ZONING **PRACTICE** DECEMBER **2018**

AMERICAN PLANNING ASSOCIATION

ISSUE NUMBER 12

PRACTICE FAIR HOUSING

12

Fair Housing Is More Important Than Ever

By Don Elliott, FAICP

Fair housing seems like a quintessentially American goal. Of course we're against housing discrimination. Who would be in favor of it? But our nation's path toward that goal has been long and slow. In April 2018, Planning magazine devoted its cover and lead article to the many unfulfilled promises of the Fair Housing Amendments Act of 1988 (the Fair Housing Act), and support for the Fair Housing Act has been less than robust in Washington. But there is more to the story than that. Fair housing remains a priority for many local governments and has become increasingly intertwined with efforts to address America's affordable housing crisis. This article will review the basics of fair housing law, two recent developments in fair housing, and best practices to help close the gap between the current reality and the ideal of fair housing.

BACKGROUND

To review, the Fair Housing Amendments Act of 1988 is a part of the Civil Rights Act. It prohibits "making unavailable" housing on the basis of race, color, national origin, religion, sex, family status, or handicap (42 U.S.C. §§3601-3619 and §3631). While we don't use the word "handicap" much anymore, it is used in the Fair Housing Act and in many court decisions interpreting it, so it will be used occasionally in this article. The Fair Housing Act advises the courts to interpret its requirements broadly in order to achieve its purposes. While originally and primarily intended to prevent redlining by real estate brokers and mortgage lenders, it also applies to local governments. In that context, some courts have held that the "making unavailable" prohibition may be violated when local government programs, policies, and rules result in protected people not being able to access housing options on the same basis as the population at large (42 U.S.C. §§3604(a)). While some commentators insist that the act protects everyone, not just those in the listed categories, this article uses the phrase "persons protected by the act" to mean persons in those categories explicitly listed in the Fair Housing Act.

A separate provision requires that if an applicant for a development approval asks the local governments to make a "reasonable accommodation" for persons protected by the act by bending its rules, or to make a "reasonable modification" to its programs and policies to carry out the intent of the act, the local government must be willing to accommodate the request if it is reasonable and does not undermine the effectiveness of the rule or policy. A surprising number of local governments seem to be unfamiliar with this part of the Fair Housing Act, and most zoning ordinances do not reflect its requirements.

TWO LEVELS OF COMPLIANCE REQUIRED

Since it is included in the very broad reach of the Civil Rights Act of 1964, the Fair Housing Act applies to everyone. There are no exemptions from its basic requirements. While there are some defenses available to communities whose rules or policies are challenged under the act, those defenses generally apply when full compliance would threaten another federal constitutional right or obligation. Federal constitutional rights have to be balanced against other federal constitutional rights, but they are not balanced against the convenience, political desires, or financial resources of the local government. Importantly, the basic requirements of the Fair Housing Act cannot be used to force state and local governments to spend money to build housing for those protected by the act. Its reach is limited to preventing discrimination in rulemaking, program management, and the impacts of spending decisions made by local governments.

There is a second tier of obligations under the Fair Housing Act, however. State and local governments that accept local government funds agree in writing to "Affirmatively Further Fair Housing," which goes by the acronym AFFH. Since the vast majority of state and local governments do accept money from the federal government (in this context, most notably through Community Development Block Grants or the HOME program), this second tier also applies to most state and local governments. This additional contractual obligation reflects the U.S. Department of Housing and Urban Development (HUD)'s attempt to put some teeth behind the act's language on AFFH. For many years, however, many local governments checked the box acknowledging their AFFH obligations but did little or nothing differently than they would have done otherwise. That changed after a Westchester County, New York, case (*U.S. ex rel. Anti-Discrimination Center of Metro New York, Inc. v. Westchester County*, 495 F.Supp.2d 375. (S.D.N.Y. 2007)).

While the antidiscrimination center that filed the lawsuit against Westchester County did not allege a violation of the Fair Housing Act, the case raised important questions about what local governments that accept federal funds need to do to satisfy their duty to AFFH.

To make a very long and complex story short, the outcome of the case was a settlement in which Westchester County acknowledged that its practice of focusing housing resources to upgrade the poorest quality housing (which was located in predominantly minority neighborhoods) could have the unintended effect of perpetuating those concentrated pockets of minorities because it did not create housing opportunities in other (predominantly white) neighborhoods in the county.

