*, EQUITABLE HOUSING INSTITUTE 15 (June 2019), [https://www.equitablehousing.org/images/PDFs/PDFs--2018-/Attys-fees-in\\_housing-related\\_litigation\\_EHI-memo-final.pdf](https://www.equitablehousing.org/images/PDFs/PDFs--2018-/Attys-fees-in_housing-related_litigation_EHI-memo-final.pdf) (providing examples of multi-million dollar fee and damage awards under the Federal Religious Land Use and Institutionalized Persons Act (RLUIPA)).

order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).<sup>64</sup>

Attorney's fees provisions appear to have increased substantially the ability of low- and moderate-income Americans to remedy discrimination under the FHAA and numerous other federal civil rights statutes.<sup>65</sup> The additional remedies available to victims of housing discrimination under the FFHA also predictably will increase compliance and compensate those victims more completely.

### *FFHA Summary*

The FFHA approach shows some promise as a model for a statutory ban on exclusionary housing practices generally, due in part to the statute's specific definitions of prohibited conduct, and its strong enforcement provisions. The statute may be enforced through legal action by DOJ, by alleged victims of Fair Housing violations, and/or by HUD.

One crucial remedy under the FFHA is the discretionary authority of HUD and the courts to order reimbursement by the party responsible for unlawful discrimination, of the necessary legal expenses incurred by proven victims. In addition, courts may award victims monetary damages, to compensate them for other losses due to the unlawful discrimination—and appropriate injunctions, to prevent repeated housing discrimination by the violator(s).

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. Studies show that since creation of the FFHA, racial isolation in housing—notably of Blacks from Whites—has decreased slowly but steadily. The FFHA offers a credible model for a statute banning exclusionary housing practices generally.

## **B. State statutes addressing exclusionary housing practices**

Numerous states have enacted statutes attempting to curb certain exclusionary housing practices.<sup>66</sup> Among the first were California's *Housing Element* statute—originally

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<sup>64</sup> 42 U.S.C. § 3613(c)(1) (2012).

<sup>65</sup> See, e.g., *Making challenges to exclusionary housing practices feasible*, *supra* note 63, at 10-11 (discussing the FFHA); *id.* at 12-13 (discussing the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988(b)); *id.* at 13-14 (discussing the federal Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412); *id.* at 14-15 (discussing the Religious Land Use and Institutionalized Persons Act (RLUIPA)).

<sup>66</sup> See, e.g., OR. REV. STAT. § 197.312 (1973); N.J. REV. STAT. §§ 52:27D-301 – 329 (2019); CONN. GEN. STAT. § 8-30g (2019); R.I. GEN. LAWS § 45-53-1 (2019); 310 ILL. COMP. STAT. 67/1-60, 67/30(b) (2004); N.H. REV. STAT. ANN. § 674:58-61 (2010).

enacted in 1967,<sup>67</sup> and Massachusetts' *Comprehensive Permit Law*, enacted in 1969.<sup>68</sup> A number of those statutes have been credited with leading to substantial increases in the amount of housing in the state that is affordable to low- and moderate-income people.

However, the prominent state statutes along those lines have not been able to prevent worse-than-average housing affordability problems in their states.<sup>69</sup> None of those statutes include an outright ban on exclusionary housing practices. We look at achievements and ongoing challenges under those statutes below.

## 1. Massachusetts Chapter 40B and its Progeny

Massachusetts Chapter 40B (sometimes termed the “Anti-Snob Zoning Act of 1969”)<sup>70</sup> is the first state statute that attempted to curb exclusionary zoning directly. That statute has been influential in numerous other states, serving as a model for statutes enacted in Connecticut (1989),<sup>71</sup> Rhode Island (1991),<sup>72</sup> and Illinois (2004).<sup>73</sup>

### *Achievements*

Massachusetts' Chapter 40B introduced notable innovations, such as:

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<sup>67</sup> CAL. GOV'T CODE §§ 65580-89.11 (2018).

<sup>68</sup> MASS. GEN. LAWS, ch. 40B, §§ 20-23 (2019).

<sup>69</sup> A 2017 study of housing production under state and local affordable housing programs generally reached some somber conclusions: “Unfortunately, most state and local programs have produced relatively small numbers of affordable units, and so are unlikely to substantially meet the demand for below-market-rate housing. Moreover, low-cost housing tends to be built where land is cheap and political opposition is muted, which in practice limits the ability of low-income families to move into neighborhoods with more employment opportunities, better schools, lower crime, and higher-quality public and private services.” Lance Freeman & Jenny Schuetz, *Producing Affordable Housing in Rising Markets: What Works?*, 19 *Cityscape* 217, 228 (2017).

Similarly, leading housing economists recently observed: “There have been some attempts at the state level to soften severe local land use restrictions, but they have not been successful.” Ed Glaeser & Joe Gyourko, *The Economic Implications of Housing Supply* (Nat'l Bureau of Econ. Research, Working Paper No. 23833, Sept. 2017).

<sup>70</sup> MASS. GEN. LAWS, ch. 40B, §§ 20-23 (2019).

<sup>71</sup> *Affordable Housing Land Use Appeals Act*, CONN. GEN. STAT. § 8-30g (2019).

<sup>72</sup> *Low and Moderate Income Housing Act*, R.I. GEN. LAWS §§ 45-53-1 to 45-53-8 (2019).

<sup>73</sup> *Affordable Housing Planning and Appeal Act*, 310 ILL. COMP. STAT. 67/1-60 (2004). See, e.g., Jennifer Devitt, *Illinois' Affordable Housing Planning and Appeal Act: An Indirect Step in the Right Direction*, 18 WASH. U. J. L. & POL'Y 267, 269-278 (2005).

- i. A streamlined, “Comprehensive Permit” approval process for residential development proposals by “qualified” developers (government, nonprofit, or limited-profit developers), whose proposals include a certain percentage of affordable units;<sup>74</sup>
- ii. A requirement that (basically) more than 10 percent of a municipality’s housing units be “low or moderate income housing,” or else the municipality is vulnerable to a state override of its denial (or conditional approval) of such a development proposal;<sup>75</sup> and
- iii. A statutory “builder’s remedy” for “qualified” developers whose applications for such developments are improperly denied or conditioned.<sup>76</sup>

**Streamlined approval process for proposed housing developments  
that include affordable housing**

Chapter 40B’s Comprehensive Permit procedures have been influential in numerous other states. As mentioned, Chapter 40B requires expedited review by a municipality of an application for residential development by a “qualified developer” (non-profit organization, local housing authority, or limited-dividend organization),<sup>77</sup> where the application includes a certain percentage of units affordable to low- and moderate-income people.<sup>78</sup> That review is conducted by the local Zoning Board of Appeals (“ZBA”), based on a single, comprehensive development application—rather than requiring a developer to file separate applications with multiple local agencies or officials.<sup>79</sup>

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<sup>74</sup> MASS. GEN. LAWS, ch. 40B, § 21 (2019).

<sup>75</sup> *Id.*, §§ 20 (definition of “Consistent with local needs”), 22-23.

<sup>76</sup> *Id.*, § 22.

