

# CLT PREFERENCE POLICIES

## Legal Barriers & Implementation Strategies



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# Disclaimer

This report was prepared by Jacquyn Blatteis, Isabel Flores-Ganley, Lucy Rollins, and Belén Thomsen as part of a seminar at UCLA School of Law. This report is meant to provide general information. This document is not all-inclusive and is not intended to provide any individual or entity with specific legal advice. For more detailed information, readers are encouraged to obtain legal advice from their own legal counsel.

## Introduction

Our team met with Community Land Trusts across California to learn about the preference policies they are hoping to implement and the pushback they have received. This report is intended to provide CLTs with information needed to respond to stakeholders resisting preference policies, such as local governments that contribute to CLT funding, and to help CLTs design their policies in ways that mitigate potential legal challenges.



# Legal Background

## Overview:

Housing preference policies **are not per se unlawful**. Meaning, they are not inherently illegal.

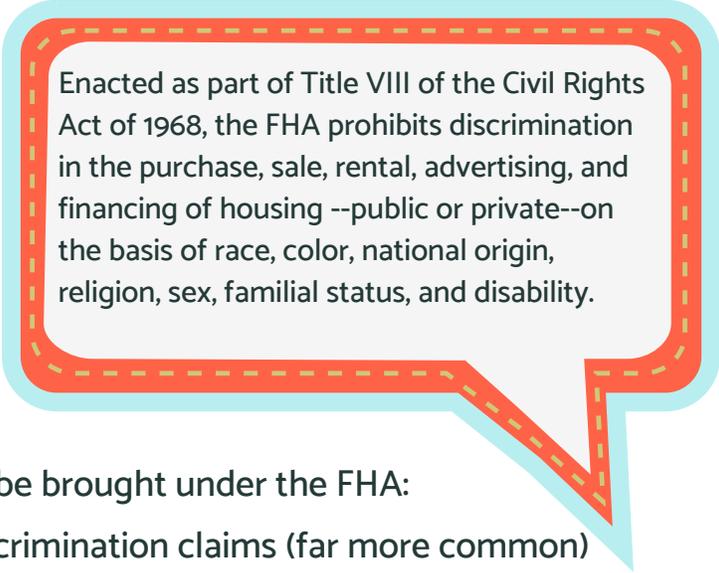
However, preference policies have a complex legal history because, in the past, they have been used to exclude minority communities from white suburban enclaves. To date, courts have almost exclusively evaluated the legality of exclusionary policies. There is sparse litigation on preference policies that are meant to remedy the harmful effects of displacement. Therefore, courts will likely use the same framework they have used in exclusionary policy cases to evaluate future preference policy cases. Hopefully, courts will eventually adopt a different framework for preference policies that mitigate displacement.

This means it is important for advocates to understand the basis for common legal challenges brought against preference policies (namely, the Fair Housing Act) and to design policies accordingly to mitigate their potential legal risk. Additionally, the FHA has a mandate which protects policies that "Affirmatively Further Fair Housing." This offers a powerful legal tool for anti-displacement preference policies to withstand legal challenges in court.

# Legal Background

## The Fair Housing Act:

- Housing preference policies are most commonly challenged as violations of the Fair Housing Act (FHA).



Enacted as part of Title VIII of the Civil Rights Act of 1968, the FHA prohibits discrimination in the purchase, sale, rental, advertising, and financing of housing --public or private--on the basis of race, color, national origin, religion, sex, familial status, and disability.

- Two types of claims can be brought under the FHA:
  - Disparate impact discrimination claims (far more common)
  - Intentional discrimination claims
- Disparate impact claims may be brought against a policy or practice that has a "disparate impact" on individuals belonging to a protected group, which means that it "creates, increases, reinforces, or perpetuates segregated housing patterns." A policy that has a disparate impact may nonetheless be lawful if it is found "necessary to achieve a valid interest" that could not be served by an available alternative practice with a less discriminatory impact.
- Intentional discrimination claims have been brought less frequently against housing preferences because the plaintiff must show intent to discriminate, which is often hard to prove. Thus, preference policies that are facially neutral (meaning without express race-conscious intent) are best suited to withstand these claims.
  - That being said, New York's Community Preference Policy is currently being challenged under both disparate impact and intentional discrimination theories in the ongoing lawsuit, Winfield v. City of New York.