As part of its settlement, Westchester County agreed to take numerous expensive and politically unpopular actions to increase the supply of affordable housing in areas of the county with predominantly white populations. That result made many state and local governments question whether they too might be challenged for failure to meet their AFFH obligations.

TWO RECENT DEVELOPMENTS

While the meaning of the Westchester County case and settlement was working its way into state and local government thinking, two other changes in the Fair Housing Act landscape occurred. The first was the Inclusive Communities case (*Inclusive Communities Project, Inc. v. Texas Department of Housing and Community Affairs*, 576 U.S. ___ (2015)), and the second was the finalization of a HUD rule as to what the AFFH duty requires.

Inclusive Communities, Inc. sued the state of Texas alleging that the way the Texas Department of Housing and Community Affairs allocated low-income tax credits for affordable housing violated the Fair Housing Act because it had a "disparate impact" on persons protected by it. That case became a legal vehicle to resolve a long-standing difference of opinion as to whether the act required a showing of "disparate treatment" (i.e., a rule, policy, or program that deliberately treats persons protected by the act differently) or just a showing of "disparate impact" (i.e., a rule, policy, or program that is neutral on its face but in fact makes it more difficult for persons protected by the act to obtain housing on an equal basis). The uncertainty arose because of the wording of the act itself and how federal courts had interpreted that wording in other decisions. Although a majority of the U.S. Court of Appeals circuits had recognized "disparate impact," many Supreme Court watchers assumed that the Court would hold that a showing of "disparate treatment" was needed. To the surprise of many, the U.S. Supreme Court held that showing of "disparate impact" could be a violation of the Fair Housing Act. It also reinforced the requirement that claims under the act must be based on a rule, policy, or program affecting multiple decisions—and that "disparate impact" claims cannot be based on a single decision or incident.

But that was not the end of the decision. The Supreme Court went on to clarify that claims of "disparate impact" had to meet a "robust causality" requirement. More specifically, plaintiffs must show that the rule, policy, or program actually caused the unfair housing outcomes that violate the Fair Housing Act. The Court added that the causality requirement could not be satisfied just by presenting evidence showing a statistical correlation between the government implementation of the rule or program and the existence or increase in the segregation or isolation of those groups protected by the Fair Housing Act. Upon remand, the U.S. District Court held that Inclusive Communities' evidence did not show the "robust" causality required by the Supreme Court (*Inclusive Communities. Project, Inc. v. Texas Department of Housing and Community Affairs*, C.A. No. 3-08-00546, 2016 WL 4494322 (N.D. Tex. Aug. 26, 2016)). In other words, it had not shown that Texas's implementation of its program to award tax credits caused the segregation of racial minorities or other groups, so there was no violation of the act. Since that decision, most of the federal courts considering "disparate impact" claims have likewise found that plaintiffs cannot show the causality required to support their challenges.

The second change after the Westchester County case was the finalization of a HUD regulation on what the duty to AFFH means in practice (24 CFR Parts 5, 91, 92, et al., July 16, 2015). This new rule had been under development during six of the eight years of the Obama administration, and reflected a dramatic strengthening of the AFFH requirement beyond what many assumed it meant. Again, to make a long and complex story short, HUD's AFFH rule provided that, in the future, HUD would provide local governments with a series of maps generated from U.S. Census data, the American Housing Survey, and other sources showing where those groups of persons protected by the act lived, plus many indicators of how those locations related to jobs, transportation, public facilities, good schools, and other proxies for quality of life and opportunity. HUD also stated that it would be paying attention to whether certain types of regulations—including zoning regulations—were inconsistent with AFFH obligations.