<sup>77</sup> A “limited-dividend organization” generally means a non-public entity that “agrees to comply with the requirements of the Subsidizing Agency relative to a reasonable return for building and operating” a project that includes a qualifying number of affordable housing units. Ch. 760 Mass. Code Regs. § 56.02 (2019). A “Subsidizing Agency” is “any agency of state or federal government that provides a Subsidy for the construction or substantial rehabilitation of Low or Moderate Income Housing.” *Id.*

<sup>78</sup> MASS. GEN. LAWS, ch. 40B, § 21 (2019). “In ownership developments, at least 25 percent of the units must be affordable to low-income households earning less than 80 percent of the AMI [area median income]. For rental developments, the project can provide 20 percent of the units to households earning below 50 percent of the AMI.” Carolina K. Reid, *et al.*, *Addressing California’s Housing Shortage: Lessons from Massachusetts Chapter 40B*, 25 J. OF AFFORDABLE HOUS. 241, 246 (2017). (“In order to be eligible for the comprehensive permit, the proposed development must receive funding under a state or federal housing program, such as the Low Income Housing Tax Credit, although as funding for affordable housing has shifted in recent years, what counts as funding has been expanded to include technical assistance[.]”)

<sup>79</sup> *See* MASS. GEN. LAWS, ch. 40B, § 21 (2019).



A public hearing on the application is to be held within 30 days of its filing, and the Board of Appeals is to decide whether to grant the application within 40 days after that hearing (unless the time has been extended by mutual agreement between the board and the applicant). If the Board of Appeals fails to comply with those time limits, “the application shall be deemed to have been allowed and the comprehensive permit or approval shall forthwith issue.”<sup>80</sup>

The “state override” process is as follows. If an application by a “qualified developer” is “denied, or is granted with such conditions and requirements as to make the building or operation of such housing uneconomic,”<sup>81</sup> the applicant may appeal within 20 days for review by the state’s Housing Appeals Committee (“HAC”) within the Department of Housing and Community Development (“DHCD”).<sup>82</sup> HAC is to hold a hearing on the appeal within 20 days and render its decision within 30 days after the end of the hearing.<sup>83</sup> From HAC’s decision, an appeal may be taken to the state’s Superior Court.

The state review and judicial appeal provisions for applicants constitute a statutory “builder’s remedy.” Massachusetts has an admirable set of procedures for expediting residential development applications that include a substantial number of affordable housing units.

### **Increased production of affordable housing**

“Research has shown that Chapter 40B has resulted in significantly more low- and moderate-income housing being built in the suburbs than would have been created if the statute had not been enacted.”<sup>84</sup> As of 2010, “Chapter 40B had been used to produce approximately 58,000 housing units, including nearly 31,000 units of housing for low- and moderate-income households and 27,000 market rate units.”<sup>85</sup> Other states that have adopted variations of Chapter 40B also have increased their amounts of low- and moderate-income housing substantially.<sup>86</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> “Uneconomic” means “any condition . . . that . . . makes it impossible for [the applicant] . . . to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return.” MASS. GEN. LAWS, ch. 40B, § 20 (2019).

<sup>82</sup> *Id.*

<sup>83</sup> MASS. GEN. LAWS, ch. 40B, § 22 (2019).

<sup>84</sup> Reid, *et al.*, *supra* note 78, at 251 (citing Spencer M. Cowan, *Anti-Snob Land Use Laws, Suburban Exclusion, and Housing Opportunity*, 28 J. URB. AFF. 295-313 (2006)).

<sup>85</sup> Reid, *et al.*, *supra* note 78, at 251 (citing Rachel G. Bratt & Abigail Vladeck, *Addressing Restrictive Zoning for Affordable Housing: Experiences in Four States*, 24 HOUS. POL’Y DEB. 594–636 (2014)).

<sup>86</sup> Since Connecticut’s statute took effect in 1992, “estimates suggest that the statewide shock of assisted housing has increased by about 25,000,” although “the exact number has not been quantified[.]” Reid, *et al.*,

### *Ongoing challenges*

However, despite the tremendous efforts in Massachusetts and in the states that have enacted statutes modeled on Chapter 40B, those states have experienced daunting problems with housing affordability. As explained in the following sections:

- Housing costs in those states are still quite high. Massachusetts is the third most costly state for rental housing, and rental costs in Connecticut, Rhode Island, and Illinois still are above average.
- The statutes in those states basically only apply to municipalities in which low- and moderate-income housing constitutes 10 percent or less (in certain cases, 15 percent) of the housing units. Nationwide at least 30 percent of households lack housing they can afford.
- Those state override statutes provide no personal right of action for low- and moderate-income victims of exclusionary zoning and/or other exclusionary housing practices. The highest courts of numerous states have declared that those practices violate victims' legal rights. The "builder's remedy" on which those statutes rely has proven insufficient.
- Those statutes do not spell out the specific actions that land use officials must take to avoid violating individual legal rights.

#### **Continued, high housing costs in state-override jurisdictions**

Despite Chapter 40B's provisions to increase development of low- and moderate-income housing units, the average wage level needed to enable a family to afford a modest, two-bedroom rental apartment in Massachusetts is among the nation's highest. According to the National Low-Income Housing Coalition ("NLIHC"), a household whose members earn the state's minimum wage (\$12.00 per hour) would need to work 113 hours a week, in order to afford such an apartment at the fair market rent.<sup>87</sup> That makes Massachusetts the third most expensive state for rental housing.<sup>88</sup>

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*supra* note 78, at 254. Under Rhode Island's 1991 statute, ten of its thirty-nine cities and towns have met the 10 percent affordable housing threshold; nine others have made good or excellent progress; and eleven others have made adequate progress toward their affordable housing plan goals. *Affordable Housing Progress Report*, STATE OF RHODE ISLAND OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT, *Affordable Housing Progress Report*, <http://ohcd.ri.gov/policy-planning/affordablehousingreport.php>. Progress under Illinois' statute has been less clear. It has faced a good bit of resistance in suburban communities. Reid, *supra* note 78, at 255.

<sup>87</sup> National Low-Income Housing Coalition (NLIHC), *Out of Reach* 2019, at 119.

<sup>88</sup> *Id.* at 16.

By some measures, housing has become less affordable in Massachusetts in the last 40 years, compared with other states. In 1980, Massachusetts was the 26<sup>th</sup> least affordable state, based on the ratio of median housing price to median household income.<sup>89</sup> By the year 2000, Massachusetts became the third least affordable state by that measure.<sup>90</sup>

Housing costs in the other states that have adopted the Massachusetts approach also continue to be relatively high. Connecticut’s rental housing costs rank ninth-highest in the nation; Rhode Island’s rank 18<sup>th</sup>; and Illinois’ rank 19<sup>th</sup>.<sup>91</sup> Because most low-income people rent, their rental costs are especially important here.

**The “10% solution” seems inadequate; for example,  
more than 30 percent of Massachusetts households—and of  
American households overall—are housing cost-burdened**

The Massachusetts state override process does not apply where:

- More than 10 percent of the municipality’s housing is low- and moderate-income housing; *or*
- Such housing occupies 1½ percent or more of the locality’s total zoned land (excluding public land); *or*
- The development application would result in construction on sites comprising more than 0.3 percent of that land, or more than 10 acres (whichever is larger), in any one calendar year.<sup>92</sup>

However, about 35 percent of Massachusetts households were considered housing cost-burdened in 2017—47.9 percent of its renters and 26.4 percent of its homeowners.<sup>93</sup> The

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<sup>89</sup> See, e.g., Katherine L. Melcher, *Changes in the 40B Landscape: Assessing the Need for Reform*, 38 NEW ENG. L. REV. 227, 229 (2003)

<sup>90</sup> *Id.* (“[O]ver the course of its thirty-four years [to 2003], 40B has only seen the affordable housing shortage worsen.”) (citing Andrew Sum, et al., *Home Ownership in Massachusetts: A New Assessment*, 2 (MassINC, Winter 2003).)