# Legal Background

## FHA Disparate Impact Claims

- In light of Congress's widely recognized intent to promote racial integration in enacting the FHA, legal challenges may allege that preference policies violate the law by perpetuating segregation in areas in which they are implemented.
- As a result, preferences based on residency are susceptible to disparate impact claims if they are implemented in an already segregated neighborhood, as they may be found to perpetuate existing segregated housing patterns.
- However, policies that preference applicants who reside in neighborhoods undergoing extreme displacement pressure based on census tract data are likely more legally viable than specific neighborhood-level preferences.
- HUD has tacitly endorsed this through its initial denial and subsequent approval of San Francisco's Neighborhood Resident Housing Preference. (see p. 9).

## FHA Takeaways:



# Legal Background

## **FHA's "Affirmatively Further" Mandate:**

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

The FHA imposes a powerful obligation on federal agencies and federal funding recipients to "affirmatively further" the purposes of the FHA. According to HUD's interim final rule, published in June 2021, its funding recipients must take proactive steps to "remedy fair housing issues such as racially segregated neighborhoods, lack of housing choice, and unequal access to housing-related opportunities." California codified its own commitment to affirmatively furthering fair housing into state law in 2018, known as AB 686.

Thus, in response to legal challenges which allege that anti-displacement preference policies contravene the purposes of the FHA, proponents may assert that preference policies support the AFFH mandate because they are inclusionary. Preference policies mitigate the harmful effects of gentrification-induced displacement and preserve racial and socioeconomic diversity in communities, which is legal under the AFFH mandate.

# Legal Background

## Occupational Preference Policies:

Occupational preference policies have been successfully implemented by some local governments, and their legality has been subject to far less judicial scrutiny than residency preferences.

Legal scholars anticipate that the main legal risk posed by occupational preferences will arise in jurisdictions that, in addition to the FHA's protected classes, prohibit discrimination on the basis of some sources of income.

California has codified source of income as a protected class under the **Fair Employment and Housing Act**, which means that housing providers cannot discriminate against individuals because they use any form of a federal, state, or local housing subsidy to assist with paying rent. Thus, occupational preferences may conflict with source of income protections if housing providers deny fully qualified applicants who have government housing subsidies while favoring others based on occupation. To best avoid legal challenges, occupational preference policies should be designed to mitigate the risk that in prioritizing specific occupations, other members of protected classes (like source of income and the groups protected by the FHA) are not disparately impacted by the preference policy.

# Preference Policies in the Real World

## Residency Preferences

### NEW YORK CITY

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. The residency preference policy is in response to an urgent shortage of housing and an effort to mitigate displacement of low-and-moderate-income families from their neighborhoods.

### SAN FRANCISCO

San Francisco City uses a lottery. When a developer sets aside several units to sell/rent at an affordable rate, the units are distributed to low-income applicants based on a lottery. There are eight different preference categories and a general lottery. When one applies to be a part of the general lottery, they can also apply to the preference category that they qualify for. For example, there's a "live or work in San Francisco" preference and a "displaced tenant housing" preference. The available units are allotted to those in the general lottery and those who qualify for the preferences, and residency is chosen based upon a lottery.

### AUSTIN

The Guadalupe Neighborhood Development Corporation (GNDC) started in Guadalupe in Austin, Texas. The neighborhood was historically a community of color, with a predominantly Mexican American population. Through the 1970s and 1980s, the area suffered from rapid deterioration, population loss, and large-scale redevelopment pressures. In the 1980s, community leaders rallied to create a CLT where low-income residents and former residents with generational ties to the area served by GNDC received priority placement for affordable housing and homeownership opportunities.