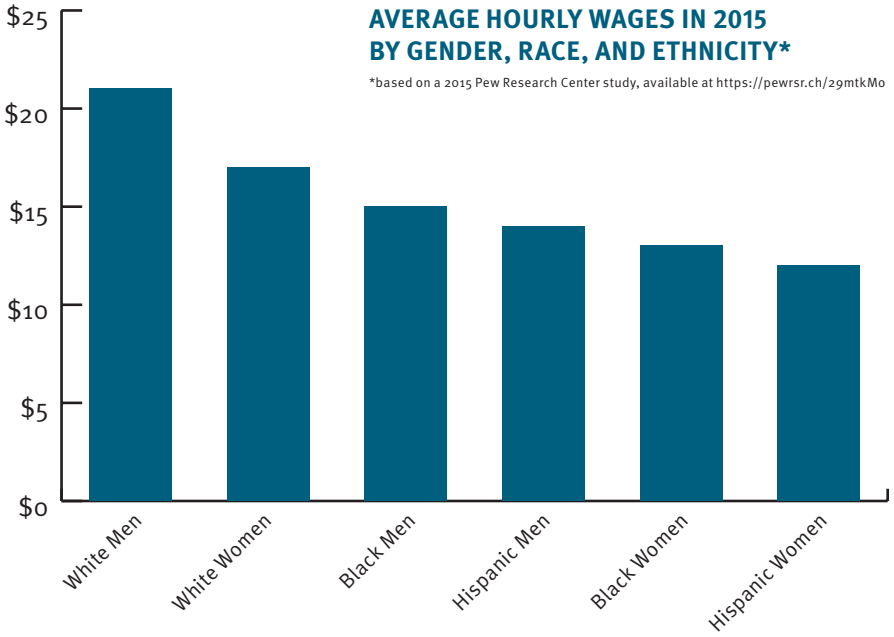
Given the current demographics and settlement patterns in the U.S., it was clear that many of the HUD maps would show that minorities, the handicapped, persons born in other countries, female-headed households, and other groups protected by the Fair Housing Act were concentrated in specific locations. Going forward, state and local governments would need to respond to those maps, or at least understand that HUD would be considering the patterns shown in those maps, as part of the evaluation of whether they were affirmatively furthering fair housing." State and local recipients of federal funds would now have to complete a more stringent Assessment of Fair Housing (AFH) instead of the more general Analysis of Impediments to Fair Housing that had previously been required.

No specific response to the maps was required. For example, one possible city response might be that the concentrations were due solely to personal preferences and that their regulations had nothing to do with the outcome. However, HUD assumed (probably correctly) that the public review of those maps and the AFH would provoke discussions among elected officials, planners, and citizens as to whether any of their regulations were in fact contributing to the concentrations of persons protected by the Fair Housing Act, and that some communities might conclude that their own rules and programs were partly responsible. The HUD AFFH rule was widely criticized as being very burdensome to state and local governments (as well as HUD), but it was finalized on July 16, 2015.

Not surprisingly, the Trump administration took a different view as to how it wanted to address the enforcement of the duties in the Fair Housing Act. Shortly after taking office, HUD Secretary Ben Carson stated that the department was not in support of the AFFH rule. More tactically, in May 2018 HUD withdrew the computer assessment tool that was used to generate and evaluate the maps showing where those groups protected by the Fair Housing Act lived and their access to opportunities from those locations. In support of its action, HUD stated that the assessment tools contained errors and that administration of the tool was overly burdensome. Without the computerized assessment tool, many observers concluded that it

would be difficult for local governments or HUD to respond to or evaluate concentrations of minorities, female-headed households, immigrants, persons with disabilities, and others. Although the HUD action was promptly challenged in federal court, by August 2018 the suit had been dismissed on the grounds that withdrawal of the assessment tool did not amount to repeal of the AFFH rule (which could only be done through a new federal rulemaking process), and that many aspects of the AFFH rule remained in place. In the meantime, HUD had issued an Advance Notice of Proposed Rulemaking for "Streamlining and Enhancements" to the AFFH rule. As a first step, public comments on how the rule should be revised are being accepted, but no draft of a proposed revised or replacement rule has been published. At present, the AFFH rule remains in place because no alternative rule has been approved, but the data needed to comply with that rule is not readily available.

The saga of the AFFH rule leaves state and local governments in an interesting (but somehow familiar) spot. In light of uncertain or conflicting federal government requirements, plus the common desire of local elected officials to continue receiving federal CDBG and HOME funds, what kind of AFFH showing is needed? The answer will probably also seem familiar. In the face of uncertainty, local government responses tend to reflect the political will of the elected officials. Some local governments that may not be fully supportive of the Fair Housing Act's constraints on their local authority may decide to make the fairly general showings of efforts toward AFFH that they made before the Obama-era rule, and expect that HUD will not be particularly strict in reviewing their applications. Other communities with strong support for fair housing may continue to prepare the stricter Assessments of Fair Housing (using their own analyses of U.S. Census and housing data, if necessary) and then try to address the patterns of concentration shown in those documents in hopes that their showings still meet the requirements of the not-yet-replaced AFFH rule.



