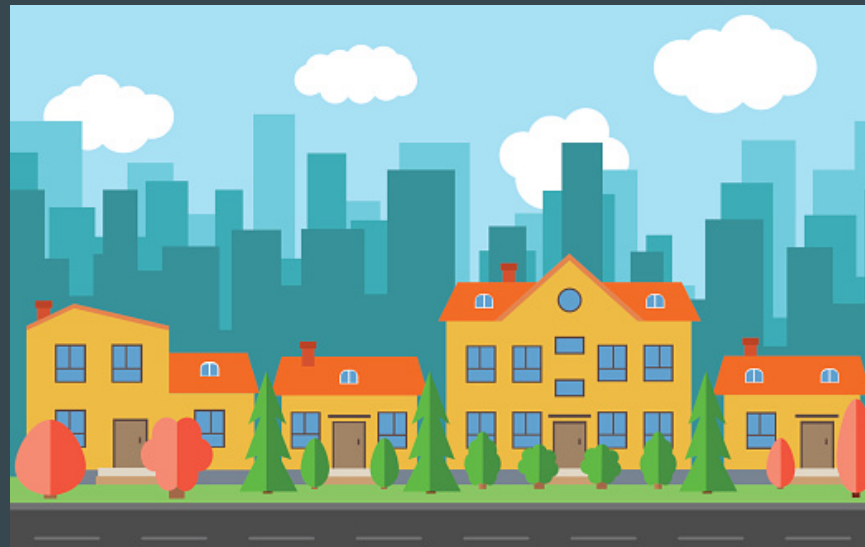


Community Land Trusts

Legal Barriers and Strategies to Implementing Preference Policies

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Our Project & Goals



**BEVERLY-VERMONT
COMMUNITY
LAND TRUST**



CLAM
COMMUNITY LAND TRUST
OF WEST MARIN



RichmondLAND
LOCAL ACTION IN NEIGHBORHOOD DEVELOPMENT



California
Community
Land Trust
Network

Perpetual Affordability - Stewardship - Community Control

Affordable homes for California in perpetuity

Preference Policies- what are they and why do CLTs want them

A preference policy gives priority to applicants who meet a certain criteria.

Many CLTs are hoping to implement preference policies to advance their goals of providing affordable housing to communities most vulnerable to gentrification-induced displacement and communities that have historically been denied equitable access to home ownership.

Examples of preference policies CLTs hope to implement:

- Residential preference
- Historical displacement preference
- Occupational preference
- Ideally, racial preference

Legal Background & Overview



Overview: Housing preference policies are not *per se* unlawful.

However, preference policies have a complex legal history because, in the past, they have been used to *exclude* minority communities from white suburban enclaves.

To date, courts have almost exclusively evaluated the legality of these *exclusionary policies*. Unfortunately, it is likely that courts will evaluate preference policies intended to remedy the harmful effects of gentrification-induced displacement under the same framework as their exclusionary counterparts.

Legal Barriers to Implementation: The Federal Fair Housing Act

- Housing preference policies are most commonly challenged as violations of the FHA.

- Enacted in 1968, the FHA prohibits discrimination in the purchase, sale, rental, advertising, and financing of housing- public or private- based on the following protected classes:

- Race

- Color

- National origin

- Religion

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- Sex

- Familial status

- Disability

- Two types of claims are cognizable under the FHA:

- Disparate impact claims and intentional discrimination claims

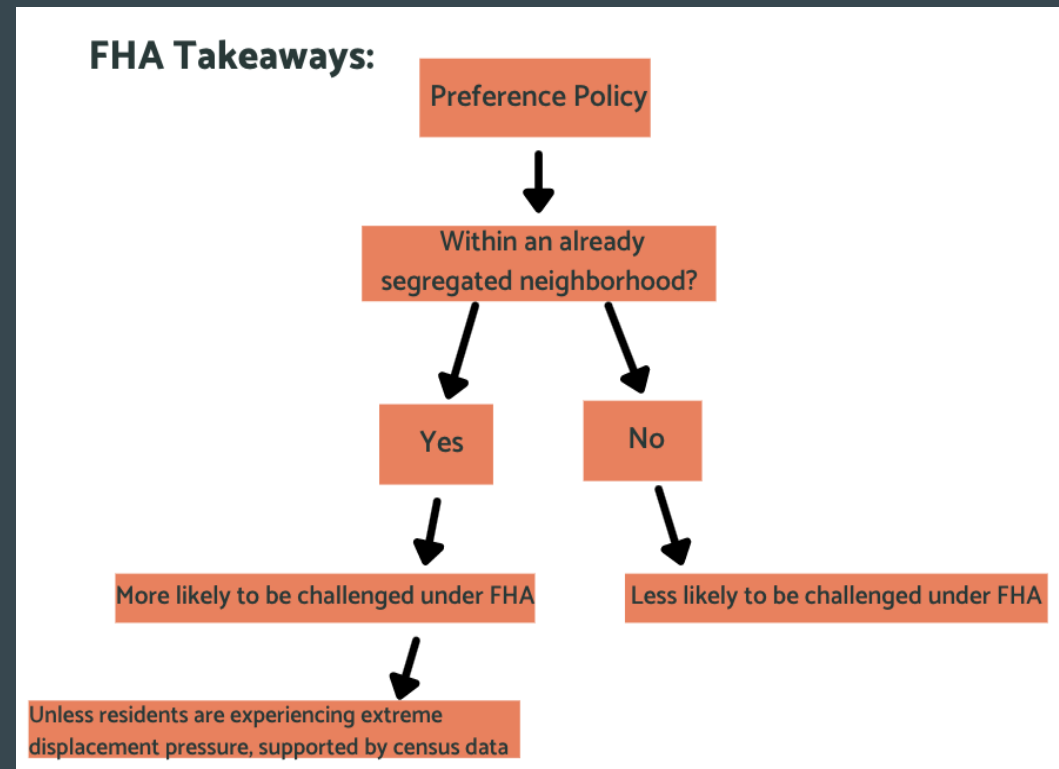
- Legal challenges against preference policies often arise due to Congress' intent in enacting the FHA to promote integration of communities over segregation.