<sup>91</sup> NLIHC, *supra* note 87, at 16.

<sup>92</sup> MASS. GEN. LAWS, ch. 40B, §20 (2019) (definition of “consistent with local needs”). The municipality’s action apparently is deemed “reasonable” under the administrative appeal provision if it is “consistent with local needs,” and if any conditions do not make the proposed project economically infeasible (“uneconomic”). MASS. GEN. LAWS, ch. 40B, §§ 20, 23 (2019) (definition of “uneconomic”). See, e.g., Sharon P. Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act*, 22 W. NEW ENG. L. REV. 381, 387-88 (2001).

<sup>93</sup> *SONH 2019 Appendix & Web Tables, W-23: State-Cost Burden Rates for Renters and Owners: 2017* (hereinafter SONH Appendix 2019), JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY (2019). (The national average of renters who were cost-burdened was 47.4%, and of homeowners who were cost-burdened, it was 22.5%.. For the other states with state-override approaches, the percentages of cost-

Boston-Cambridge-Newton, MA-NH Metropolitan Statistical Area (“MSA”) had about the same proportion of housing cost-burdened households (34.5 percent).<sup>94</sup> Nationwide, more than 30 percent of American households were housing cost-burdened that year.<sup>95</sup>

The percentages of households in Connecticut, Rhode Island, and Illinois that had housing cost burdens that year were similar. All of those states had higher overall shares of cost-burdened households than the national average.<sup>96</sup>

The 10 percent target “was actually an arbitrary number intended to stimulate a ‘reasonable supply’ of affordable housing.”<sup>97</sup> That target has the advantage of sounding fairly modest, allowing affordable housing to get its foot in the door of local government policy. However, it does not elide fully with the reality of Americans’ housing affordability problems.

### **Remedies provided by Chapter 40B have not been sufficient**

Unlike the FFHA and other major federal civil rights laws, the state override statutes do not give low- and moderate-income victims of unlawful exclusion and discrimination a right to sue for relief. Instead, the state remedy is a “builder’s remedy,” for the “qualified developers” described above, that want to provide housing for low- and moderate-income people.

The “builder's remedy” was an improvement on traditional restrictions on legal standing to challenge a zoning restriction. Under those restrictions, basically only people who already owned land in the community had standing to sue.<sup>98</sup> But numerous courts have

burdened renters and owners were: Connecticut (27.4% & 49.2%); Rhode Island (27.9% & 42.7%); and Illinois (23.4% & 47.0%).

<sup>94</sup> SONH 2019 Appendix, *supra* note 93, at W-10: Metro Area General Housing and Demographic Characteristics: 2017. Some 47.4 percent of renter households were cost-burdened, as were 26.5 percent of homeowners. (Both of those figures were about average for American MSAs.)

<sup>95</sup> SONH 2019, p. 40, Table A-2. The vast majority of those households were in the lower income categories.

<sup>96</sup> SONH APPENDIX 2019, *supra* note 93, at W-23, W-31. Connecticut’s overall housing cost-burden rate was 34.8 percent; Rhode Island’s was 33.7 percent; and Illinois’ was 31.3 percent.

<sup>97</sup> Sharon P. Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act*, 22 W. NEW ENG. L. REV. 381, 394 (2001) (quoting Karen Schneider, *Innovation in State Legislation: The Massachusetts Suburban Zoning Act (1970)* (unpublished A.B. thesis, Radcliffe College)).

<sup>98</sup> “Under the traditional rule, only those who assert pecuniary or economic loss and who have a legal or equitable interest in land have standing to challenge a zoning restriction. The rule... simply omits the interests of those excluded by such ordinances.” *Suffolk Hous. Serv. v. Town of Brookhaven*, 397 N.Y.S.2d 302, 308 (Sup. Ct. 1977) *aff’d as modified*, 405 N.Y.S.2d 302 (1978).

criticized remedies for exclusionary housing practices that do not permit low- and moderate-income people excluded by those practices to pursue a legal remedy themselves.

The people who have the greatest interest in ending exclusionary zoning, non-resident poor people and organizations [which] represent the interests of such people, very often have little or no direct relationship with particular exclusionary municipalities. In fact, the whole problem is that exclusionary zoning prevents such relationships from developing.<sup>99</sup>

Another court described as “irrational” a rule of standing that:

would compel potential plaintiffs to obtain the assistance of beneficent landowners willing to create specific projects for the sole purpose of instituting litigation. There is not always an identity of interest between landowners and those excluded by zoning restrictions . . . particularly where the complaint is not that multi-family housing is prohibited in [the zoned area], but only that it is so restricted as to exclude the poor and racial minorities.<sup>100</sup>

The housing cost statistics discussed above indicate that the builder's remedy has not been effective in producing sufficient affordable housing in Massachusetts.

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<sup>99</sup> Southern Burlington Co. NAACP v. Mount Laurel, 92 N.J. 158, 456 A.2d 390, 483 (1983) (“Mount Laurel II”) (holding that individuals demonstrating an interest in securing lower income housing opportunities in a municipality will have standing to sue that municipality).

<sup>100</sup> Suffolk Housing Services v. Brookhaven, *supra* note 98, 397 N.Y.S.2d at 310 (citations omitted) (Housing cost statistics discussed above indicate that the builder's remedy has not been effective in producing sufficient affordable housing in Massachusetts). To the same effect as Suffolk Housing, the California Court of Appeals concluded that plaintiffs have standing to challenge a zoning practice if they have been excluded from a city in which they desire to reside. *See* Stocks v. City of Irvine, 170 Cal. Rptr. 724, 731 (Cal. Ct. App. 1981).

That decision also held that it would be sufficient for standing that nonresidents allege that the zoning practice had raised their housing costs outside the city by adversely affecting the regional housing market. *Id. Cf.* Torres v. City of Yorba Linda, 17 Cal. Rptr. 2d. 400, 406 (Cal. Ct. App. 1993) (in *dicta*, court questioned whether *Stocks* approach might give plaintiff standing despite an inadequate personal interest in the litigation's outcome).

The New Hampshire Supreme Court has held that lower-income people who have been unsuccessful in finding affordable housing in a town have standing to challenge its exclusionary zoning practices, at least where they work in the town. Britton v. Chester, 595 A.2d 492, 494 (N.H. 1991).

**Chapter 40B doesn't make clear what local officials are required to do  
to avoid creating or applying exclusionary housing practices**

Unlike the FFHA and other federal civil rights statutes, Chapter 40B does not define the required and prohibited actions specifically. Instead, it sets forth procedures under which a “qualified developer” may apply for an expedited, Comprehensive Permit to produce housing that includes a sufficient percentage of units affordable to low- and moderate-income people. If not satisfied with the municipality’s response to that application, the developer may appeal for expedited, state-level review of the application.