ANNUAL EARNINGS DIFFERENCES BETWEEN THOSE WITH AND WITHOUT DISABILITIES IN 2011*

Educational Attainment	Without a Disability	With a Disability	Difference
High school or equivalent	$29,471	$22,966	($6,505)
Some college	$31,104	$26,489	($4,615)
Associate degree	$39,968	$32,768	($7,199)
Bachelor's degree	$58,822	$46,103	($12,719)
Master's degree or higher	$87,771	$66,899	($20,871)

*based on a 2014 report issued by the American Institutes for Research, available at https://bit.ly/2JJEeNG

THE FAIR HOUSING ACT/LOW-INCOME NEXUS

These housing challenges are further compounded by the nexus between the Fair Housing Act and lower income populations. To repeat—the FHA prohibits "making unavailable" housing based on race, color, national origin, religion, sex, family status, or handicap. It does not prohibit "making unavailable" housing because of low income. Under the constitution and federal laws of the United States, there is no legal duty for local governments to make housing available to everyone regardless of their ability to pay for it.

Some would consider it a moral duty, and others would consider it good planning practice to create inclusive cities. The AICP Code of Ethics and Professional Conduct recognizes "a special responsibility to plan for the needs of the disadvantaged and to promote racial and economic integration"—but there is no federal legal duty to do so.

At the same time, a disproportionate number of households headed by minorities, women, the disabled, immigrants, and refugees have lower-than-average incomes. The income and wealth gaps between male- and female-headed households are well documented, and the same is true for majority- and minority-headed households in most communities. That is the Fair Housing Act/low-income nexus. One group (named in the Fair Housing Act) has federal legal protection aimed at equal treatment, while the other group (lower income households) does not, but the two

groups overlap significantly. That raises two interesting questions.

The first question is: "Do housing policies that tend to restrict the supply of affordable housing (defined broadly here as housing for those that are currently priced out of the housing market) create a 'disparate impact' on groups protected by the Fair Housing Act?" Or, to put it another way, "Do local regulations that restrict the supply of low-income housing fall more heavily on minority-, women-, disabled-, and immigrant-headed households to a point that violates the Fair Housing Act?" To date, no court has said so, and it would be difficult to prove because of the "robust causality" requirement of the *Inclusive Communities* decision. In other words, it would be difficult to prove that regulations restricting affordable housing cause concentrations of Fair Housing Act-protected persons that deny them equal access to housing opportunities, because there are so many other possible causes for those concentrations. Other possible causes include traditional ties to the neighborhood, personal preference, proximity to the resident's job or school, or the obvious one—lack of income to afford higher rents elsewhere. While that showing may someday be made, the bar to proving a violation of the Fair Housing Act based on "disparate impact" has been set very high.

The second question is: "Do state and local government actions that increase the supply of affordable housing tend to promote the goals of the Fair Housing Act?" The answer is almost certainly "yes." Because of the Fair Housing Act/low-income nexus, the benefits of increasing the supply of affordable housing almost certainly have a disproportionately positive impact on those groups protected by the act. Put simply, since some of the populations protected by the Fair Housing Act have lower-than-average incomes, the probability that a new affordable housing unit will be occupied by a household led by or including a person in a protected group is higher than average. There is no guarantee, of course. Theoretically, most of the additional affordable housing units made available through increased spending or regulatory reform could be occupied by white males without disabilities who were born in the United States, but it seems unlikely. Increasing the supply of affordable housing almost certainly provides a disproportionately positive increase in housing opportunities for at least one, and probably several, of the groups listed in the Fair Housing Act.

Joe DeAngelis

Local officials can help to increase the availability of housing for people with disabilities by treating small group homes just like any other type of single-family housing.

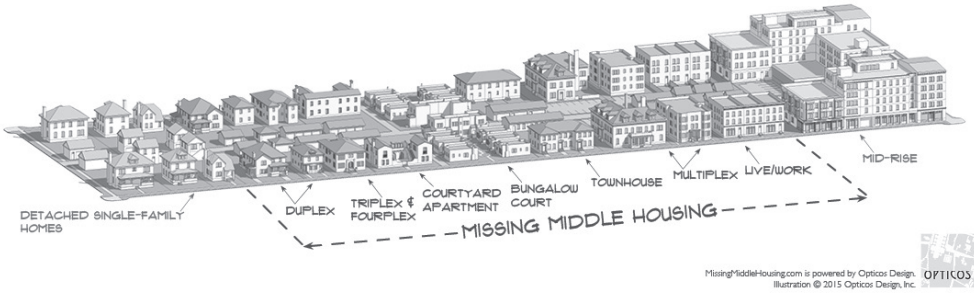
THE INITIATIVE SHIFTS TO LOCAL GOVERNMENT

As always, when the federal government reduces its regulatory involvement, the range of opportunities open to state and local government expands. As documented in *Planning* magazine's April cover story, the nation's success in implementing the Fair Housing Act has been spotty, and the challenges of implementing it remain daunting. Many of the housing challenges faced by minorities, persons with disabilities, female-headed households, and legal immigrants, refugees, and other persons born outside the United States still exist.