Intentional Discrimination Claims (less common)

- These are less frequently brought against housing preferences because the plaintiff must show intent to discriminate, which is often hard to prove.
- The best way to avoid these claims is to design preference policies that are facially neutral, meaning without express race-conscious intent (or intent to specifically target any other protected class under the FHA).
- However, New York's Community Preference policy is currently being challenged under both disparate impact and intentional discrimination theories. Advocates should closely follow the ongoing lawsuit, Winfield v. City of New York.

Disparate Impact Claims (more common)

- A policy has a discriminatory effect where it “actually or predictably results in a disparate impact” or “creates, increases, reinforces, or perpetuates segregated housing patterns.”
- Legal challenges may allege that preference policies violate the FHA by perpetuating segregation in areas in which they are implemented. (Thus, preferences based on residency are more susceptible).
- However, preferences based on areas undergoing extreme displacement pressure based on census tract data are likely more legally viable (ex: HUD’s approval of SF’s Neighborhood Residency Preference).



FHA's "Affirmatively Further" Mandate Offers Hope

- Affirmatively Further Clause of the FHA:

“The obligation requires that federal agencies and federal funding recipients “affirmatively further” the purposes of the FHA by taking proactive steps to address longstanding patterns of segregation, discrimination, and disinvestment.”

- The AFFH mandate can be used to distinguish anti-displacement preference policies from their exclusionary historical counterparts.

- In 2018, CA codified the affirmatively further clause into state law under [AB 686](#), which requires all cities, counties, and state agencies in California to assess the extent of housing inequality and segregation, and to take concrete steps to dismantle this injustice and create equal housing opportunities for all.

Occupational Preference Policies

- Occupational preferences have been successfully implemented by some local governments, and their legality has been subject to far less judicial scrutiny than residency preferences.
- The main legal risk anticipated by these preferences are likely to arise in jurisdictions (including CA) that, in addition to the FHA's protected classes, prohibit discrimination on the basis of some sources of income.
- Occupational preferences may conflict with SOI protections if housing providers deny fully qualified applicants who have government housing subsidies while favoring others based on occupation.
- To best avoid legal challenges, preferences should be designed to mitigate the risk that in prioritizing specific occupations, other members of protected classes (like SOI and the groups protected by the FHA) are not disparately impacted.

Preference Policies in the Real World

New York City	Historical displacement preference
San Francisco	(1) Occupational preference (2) At-risk displacement preference
Portland	Historical displacement preference
Seattle	Historical displacement preference
Serramonte del Rey (CA)	Occupational preference
Guadalupe Neighborhood (Austin, TX)	Historical and at-risk displacement preference

Residency preferences

New York

- NYC'S “Community Preference Policy” dedicates 50% of units in each affordable housing development for residents who already live in the community where the affordable housing unit is located.

San Francisco

- 40% of the units are set aside for preferred applicants under a lottery system. There are eight different preference categories. Among them there is a “live or work in San Francisco” and a “displaced tenant housing” preference.

Austin

- The Guadalupe Neighborhood created a CLT where low-income residents and former residents with generational ties to the area received priority placement for affordable housing and homeownership opportunities.

Residency preferences

Seattle

- Seattle's residency preference model is a set of guidelines created in an attempt to protect long established ethnic enclaves, from gentrification-induced displacement. Under this system, housing developers using city funding may, but are not required to, follow the City's Community Preference Guidelines to design preference policies

Portland

- Portland issued a housing policy to stop the effects of gentrification in historically Black neighborhoods. The policy creates a preference point system for former residents who were displaced after the implementation of the city's urban renewal plans.

Occupational preferences

School Teachers

In 2016, California approved the Teacher Housing Act. This law expressly permits recipients of state funds or tax credits to restrict occupancy to teachers and school employees. One such project is currently underway in Daly City, in connection to the Jefferson Union School District (Serramonte del rey).

Artists

Under the Federal Internal Revenue Code, housing developers financed by federal tax credits (Federal Low Income Housing Tax Credits) are expressly allowed to orient their projects to those who are involved in artistic or literary activities. Artspace Housing Affordable Projects is non-profit organization that has developed 49 projects in different states of the country under this regulation.

Common Themes

1. Residency preferences offer a way to prioritize specific racial demographics, without incorporating an express race-conscious element.
2. All the residency preference policies studied restrict the number of units to which the preference policy applies, while the rest of their units are usually assigned by lottery systems.
3. Occupational preferences examples we described seem to have a stronger basis for legal support and thus may raise a lower risk of legal challenges.

CLT Solutions? Strategies to Avoid Legal Challenges ~hopefully~

- Apply the preference to a smaller portion of units
- Narrowly tailor preferences
 - Lottery system; set asides
 - “Plus Factor”/ Point System
- Increasing Data Collection
- Expand geographic scope of residency/anti-displacement preferences
- Framing

Broader/Long-term Goals

- **Advocacy:**

- Supporting coalitions like the CA CLT Network and nationwide fair housing organizations in their efforts to encourage legislative/government officials to support preference policies and broaden the interpretation of the FHA's "affirmatively further" language to encompass such policies

- **Constitutional Re-framing:**

- Reframe concepts like "equal protection" and "protected class" so that they disproportionately protect historically marginalized communities.