However, Chapter 40B does not spell out important legal principles that are at stake. Doing so would provide more guidance to local zoning officials. Landmark decisions by the highest courts of a number of states have spelled such matters out, in declaring exclusionary housing practices unlawful. The decisions based on constitutional rights include:

- *Appeal of Girsh*, holding if a township “is a place where apartment living is in demand,” lack of provision for apartments in its zoning ordinance renders that ordinance unconstitutional;<sup>101</sup>
- *Southern Burlington Co. NAACP v. Mount Laurel (“Mount Laurel I”)*, holding “when it is shown that a developing municipality in its land use regulations has not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, a facial showing of violation” of due process or equal protection of the laws under the New Jersey constitution has been established;<sup>102</sup>
- *Assoc. Home Bldrs. v. Livermore*, holding to be constitutional, a municipal zoning ordinance must reasonably relate to the regional welfare, including the interests of “[o]utsiders searching for a place to live in the face of a growing shortage of adequate housing”.<sup>103</sup>
- *Cf. Robert E. Kurzius, Inc. v. Upper Brookville*, holding “[a] zoning ordinance will be invalidated on both constitutional and State statutory grounds if it was enacted with an exclusionary purpose, or it ignored regional needs and has an unjustifiably exclusionary effect”.<sup>104</sup>

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<sup>101</sup> *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395, 397-98 (1970).

<sup>102</sup> *See Mount Laurel II*, *supra* note 99 at 730-31.

<sup>103</sup> *Assoc. Home Bldrs. v. Livermore*, 18 Cal.3d 582, 557 P.2d 473, 488-89 (1976).

<sup>104</sup> *Cf. Robert E. Kurzius, Inc. v. Upper Brookville*, 51 N.Y.S.2d 338, 414 N.E.2d 680 (1980), cert. denied, 450 U.S. 1042 (1981).

Among the decisions under state zoning enabling statutes are:

- *Board of Sup'rs of Fairfax Cty. v. Carper*, holding county zoning ordinance, which downzoned the western two-thirds of a rapidly growing suburban county to two-acre minimum lots per dwelling, was invalid because it “is unreasonable and arbitrary and that it bears no relation to the health, safety, morals, or general welfare of the owners or residents of the area so zoned”;<sup>105</sup>
- *Builders Serv. Corp. v. Planning and Zoning Comm'n of East Hampton*, holding town ordinance that required a minimum floor area of 1,300 square feet for new housing was invalid, because it served none of the purposes of zoning set forth in the state’s zoning enabling act;<sup>106</sup>
- *Britton v. Chester*, holding municipality’s zoning ordinance as “blatantly exclusionary,” and thus violative of the state’s zoning enabling act requirement that such ordinances promote the general welfare.<sup>107</sup>

In our view, the lack of clear definition in Chapter 40B of the prohibited local actions reduces its effectiveness.

### ***Chapter 40B approach--Summary***

The Chapter 40B approach has been innovative and helpful in numerous ways. However, the ongoing, above-average housing affordability problems in states that have adopted that approach, and the other ongoing challenges discussed above, suggest that the 40B model should be tweaked, in order to maximize its effectiveness.

## **2. New Jersey Fair Housing Act**

In 1985, New Jersey enacted its state Fair Housing Act (“NJFHA”),<sup>108</sup> in response to the state Supreme Court’s landmark decisions in the *Mount Laurel* line of cases,<sup>109</sup> which

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<sup>105</sup> *Board of Sup'rs of Fairfax Cty. v. Carper*, 200 Va. 653, 107 S.E.2d 390 396-97 (Va. 1959).

<sup>106</sup> *Builders Serv. Corp. v. Planning and Zoning Comm'n of East Hampton*, 208 Conn. 267, 545 A.2d 530 (1988).

<sup>107</sup> *Britton v. Chester*, 595 A.2d 492, 495-96, 499 (N.H. 1991). In introducing the Standard State Zoning Enabling Act in 1924, then-Commerce Secretary Herbert Hoover stated: “This standard act endeavors to provide, so far as it is practicable to see, that proper zoning can be taken *without injustice* and without violating property rights.” Herbert Hoover, *Foreword* to U.S. DEPARTMENT OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926) (emphasis added). The many judicial decisions mentioned above make clear that such Zoning Enabling Acts, as applied by many local governments in the intervening decades, work injustices toward many low- and moderate-income Americans who lack suitable housing that they can afford.

<sup>108</sup> N.J. REV. STAT. §§ 52:27D-301 to 329. N.

declared exclusionary housing practices illegal. The NJFHA created an executive agency, the Council on Affordable Housing ("COAH"), within the state's Department of Community Affairs, to administer the Act.<sup>110</sup> COAH was tasked with determining each New Jersey local government's (municipality's) fair share of its region's housing needs for low- and moderate-income families.

COAH is required under the NJFHA to publish its determinations periodically.<sup>111</sup> However, although COAH's Third Round of determinations were due by 1999, they never have taken effect, due to internal delays and reversals by courts (further discussed below).

Municipalities may file a master plan with COAH showing how the municipality will fulfill its fair share obligation, and it may ask for COAH's certification.<sup>112</sup> If COAH certifies the plan, the municipality's residential zoning ordinance will have a presumption of validity in the event of a court challenge.<sup>113</sup>

However, municipalities are not required to file with COAH, and many of them have not done so—even though that leaves them vulnerable to a “builder’s remedy” lawsuit by a developer that wants to build housing affordable to low- and moderate-income people.<sup>114</sup>

Turmoil over COAH reached the point where the New Jersey legislature in 2011 voted to abolish COAH and replace it with different “fair share” obligations for municipalities.<sup>115</sup> Governor Chris Christie conditionally vetoed that bill, but he later attempted to abolish COAH through an executive branch reorganization plan.<sup>116</sup> His attempt was overturned by the New Jersey Supreme Court, and in 2015 that court returned the responsibility for overseeing compliance with the state Fair Housing Act to the judicial branch.<sup>117</sup>

<sup>109</sup> See, e.g., *S. Burlington Cty. N.A.A.C.P. v. Twp. Of Mount Laurel*, 336 A.2d 713 (N.J. 1975) (“Mount Laurel I”); *S. Burlington Cty. N.A.A.C.P. v. Twp. Of Mount Laurel*, 456 A.2d 390 (N.J. 1983) (“Mount Laurel II”).

<sup>110</sup> N.J. STAT. ANN. § 52:27D-305 (2019).

<sup>111</sup> *Id.* § 52:27D-307 (2019).

<sup>112</sup> *Id.* § 52:27D-309 (2019).

<sup>113</sup> *Id.* § 52:27D-317 (2019).