Fortunately, many of the barriers to fair housing are well within—and have always been within—the control of local government. Most importantly, zoning regulations have a substantial direct impact on both the availability of housing for those with physical disabilities and a substantial indirect impact on the supply of affordable housing. The paragraphs below list several steps that city and county governments can take to promote the goals of the Fair Housing Act.

Treat small group homes for persons with disabilities like single-family homes. While few Americans would object to fair housing in principle, that support sometimes turns to opposition when a small group home for the disabled is proposed close to that person's home. Since up to half of the land area in many U.S. cities is occupied by single-family homes, regulations that make it harder for small group homes to locate in those neighborhoods can substantially limit the availability of housing for persons with disabilities. Because of localized opposition to group homes, many cities and counties

impose additional barriers to their entry into single-family neighborhoods. The two most common barriers are special permit requirements and minimum required distances between group homes. Less common barriers include requirements to provide more off-street parking, more vegetated buffering, additional fences, or that the facility enter into an operating agreement or "good neighbor" agreement.



Opticos Design, Inc.

Allowing a wider variety of housing types, typified by the spectrum of "missing middle housing," can help to increase access to affordable housing for those protected by the Fair Housing Act.

Those and other regulatory hurdles are frequently challenged in federal court as violations of the Fair Housing Act, because they do not make a single-family dwelling available for persons with disabilities on the same basis the dwelling unit is available to persons without disabilities. The results of those lawsuits have been uneven. Sometimes the local regulation is upheld; sometimes it is overturned. (See, for example, *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (10th Cir., 1995) and *Familystyle of St. Paul, Inc. v. City of St. Paul, Minn.*, 923 F.2d 91 (8th Cir. 1991).)

In general, federal courts considering these challenges have suggested that group home providing housing for six to eight residents should be able to locate in existing single-family dwellings without facing significant regulatory barriers (e.g., *Bryant Woods Inn. v. Howard County*, 911 F,Supp. 918 (D.Md. 1996)), but they disagree as to what types of additional regulations are so significant that they constitute a violation of the Fair Housing Act.

The better practice is to treat occupancy of single-family detached homes by group homes containing no more than six or eight persons with physical or mental disabilities the same as occupancy of that structure by other persons, and without applying limits on the number of unrelated persons that can occupy that dwelling unit. Oregon has required this result by state law, saying:

> (1) Residential homes [defined as housing for up to five persons receiving care plus their caregivers] shall be a permitted use in (a) any residential zone, including a residential zone which allows a single-family dwelling, and (b) any commercial zone that allows a single-family dwelling, and a city or county may not impose any zoning requirement on the establishment and maintenance of a residential home in a zone described in subsection (1) of this section that is more restrictive than a zoning requirement imposed on a single-family dwelling in the same zone.
>
> (2) A city or county may not impose any zoning requirement on the establishment and maintenance of a residential home in a zone described in section (1) of this section that is more restrictive than a zoning requirement imposed on a single-family dwelling in the same zone. (ORS §197.665)

The same type of equal treatment ordinance could be adopted at the local level, and many cities and counties follow this approach.

Treat larger group homes for persons with disabilities like other multifamily housing. The same logic outlined above applies to multifamily housing. If the intent of the Fair Housing Act is that protected persons not face barriers to housing choice that are not faced by persons without disabilities, then larger group homes (i.e., those with more than six or eight residents) should be treated the same as apartment or condominium buildings with the same number of residents. Again, Oregon law requires that result (ORS §197.667), and some governments have embodied the same result in ordinances.

