

# Toward 'One America': A Proposed Federal Statute Prohibiting Exclusionary Land-Use Practices and Mandating Inclusionary Policies

by Charles E. Daye

Fair housing laws and court decisions, whether on constitutional or statutory grounds, have not been effective in stopping municipalities from engaging in "exclusionary land-use practices." Neither our federal legislation nor judicial decisions have addressed broadly inclusionary ends focused on race and class. This commentary<sup>1</sup> sets forth a proposal for a federal statute designed to more effectively achieve twin policies: prohibiting municipal actions that in fact exclude racial and lower economic groups and mandating inclusion of these groups within geographic areas and governmental units.

### NEEDED: A SUSTAINED NATIONAL UNDERTAKING

Actually stopping municipal governments from excluding racial groups and economic classes would concededly require a sustained national, coordinated, and, unfortunately, highly controversial undertaking. This effort is separate from the considerable difficulty of actually achieving substantial inclusion by race and economic class within such entities throughout the nation. Moreover, the pervasiveness of residential segregation and its underlying causes would require a multifaceted approach to remedy these conditions.<sup>2</sup> In the

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1. This commentary is excerpted from a longer work, Charles E. Daye, *Whither "Fair" Housing: Meditations on Wrong Paradigms, Ambivalent Answers, and a Legislative Proposal*, 3 WASH. U. J. OF L & POL'Y 241 (2000), and is used with permission. It has been edited slightly from its original version. The proposed statute is an updated version of a statute I originally proposed nearly a quarter of a century ago. Charles E. Daye, *The Race, Class and Housing Conundrum: A Rationale and Proposal for a Legislative Policy of Suburban Inclusion*, 9 N.C. CENT. L. REV. 37 (1977).

2. Many proposals have been advanced. Some of them include, e.g., Michelle Adams, *Separate and [Un]equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 TUL. L. REV. 413 (1996); Margalynne Armstrong, *Desegregation Through Private Litigation: Using Equitable Remedies to Achieve the Purposes of the Fair Housing Act*, 64 TEMP. L. REV. 909 (1991); John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1580-90 (1993); Harold A. McDougall, *From Litiga-*

current political climate, I regret that I do not think such an effort will be undertaken. Despite this, I propose this statute as an example of the kind of effort that is required if we are to have any chance of remedying residential living patterns that are starkly segregated by race and class.

A statute prohibiting suburban exclusion and mandating inclusion cannot be subordinated either to the tradition of local land-use autonomy<sup>3</sup> or to the desire for unrestricted freedom of individuals to associate, at least not when governmental action becomes the vehicle for effecting that desire.<sup>4</sup> Nevertheless, the proposed statute recognizes the importance of this autonomy and the interests of free association. It subordinates them to the limited extent clearly necessary to achieve its objectives.

If ending suburban exclusion and mandating suburban inclusion are to be made an enforceable and meaningful national fair housing policy, probably the only adequate remedy would be to require the entire federal apparatus to further that policy. Such a requirement would mean

*tion to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.I.L. L. REV. 623 (1987); Timothy J. Choppin, Note, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L.J. 2039, 2062-63 (1994); J. Mark Powell, Note, *Fair Housing in the United States: A Legal Response to Municipal Intransigence*, 1997 U. ILL. L. REV. 279; Peter W. Salsich, Jr., *Thinking Regionally About Affordable Housing and Neighborhood Development*, 28 STETSON L. REV. 577 (1999); Julie M. Solinski, *Affordable Housing Law in New York, New Jersey, and Connecticut: Lessons for Other States*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 36 (1998); Peter J. Vodola, *Connecticut's Affordable Housing Appeals Procedure Law In Practice*, 29 CONN. L. REV. 1235 (1997).

3. *Hills v. Gautreaux*, 425 U.S. 284, 300-301 (1976).

4. See, e.g., *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970) (in racial discrimination action it is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1063-66 (4th Cir.1982) (town was found liable under the Equal Protection Clause, *inter alia*, for withdrawing from a joint plan to construct low-income housing, where its withdrawal was a response to *town residents'* opposition that was "motivated in significant part by racial considerations").

that—at least to the extent that funds are involved—every federal agency should provide funds to local governments only when the funds will be used consistently with, and in furtherance of, the nation's fair housing policies.<sup>5</sup> The requirement should not differentiate between federal grants made to local governments for, say, highway improvement projects and those made for community development, exempting one from the application of the statute while including the other. Federal funds of any type would not be awarded to local governments that engage in exclusionary land-use practices.