<sup>114</sup> *Id.*

<sup>115</sup> *In re N.J.A.C. 5:96 & 5:97*, 110 A.3d 31, 42-43 (N.J. 2015); see, e.g., Alan C. Weinstein, *Reflections on the Persistence of Racial Segregation in Housing*, 45 CAP. U. L. REV. 59, 70 (2017).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*



## *Achievements*

Among the strengths of New Jersey's statute are: (1) its clearly-explained basis in the state constitution—not just in legislation; and (2) its emphasis on municipalities bearing their fair share of regional housing needs—not just local ones. As explained in the New Jersey Supreme Court's landmark decision in *Mount Laurel II*:

*The constitutional power to zone . . . is but one portion of the police power and, as such, must be exercised for the general welfare. When the exercise of that power by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare—in this case the housing needs—of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality. Municipal land use regulations that conflict with the general welfare thus defined abuse the police power and are unconstitutional.*<sup>118</sup>

Another achievement under the NJFHA has been establishment of a system for calculating housing needs on a regional basis.<sup>119</sup> In addition, the NJFHA has been credited for a substantial reduction in racial segregation in New Jersey, and for more than 60,000 homes built for low- and moderate-income families there.<sup>120</sup>

## *Ongoing challenges*

### **Continued high housing costs**

Despite the landmark *Mount Laurel* doctrine and the NJFHA, the state's housing costs remain among the nation's highest. A household whose members earn New Jersey's minimum wage (\$8.85 per hour) would need to work 130 hours a week, in order to afford a modest, two-bedroom rental home at the fair market rent.<sup>121</sup> Only in Hawaii would such a household need to work more—146 hours a week—to afford such a rental home. (Hawaii's minimum wage is \$10.10).<sup>122</sup>

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<sup>118</sup> *Mount Laurel II*, *supra* note 99 at 415 (emphasis added).

<sup>119</sup> See, e.g., Julie M. Solinski, *Affordable Housing Law in New York, New Jersey, and Connecticut: Lessons for Other States*, 8 J. AFFORDABLE HOUS. & COMMUNITY DEV. L. 36 (1998).

<sup>120</sup> Editorial, *Ending the Cycle of Racial Isolation*, N.Y. TIMES (Oct. 17, 2015), <https://www.nytimes.com/2015/10/18/opinion/sunday/ending-the-cycle-of-racial-isolation.html>.

<sup>121</sup> NLIHC, *supra* note 87, at 166.

<sup>122</sup> *Id.* at 69.

### COAH's dysfunctions

As mentioned, COAH has been chronically dysfunctional and has lost its role overseeing compliance with the NJFHA. Also, the voluntary nature of the Fair Housing Act is frequently accused of effectively cutting the legs from under the *Mount Laurel* doctrine.<sup>123</sup>

COAH has been criticized for cutting deals with municipalities that do not comport with that doctrine and of misrepresenting the need for affordable housing in a region in order to gain municipalities' participation. "The [NJFHA] puts COAH in the unseemly position of having to entice municipalities to avail themselves of its certification process."<sup>124</sup>

Another problem is that, once a municipality obtains COAH's certification, the *Mount Laurel* doctrine will allow other, restrictive zoning measures by the municipality, such as large-lot and open-space zoning.<sup>125</sup> Such measures can lead to unnecessarily sprawling development.

An added problem that aggravates sprawl is that COAH's "fair share" formula is inapplicable to older, developed municipalities (following the judicial *Mount Laurel* doctrine). COAH's "fair share" formula is actually a Growth Share formula that applies only to "developing communities."<sup>126</sup>

### Insufficient legal remedies

Legal remedies under the statute have been ineffective.

The legislature chose to prompt municipal compliance solely by recognizing a "builder's remedy" that allows a housing developer to override local zoning provisions and build inclusionary developments if a

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<sup>123</sup> See, e.g., JOHN M. PAYNE, *The Unfinished Business of Mount Laurel II*, in MOUNT LAUREL AT 25: THE UNFINISHED AGENDA OF FAIR SHARE HOUSING 11 (Timothy N. Castano & Dale Sattin, eds., 2008).

<sup>124</sup> *Id.*

<sup>125</sup> See *Mount Laurel II*, 456 A.2d at 421; see also, Alan Mallach, *Challenging the New Geography of Exclusion: The Mount Laurel Doctrine and the Changing Climate of Growth and Redevelopment in New Jersey*, in MOUNT LAUREL AT 25: THE UNFINISHED AGENDA OF FAIR SHARE HOUSING (Timothy N. Castano & Dale Sattin, eds., 2008).

<sup>126</sup> See, e.g., Daniel Meyler, *Is Growth Share Working for New Jersey?*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 219, 240 (2010); see also, John Boger, *Mount Laurel at 21 Years: Reflections on the Power of Courts and Legislatures to Shape Social Change*, 27 SETON HALL L. REV. 1450, 1460-61 (1997). "Growth Share is premised on continuous sprawl; for affordable housing to be built in New Jersey, all municipalities must continue to build. Though Growth Share prevents municipalities from making exclusionary construction decisions, for it to work properly it requires and assumes the constant construction of new housing."

municipality has no approved "fair share" plan. This approach provides, at best, a partial remedy.<sup>127</sup>

Also, the builder's remedy has been criticized for being “closely associated with sprawl. It is a blunt instrument applied on a case-by-case basis, the antithesis of sound planning.”<sup>128</sup> That remedy:

is partial to large parcels. First, developers finance the low-cost units through cross-subsidies, and try to construct as many profitable units as possible. Second, development costs tend to be lower in less urbanized settings.<sup>129</sup>

In addition, the NJFHA:

offers neither financial incentives nor legislative support to public advocates or private attorneys who otherwise might well be willing to mount legal challenges. Because the number of municipalities that face actual threat from builders or public interest lawyers is very small, so is the degree of municipal compliance.<sup>130</sup>

### ***NJFHA Summary***

The NJFHA has numerous strengths, including its: (1) clearly-explained basis in the state constitution and the judicial *Mount Laurel* doctrine; and (2) emphasis on municipalities bearing their fair share of regional housing needs. However, the statute’s administration and enforcement have been chronically dysfunctional; its legal remedies for noncompliance with “fair share” requirements have been inadequate, and the state’s housing costs remain among the most burdensome in the nation. New Jersey has not yet provided an effective model statute for controlling exclusionary housing practices.

### **3. California**

California has “the most comprehensive set of laws, outside of New Jersey, to combat exclusionary zoning and require affordable housing.”<sup>131</sup> Starting with the first version of

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<sup>127</sup> Boger, *supra* note 126, at 1459.

<sup>128</sup> Rusty Russell, *Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?*, 30 B.C. ENVTL. AFF. L. REV. 437, 474 (2003).

<sup>129</sup> *Id.*

<sup>130</sup> Boger, *supra* note 126, at 1459 (citations omitted).

<sup>131</sup> KELLY, ED., 1 ZONING AND LAND USE CONTROLS § 3.03[8] (2019).

its Housing Element planning requirements for local governments,<sup>132</sup> signed into law by Gov. Ronald Reagan in 1967,<sup>133</sup> the Golden State has produced a vast amount of legislation designed to reduce its dramatic and widening housing shortfall.<sup>134</sup>

However, compliance with those requirements by local governments, and their enforceability by the state government, have been persistently inadequate.<sup>135</sup> As of 2016, California ranked next to last among the 50 states in the number of housing units per capita.<sup>136</sup> The state was about two million units short, according to McKinsey Global Institute—and the shortage was getting steadily worse.<sup>137</sup>

Despite its relatively high minimum wage, California families earning it face some of the most daunting housing costs in the nation. California is the nation's second-highest housing cost state.<sup>138</sup> On average, a California household would have to work 116 hours a week at the state's minimum wage (\$12.00 per hour) to afford a modest 2-bedroom apartment at fair market rent.<sup>139</sup>

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<sup>132</sup> Cal. Gov. Code §§ 65580–65589.5 (requiring municipalities to include a housing element in their comprehensive plans).