### SEATTLE

Seattle's residency preference model is a set of guidelines created in an attempt to protect long established ethnic enclaves, mainly the Central District (a historically Black area) 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 in order to protect neighborhoods the city has identified as having high displacement risk for low-income communities & communities of color.

# Preference Policies in the Real World

## PORTLAND

Portland issued a housing policy known as the “N/NE Strategy,” intended to stop the effects of gentrification in historically Black neighborhoods. The policy created 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 (AB 3308) to facilitate the acquisition, construction, rehabilitation, and preservation of affordable housing restricted to teachers or school district employees to address the teacher and housing shortages demands. This law expressly permits recipients of state funds or tax credits to restrict occupancy to teachers and school employees.

One such project is currently under way in Daly City, in connection to the Jefferson Union School District.

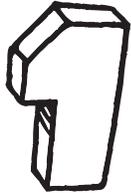
### ARTISTS

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. However, this regulation does not preclude the applicability of the FHA. In practice, a housing developer may design a project for artists but only to the extent of a threshold number of units.

Artspace Housing Affordable Projects is non-profit organization that has developed 49 projects in different states of the country under this regulation.

# Common Themes

In analyzing the above examples of preference policies there are a few important commonalities we have identified.



Residency preferences offer a way to prioritize specific racial demographics, without incorporating an express race-conscious element.



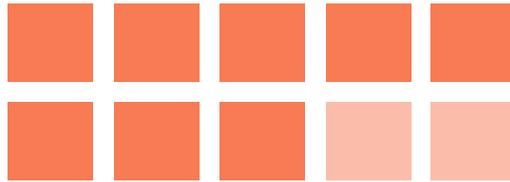
All the residency preference policies studied restrict the number of units to which the preference policy applies, while the rest of their units are usually assigned by lottery systems.



Occupational preferences seem to have a stronger basis for legal support and thus may raise a lower risk of legal challenges.



# Potential Solutions



## Narrowly Tailor Preferences

Apply the preference to a smaller portion of units: if you want to implement a preference, it is advisable to apply the preference to a portion of your available units, while making the rest of the units available more broadly. For example, an occupational preference could be given to only 40% of your units.

Treat the preference as a "plus factor": this is the terminology used for affirmative action, where race can be examined as a plus factor, enhancing a candidate's contribution to diversity without the factor of race being decisive. Similarly, a policy could treat a preference type as an enhancing factor without it being determinative of the applicant's residency. This strategy should be detailed in the CLT's applicant selection policy.

Use a lottery system: as detailed above, San Francisco City uses a lottery system, which has been approved by HUD. The randomization would likely be helpful to show that there is no underlying segregationist motive.

## Increase Data Collection

CLTs and cities want to avoid a disparate impact claim, which is identifiable if a residency preference concentrates a protected class within an affordable housing development in such a way that is not representative of the community that the development is situated in. If, however, the CLT can show, through data collection, that their preference does not disparately impact a protected class, then their policy is more likely to withstand a legal challenge. Therefore, collecting demographic data on the target population and the area that the CLT will be in could ensure that the preference policy has legitimate anti-displacement goals.

## Expand the Geographic Scope

CLTs could apply their preference policies to larger geographic areas. For example, instead of accepting applications from those who live in Koreatown (a neighborhood in Los Angeles), CLTs could expand the application pool to those who live in Los Angeles County. Once again, the idea is to take affirmative steps to further diversify the residency pool.

## Framing

The Fair Housing Act (FHA) says that it should be used to "decentralize poverty" and to advance "anti-segregationist" policies. At the same time, however, the FHA does not necessarily allow CLTs to implement preference policies. While much of this report is about how to skirt the FHA's strict rules, it is important to recognize that preference policies ARE in line with the FHA's ethos.

To better reflect this, we suggest that CLTs structure their preference policy language in a way that exemplifies that the policies align with the FHA's goals. For example, preference policies could be called "anti-segregationist efforts" or "anti-displacement efforts." CLTs' policies could include language that correlates their policies to "an integrationist purpose" and with an effort to "decentralize poverty."