Create an administrative process to address requests for "reasonable accommodation." Almost all local zoning ordinances have a formal process to grant variances if applicants show (generally at a public hearing) that a legal hardship will occur without the variance. In contrast, relatively few ordinances have a written procedure for responding to requests for "reasonable accommodation" or "reasonable modification" under the Fair Housing Act. As a practical matter, when those requests are received, most local governments find a way to respond—sometimes through a decision by the zoning administrator or the city manager, and sometimes by sending the request through a formal variance process. However, using a formal variance process is generally inconsistent with the goals of the Fair Housing Act, since it creates a public event, in a public forum, that draws attention to the special needs of the person with disabilities who is requesting the reasonable accommodation. Worse, a public hearing opens an opportunity for neighbors or other citizens to request that the city deny or condition the application in ways that a reviewing court will later find to be unreasonable under the Fair Housing Act.

The better practice is to create an administrative process for the city or county to respond to requests for reasonable accommodation or reasonable accommodation without the need for a public hearing. The Fair Housing Act does not require that there be a written procedure, or specify what that procedure needs to be, just that the local government act reasonably in responding

to the request. However, it is almost always preferable to have a written procedure in place so the public understands how those requests will be reviewed, and so succeeding zoning administrators and city managers do not need to reinvent a (potentially inconsistent) way to respond each time such a request is made. A written procedure, and criteria to guide the decision, also reduces the chance of a legal challenge claiming that the local government's charter and ordinances did not authorize it to respond to the request the way it did. Failure to respond reasonably creates liability under the Fair Housing Act; responding to the request in a way that is not authorized by law could create liability under state or local law, so the answer is to create a written procedure and use it.

Review the zoning regulations for actual barriers to fair housing. Regardless of how the HUD AFFH rule is modified in the future, zoning regulations can create significant barriers to fair housing. In addition to the barriers to location of small and large group homes discussed above, the regulations sometimes categorize group homes as commercial uses, which can subject them to higher utility rates. They can also establish very large minimum residential lot sizes that make it difficult for operators of congregate care facilities to locate in those areas. Zoning ordinances can make it difficult or impossible to create accessory dwelling units, which reduces that ability of persons with disabilities to live close to, or within the same dwelling unit as, persons who could provide prompt assistance in case of a health emergency. Many zoning ordinances limit the number of unrelated persons who can live together, which limits the ability of persons with disabilities who can live independently from living with others who could provide mutual support for daily living activities and help in an emergency. Finally, zoning regulations that establish narrow definitions for each type of group-living facility can make it hard for facilities with mixed populations, or those providing an innovative mix of services, from being approved. Zoning rules have often been used to protect residential neighborhoods from different and unexpected uses. It is worth reviewing those rules to see which barriers to fair housing have been created by zoning rules—because those same barriers can be removed by amending the rules.

Promote affordable housing—because it has fair housing impacts. While rights to fair housing are legally protected, and rights to affordable housing are not, the two topics are intricately linked. Zoning regulations, policies, and programs that tend to increase the supply of affordable housing are likely to have a disproportionately positive impact on those protected by the Fair Housing Act. While many communities across the United States are facing an affordable housing crisis, and most are working to address that crisis, the fact that those protected by the Fair Housing Act are disproportionately impacted by the shortage of affordable housing provides another reason for bold action. There are a variety of ways for zoning changes to promote affordable housing, including:

- reducing minimum residential lot sizes
- allowing a wider variety of housing—including "missing middle" housing
- reducing the barriers to creating accessory dwelling units
- providing height or residential density incentives for affordable housing
- allowing increased occupancy of existing housing stock by unrelated individuals

CONCLUSION

Implementation and enforcement of the federal Fair Housing Act has always been imperfect, but the current uncertainty about how the HUD AFFH rule may be modified should not lead to a wait-and-see attitude. Instead, it puts much of the challenge of implementation back at the local level, and many cities and counties have accepted that challenge. When it comes to zoning, many of the barriers to fair housing were created at the local level, and they can be removed at the local level. Because of the Fair Housing Act/low-income nexus, planners should also realize that reducing barriers to affordable housing tends to open up housing choices for those protected by Fair Housing Act. Much of the unfulfilled promise of the Fair Housing Act is—and has always been—in the hands of local government planners.

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VOL. 35, NO. 12

Zoning Practice (ISSN 1548–0135) is a monthly publication of the American Planning Association. James M. Drinan, JD, Chief Executive Officer; David Rouse, FAICP, Managing Director of Research and Advisory Services; Joseph DeAngelis, AICP, and David Morley, AICP, Editors.

Subscriptions are available for $95 (U.S.) and $120 (foreign). Missing and damaged print issues: Contact APA Customer Service (312-431-9100 or subscriptions@planning.org) within 90 days of the publication date.

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