<sup>133</sup> See, e.g., Liam Dillon, *California lawmakers have tried for 50 years to fix the state's housing crisis. Here's why they've failed*, L.A. TIMES (June 29, 2017), <https://www.latimes.com/projects/la-pol-ca-housing-supply/>.

<sup>134</sup> See, e.g., OFFICE OF GOV. GAVIN NEWSOM, GOVERNOR GAVIN NEWSOM SIGNS 18 BILLS TO BOOST HOUSING PRODUCTION (Oct. 9, 2019), posted at: <https://www.gov.ca.gov/2019/10/09/governor-gavin-newsom-signs-18-bills-to-boost-housing-production/>; Angela Hart, *Jerry Brown signs new California affordable housing laws*, SACRAMENTO BEE (Sept. 29, 2017), <https://www.sacbee.com/news/politics-government/capitol-alert/article176152771.html>. Gov. Brown signed 15 new housing bills passed by the California Legislature in 2017 “in a sweeping attempt to tame the state’s astronomical cost of living. Each bill has a different target, but they all aim to increase the pace of new housing construction.” See also, Cecily T. Talbert, *California's Response to the Affordable Housing Crisis*, AM. LAW. INST. (Aug. 2007).

<sup>135</sup> See, e.g., Liam Dillon, *California lawmakers have tried for 50 years to fix the state's housing crisis. Here's why they've failed*, L.A. TIMES (June 29, 2017), <https://www.latimes.com/projects/la-pol-ca-housing-supply/>; see also, Cecily T. Talbert, *California's Response to the Affordable Housing Crisis*, AM. LAW. INST. (Aug. 2007).

<sup>136</sup> *Id.*

<sup>137</sup> MCKINSEY GLOBAL INSTITUTE, A TOOLKIT TO CLOSE CALIFORNIA’S HOUSING GAP 6, 11 (2016).

<sup>138</sup> NLIHC, *supra* note 87, at 16.

<sup>139</sup> NLIHC, *supra* note 87, at 36.

## *California summary*

Despite the vigorous efforts of many Californians, and their state government, to promote housing affordability, the Golden State has not yet furnished a proven method of reducing, or even stabilizing, the state’s massive housing affordability problems.

### **4. Oregon**

Oregon implemented a bold, statewide land use planning law in 1973 with Senate Bill 100, which established mandatory state land use planning policies (Goals). Under that legislation (Oregon Land Conservation and Development Act of 1973 (LCDA)),<sup>140</sup> all local governments in the state are required to implement those goals through their binding, comprehensive land use plans.<sup>141</sup>

Goal 10 (Housing) requires communities to provide for the housing needs of the citizens of the state and to encourage adequate numbers of housing units at price ranges that match the financial situations of state households.<sup>142</sup> Notably, each city is required to provide housing for the needs of the state’s residents, not merely those currently living in their locality.<sup>143</sup>

One well-known and unique goal of the program is Goal 14 (Urbanization), which requires that every city have an urban growth boundary (UGB). “For development within the boundary, the burden rests on opponents of land development, but outside the boundary, developers must show that their land is easily supplied with necessary services and not worth retention as open space or farmland.”<sup>144</sup>

The task of adopting the Goals, as well as reviewing city and county land use plans, was given to an administrative agency, the Land Conservation and Development Commission

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<sup>140</sup> OR. REV. STAT. §197.010 (2017) *et. seq.*

<sup>141</sup> See, e.g., Robert L. Liberty, *Abolishing Exclusionary Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates*, 30 B.C. ENVTL. AFF. L. REV. 581, 589–95 (2003).

<sup>142</sup> *Id.*; Or. Admin. R. 660-015-0000(10)

<sup>143</sup> Myron Orfield, *Land Use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 FORDHAM URB. L. J. 877, 889 (2006) (citing OR. REV. STAT. §§ 197.307(1), 197.312). “With the exception of cities with populations under 2,500 and counties with populations less than 15,000, all local governments must zone to provide for all housing types determined to meet the need for housing within a UGB [Urban Growth Boundary] at particular price and rent levels.” Orfield at 889 (citing OR. REV. STAT. §§ 197.303-.307).

<sup>144</sup> Carl Abbott, *The Portland Region: Where City and Suburbs Talk to Each Other—and Often Agree*, in 8 HOUSING POLICY DEBATE 19–33 (1997).

(LCDC).<sup>145</sup> To provide for expeditious enforcement in matters involving land use, the LCDA created the Land Use Board of Appeals (LUBA), a three-member board appointed by the governor to hear appeals of land use decisions by local governments, special districts, and state agencies.<sup>146</sup> Oregon courts have affirmed, and deferred to, the broad authority the legislature gave LCDC.<sup>147</sup>

### *Achievements*

Oregon's innovative, statewide land use planning law, including enforceable housing provisions designed to meet the needs of citizens of the state of all income levels, has gone hand-in-hand with relatively moderate rental housing costs, compared to its neighboring Pacific Coast states.

On average, an Oregon family earning the state's minimum wage (\$11.25/hour) would need to work 82 hours per week to afford a modest, 2-bedroom apartment, under the standard definition of housing affordability.<sup>148</sup> By comparison to its West Coast neighbors, a California family would (as mentioned) need to work 116 hours per week at its minimum wage (\$12.00/hour) to afford such a 2-bedroom apartment.<sup>149</sup> And a typical Washington State family would need to work 93 hours at the state's minimum wage (also \$12.00/hour) to afford such a 2-bedroom apartment.<sup>150</sup>

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<sup>145</sup> Orfield, *supra* note 143, at 886–88 (LCDC may initiate proceedings for an enforcement order on its own motion. As part of an enforcement order, LCDC may withhold state planning grant money from the local government until the government complies with the order. LCDC enforcement orders are subject to judicial review by the Oregon Court of Appeals. The court may reverse, modify, or remand the order only if it finds the order to be unlawful in substance or procedure, unconstitutional, invalid because it exceeds LCDC's statutory authority, or not supported by substantial evidence in the record.)

<sup>146</sup> *Id.*

<sup>147</sup> See, e.g., *Lane Cty. v. Land Conservation & Dev. Comm'n*, 942 P.2d 278, 286 (Or. 1997) (Upholding LCDC's amendment to Goal 3 (Agricultural Lands) and implementing regulations did not exceed the scope of LCDC's authority in "promulgat[ing] regulations," even if those regulations have the effect of prohibiting uses otherwise permissible under the applicable statute."); see also, Orfield, *supra* note 113, at 888.

<sup>148</sup> NLIHC, *supra* note 87, at 199.

<sup>149</sup> NLIHC, *supra* note 87, at 36.

<sup>150</sup> NLIHC, *supra* note 87, at 256.

### *Ongoing challenges*

In February 2019, Oregon enacted the first statewide rent control law in the nation, out of widespread frustration with escalating rents.<sup>151</sup> (California followed close behind, enacting the second such statewide law in September 2019).<sup>152</sup>

In Portland, “median rents have risen 30 percent since 2011, adjusted for inflation, and the sight of people living out of cars or in tents pitched alongside highways has become common.”<sup>153</sup> And the problems extend far beyond Portland. The “median rent has increased by more than 14 percent statewide in recent years,” and some areas have experienced particularly intense rental problems.<sup>154</sup>

Even as the state’s economy hums along, with unemployment at only 4 percent, Oregon has been unable to significantly chip away at its stubbornly high 16.5 percent poverty rate. Wages have not kept pace with housing costs.<sup>155</sup>

A related challenge for maintaining affordability is Oregon’s UGB’s. They protect the state’s remarkable natural environment, but unless they are adjusted in a timely fashion in growing communities, low- and moderate-income workers and residents are subject to hyperinflation in housing costs.

### *Oregon summary*

The widespread dissatisfaction in Oregon with escalating rents, leading to Oregon’s first-in-the-nation statewide rent control statute, indicates that the state’s land use planning

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<sup>151</sup> See, e.g., Timothy Williams, *Is Your Rent Through the Roof? Oregon Wants to Fix That*, NEW YORK TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/us/oregon-rent-control-bill.html>.

<sup>152</sup> See, e.g., Conor Dougherty and Luis Ferré-Sadurní, *California Approves Statewide Rent Control to Ease Housing Crisis*, NEW YORK TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/business/economy/california-rent-control.html>. “In an indication of how dire housing problems have become, [that law] also garnered the support of the California Business Roundtable, representing leading employers, and was unopposed by the state’s biggest landlords’ group.” *Id.*

<sup>153</sup> Williams, *supra* note 151.

<sup>154</sup> *Id.* “In Talent, a city of 6,500 in southern Oregon, one in three residents spends more than half of his or her income on housing. Rents in Bend, one of the 10 fastest growing metropolitan areas in the nation, have climbed by more than 21 percent in the last three years. In Medford, the rental vacancy rate is less than 2 percent. And students at the University of Oregon in Eugene say pricey apartments have forced them to live in towns as far as an hour’s drive from campus.”

<sup>155</sup> *Id.*

law has not been sufficiently reliable in holding down housing costs for low-and moderate-income residents—despite the innovative approach and relatively strong enforcement provisions of that land use planning law. Economists caution that rent control is problematic for the housing market because, for example, it tends to discourage the production of needed, new rental housing.<sup>156</sup>

## 5. Recent statutes in other states

Many other states have attempted to reduce the effects of certain exclusionary housing practices by statute. One important, recent analysis of such statutes explains that:

For the first time in decades, there are widespread calls for states to intervene in local land use regulation. Previous generations of interventionists sought to address environmental concerns and advance desegregation. Today's interventionists, from California to Massachusetts, seek to advance economic opportunity, decrease inequality, and further national economic growth by undoing restrictive local zoning.<sup>157</sup>

Another important, recent analysis focuses on the new generation of state land use interventions that expressly preempt or displace specific elements of local zoning regulation.<sup>158</sup> Examples include state statutes that preempt local exclusions of accessory dwelling units, such as “granny flats,” on single-family lots.<sup>159</sup>

The statutes discussed in those articles (other than the four we have discussed at length above) generally focus on specific exclusionary housing practices. They do not obviate the need for a comprehensive ban on exclusionary housing practices, in our view.

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<sup>156</sup> See, e.g., WILLIAM A. FISCHER, ZONING RULES! THE ECONOMICS OF LAND USE REGULATION 367 (Lincoln Inst. of Land Policy, 2015).

<sup>157</sup> Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 294–95 (2019) (citing, *inter alia*, Lorraine Woellert, *Why Washington Can't Fix the New Housing Crisis*, POLITICO (July 7, 2017), <https://www.politico.com/agenda/story/2017/07/07/housing-crisis-shortage-no-fix-000472>). (YIMBY [Yes In My Back Yard] Party has organized rallies for more housing in high-cost cities such as Denver, CO, and Austin, TX, as well as in California, Massachusetts, and Oregon).

<sup>158</sup> John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823 (2019).

<sup>159</sup> *Id.* at 857-875.



## 6. **Conclusions about state statutes as models for ban on economically exclusionary housing practices**

Each of the four prominent, time-tested state statutory approaches discussed above (from Massachusetts, New Jersey, California and Oregon) introduced bold, innovative and helpful features. Each of those statutes has been credited with leading to substantial increases in the amount of housing in the state that is affordable to low- and moderate-income people.

However, those state statutes have not been able to prevent worse-than-average housing affordability problems in their states. None of those statutes includes an outright ban on exclusionary housing practices. Thus, none of them appears to offer a sufficiently reliable model for minimizing those practices comprehensively, statewide or nationwide. Nor do the other state statutes to which we referred in Part III.5 obviate the need for a comprehensive ban on exclusionary housing practices, in our view.

## III. **Suggested statutory language for a comprehensive ban on economically exclusionary housing practices**

Below, we offer our initial suggestions for the language of two basic provisions of a statute banning exclusionary housing practices generally: (1) the substantive prohibitions; and (2) definitions of terms.<sup>160</sup>

### **Prohibition of exclusionary housing practices**

No government, or official thereof, or other person acting under color of law, shall create or enforce any law, policy, or practice, that would have the effect or intent of depriving any person of the opportunity for suitable housing in the jurisdiction where the person works, currently resides, has family members residing, or where the person's primary support system is located.

To the extent consistent with sound planning, the opportunity for suitable housing shall include, but not be limited to, housing as close as feasible to where the person works, currently resides, has family members living, or

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<sup>160</sup> Of course, one major American metro—Houston and Harris County, Texas—has never adopted zoning, and it has a record of low housing costs, compared with similar metropolitan areas. However, in the United States cities and counties generally, zoning and related land use regulations seem to be here to stay. FISCHER, *supra* note 156, at 130. “Zoning and related land-use regulations began in the United States early in the twentieth century and spread rapidly. Almost all American urban municipalities and counties now have zoning regulations.”

where the person's primary support system is located. The opportunity for suitable housing shall be provided without discrimination based on the person's financial assets or level of income from any lawful source, or based on any other status that is legally protected from housing discrimination.

## Definitions

1. "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.
2. "Discrimination" means less than equal treatment, based on the person's financial assets or level of income derived from any lawful source, as well as other unlawful bases of discrimination, such as those based on race, color, religion, sex, handicap, familial status, and/or national origin.
3. "Family members" includes parents, children, other direct ancestors and descendants (by birth, marriage, or adoption).
4. "Government" includes any governmental entity, any official thereof, or other individual or group acting under color of law—including, but not limited to, private homeowners associations.
5. "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.
6. "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.
7. "Primary support system" means the individual or group that provides the primary form of needed, personal assistance to the person.
8. "Regulation" means a statute, ordinance, rule, binding plan provision, or other mandatory legal provision.
9. "Suitable housing" means housing reasonably suited to the person's circumstances—including economic circumstances—and meeting applicable standards of health and safety.
10. "Works" means has their primary job, has had their most recent, primary job within the past five years.

In addition to those prohibitions, the statute would have to cover numerous other subjects, such as administration, enforcement procedures, and penalties for violations. An example of a complete statute is the FFHA (42 U.S.C. §§ 3601-3619).

## Toward further provisions

### *Enforcement provisions*

As discussed, a key feature of an effective statutory ban would be strong enforcement provisions, such as those in the FFHA (detailed above, Part II.A.). For example, the ability of low- and moderate-income people to challenge unlawful discrimination against them depends heavily on the prospect of having their necessary legal expenses reimbursed by the party(ies) responsible for the violation(s).

Furthermore, such a remedy can reduce the incentives for local governments and homeowners (who generally are the dominant faction in local government politics—especially in the suburbs)<sup>161</sup> to pursue exclusionary tactics. Doing so is crucial, because home values constitute such a high percentage of their owners’ assets. Homeowners’ large, undiversified asset “drives them to worry excessively about infill developments that would make for less commuting and more convenient jobs and homes for most residents.”<sup>162</sup>

To illustrate the potential of an attorney’s fees provision to curb exclusionary zoning—among the statutes containing such a provision is the Religious Land Use and Institutionalized Persons Act of 2000, (“RLUIPA”), 42 U.S.C. §§ 2000cc *et seq.* In certain cases, under RLUIPA, local officials have acknowledged that their decision to reverse course and grant zoning applications after a religious group sued them was based largely on the financial consequences of losing in court. Those consequences included a potentially huge attorney's fees award to the religious group.

In one of those cases, *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.<sup>163</sup> The fact that the Township’s taxpayers may have had

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<sup>161</sup> FISCHER, *supra* note 156, at 156.

<sup>162</sup> FISCHER, *supra* note 156, at 300–01. Fischer notes that there are numerous other means of tempering homeowners’ exclusionary motivations as well—such as reducing the tax incentives that encourage overinvestment by owners in their homes. The problematic tax incentives include excessive deductibility of mortgage interest and state and local taxes on high-priced homes, and exemption from capital gains taxation relating to those homes. *See, e.g., id.* at 300.

<sup>163</sup> Mike Deak, *Bridgewater, Mosque Settlement Reaches \$7.75 Million*, MY CENTRAL JERSEY (Dec. 2, 2014), <https://www.mycentraljersey.com/story/news/local/somerset-county/2014/12/02/bridgewater-mosque-reach-settlement-million-land-swap/19775661/>.

to pay attorney fees that exceeded the township's insurance coverage, if the Township lost in court, was an important factor.<sup>164</sup>

Also, in a 2015 Kansas case, the County's Counselor was quoted as saying that the county's willingness to grant a church's zoning application, after the church sued for violation of RLUIPA, was done with an eye to a possible attorney's fees award against the county.<sup>165</sup>

Such strong enforcement measures can potentially permit low- and moderate-income people to overcome exclusionary housing practices. For more on the effects of provisions in the FFHA and other federal civil rights laws for reimbursement to proven victims, by parties responsible for unlawful discrimination, of the legal expenses of proven victims.<sup>166</sup>

### *Other provisions*

In drafting a statute to comprehensively ban exclusionary housing practices, much is to be learned from existing anti-discrimination statutes, as well as from existing and model state statutes that have attempted to control exclusionary housing practices. In addition to the statutes discussed above, *see, e.g.,* Stuart Meck, *et al., Growing Smart Legislative Guidebook* (American Planning Association, 2002) (Chapter 4-208 State Planning for Affordable Housing (Peter A. Buchsbaum, *et al.*) contains alternative model statutes based on Massachusetts Chapter 40B and New Jersey Fair Housing Act; Chapters 8 through 11 set forth model provisions of zoning and other land development regulations).<sup>167</sup>

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<sup>164</sup> *Id.* (“Council President Matthew Moench said the settlement could potentially save the township ‘an enormous amount of money’ if the municipality lost the lawsuit. Mayor Dan Hayes said the settlement prevents [the mosque] from seeking attorney fees allowed by federal law that would have exceeded the township's insurance coverage. Without a settlement, the mayor said, the costs would have been paid by taxpayers.”)

<sup>165</sup> Andrew Nash, *Liberty Baptist Settles with County*, MORNING SUN (June 16, 2015), <https://www.morningsun.net/article/20150616/NEWS/150619862>. “We were concerned about other cases along the same line that had been litigated in other states. Some had won significant attorney’s fees. One was in excess of \$1 million,” [County Counselor] Emerson said. “It boiled down to the decision of: ‘Is it worth the risk to take it to trial?’ Especially in light of the fact attorney’s fees could be substantial.”

<sup>166</sup> *Leveling the Playing Field for Victims of Exclusionary Housing Practices*, EQUITABLE HOUSING INSTITUTE (hereinafter EHI) (June 2019), [https://www.equitablehousing.org/images/PDFs/PDFs--2018-/Attys-fees-in\\_housing-related\\_litigation\\_EHI-memo-final.pdf](https://www.equitablehousing.org/images/PDFs/PDFs--2018-/Attys-fees-in_housing-related_litigation_EHI-memo-final.pdf).

<sup>167</sup> *See, e.g.,* Stuart Meck, *et al., Growing Smart Legislative Guidebook* AM. PLANNING ASSOC. (2002); (Chapter 4-208 State Planning for Affordable Housing (Peter A. Buchsbaum, *et al.*)

EHI will continue its research, and will present suggested language in the coming months for further provisions of a statute to ban exclusionary housing practices comprehensively.

## **Overall conclusions**

The Federal Fair Housing Act shows some potential as a model for a statutory ban on exclusionary housing practices generally. Among its features are specific definitions of the prohibited conduct, and strong enforcement provisions. The statute may be enforced through legal action by DOJ, and by alleged victims of Fair Housing violations, as well as by HUD.

Reimbursement of attorney's fees to proven victims of violations (payable by the parties responsible for those violations)—as well as other compensation to those victims, and injunctive remedies—are available in appropriate circumstances. Without such reimbursement, low- and moderate-income victims of Fair Housing violations generally are unable to bear the enormous costs of litigation that often are required to have those violations corrected.

Studies show that since creation of the FFHA, racial isolation in housing—notably of Blacks from Whites—has decreased slowly but steadily. That statute offers a credible template for a statute banning exclusionary housing practices generally.

We have reviewed the prominent state statutes that have attempted to curb those practices. To date, none of them show as much promise as the FFHA approach. All of the states with such statutes continue to have above-average housing affordability problems. None of those statutes provide to victims of economically exclusionary housing practices a personal right to raise a legal challenge to them.

Also, none of those statutes includes a comprehensive ban on exclusionary housing practices. Such a ban appears necessary, in order to adequately reform the nation's exclusionary land use regulations.

## **Acknowledgements**

A number of EHI's former law clerks did extensive and very helpful research, while they were in law school, on various state statutes discussed in this report. For their research on Massachusetts Chapter 40B—and statutes in Connecticut, Rhode Island, and Illinois that are largely modeled on it—we especially thank:

- Shakira N. Mack (George Washington University Law School, Class of '12);
- James Green (George Mason University School of Law, Class of '12);
- Jordan A. Silver (George Washington University Law School, Class of '12); and
- Ziran Zhang (George Mason University School of Law, Class of '10).

For their research on the New Jersey Fair Housing Act, we especially thank:

- Erin E. Mckenna (George Washington University Law School, Class of '12);
- Robyn N. Burrows (George Mason University School of Law, Class of '12); and
- Ziran Zhang (George Mason University School of Law, Class of '10).

For her research into California statutes, we especially thank Joanna Funke (George Washington University Law School, Class of '13). And for her research on the Oregon Land Conservation and Development Act of 1973, we especially thank Sarah Franz (George Mason University School of Law, Class of '13).