## Assumptions about the Scope of Congressional Authority

Prohibiting exclusionary land-use practices and mandating inclusion would require extensive reach and strong, consistent implementation. Whether such provisions would pass constitutional muster before the present Supreme Court cannot be predicted with confidence. There are questions about the extent of permissible conditions under the spending clause<sup>6</sup> or the commerce clause of the Constitution.<sup>7</sup> There

5. An analogous, but more limited, provision already is included in Title VIII that provides that "All executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the Secretary to further such purposes." 42 U.S.C.A. § 3608(d) (1999) [Emphasis added].

The proposed statute, in substance, would simply delete the italicized limiting phrase leaving the duty applicable to *all* of federal agencies and *all of their* "programs and activities."

6. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (setting down in certain contexts three requirements on imposing conditions under the spending power: that the matter must be within the concept of the "general welfare," be unambiguous, and be reasonably related to the federal interest in a national program.); See also Thomas Lundmark, *Guns and Commerce in Dialectical Perspective*, 11 *BYU J. PUB. L.* 183, 203 (1997) (discussing the reach of the commerce clause through use of the Fourteenth Amendment or the spending power to prohibit state discrimination).

Analyses have been made in other contexts. See Melanie Hochberg, *Protecting Students Against Peer Sexual Harassment: Congress's Constitutional Powers to Pass Title IX*, 74 *N.Y.U. L. REV.* 235, n.218 (1999) (discussing how Congress could have used either the Fourteenth Amendment or the spending power to enact Title IX.); Richard Briffault, "What About the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 *VAND. L. REV.* 1303, 1311 (1994) (arguing that that to preempt state authority, Congress can use the spending power or the Fourteenth Amendment.); Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 *CARDOZO L. REV.* 565, n.89 (1999) (discussing Religious Liberty Protection Act and suggesting basing on the Fourteenth Amendment's enforcement clause and the spending power, along with the commerce clause).

7. See generally Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulation but Preserve State Control Over Social Issues*, 85 *IOWA L. REV.* 1 (1999). Compare *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding commerce clause power to regulate farm grown wheat for a family's personal consumption on the grounds of its potential effects on interstate commerce) with *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act of 1990 that prohibited gun possession in school zones on the ground that the conduct regulated did not substantially affect interstate commerce) and *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating portions of the Violence Against Women Act of 1994 as beyond Congress' power to regulate under the commerce clause).

may be questions of congressional power to act under the Thirteenth and Fourteenth amendments as well.<sup>8</sup> But to avoid any problem of interpreting the extent to which Congress intended the act to reach local land-use practices, the proposed act makes clear that Congress is exercising all the power it possesses under any provision of the Constitution. If Congress has power to prohibit an exclusionary practice or to mandate inclusion in a particular case, the proposed act makes clear that the power is exercised.<sup>9</sup>

Although the complete analysis of these constitutional issues is not the burden undertaken here, five important matters are noted. First, and perhaps foremost, the federal government is deeply implicated in the creation of the housing segregation that continues to exist today.<sup>10</sup> Originally the federal government required and actually funded segregated housing and later, through inaction, permitted other segregative practices.<sup>11</sup>

Second, "decent housing in a suitable living environment"<sup>12</sup> is fundamental to the achievement of virtually every national social policy—in education, in employment, in economic uplift, and to our cohesiveness as a nation.<sup>13</sup> To the

8. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding public accommodations provisions of Civil Rights Act of 1964 under the commerce clause); *Jones v. Alfred E. Mayer Co.*, 392 U.S. 409 (1968) (upholding section 1982 under the Thirteenth Amendment). See generally Michelle Adams, *Separate and [Un]equal: Housing Choice, Mobility, and Equalization in the Federally Subsidized Housing Program*, 71 *TUL. L. REV.* 413 (1996).

9. An explicit statement that Congress is exercising all of the power it has will avoid some issues that have led the Supreme Court to limit the scope of congressional legislation and the interpretation of rules implementing such legislation. See, e.g., *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 Sup. Ct. 675 (2001) (53 ZD 87) (finding nothing approaching "a clear statement from Congress" that it intended in the Clean Water Act to reach an abandoned sand and gravel pit located wholly within a single state on the grounds that the pit was visited by migratory birds that moved across state borders.) Here the Court also expressed concern that extending federal jurisdiction to "ponds and mudflats falling within the 'Migratory Bird Rule' [the subject of the litigation] would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.*, at 121 Sup. Ct. 683.

10. For a fuller rendition of this theme see James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 *HOW. L.J.* 547 (1979); Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 *J. MARSHALL L. REV.* 617 (1999).

11. See Florence Wagman Roisman, *Intentional Racial Discrimination and Segregation by the Federal Government as a Principal Cause of Concentrated Poverty: A Response to Schill and Wachter*, 143 *U. PA. L. REV.* 1351 (1995) and Michelle Adams, *The Last Wave of Affirmative Action*, 1998 *WIS. L. REV.* 1395, 1419 (The extent and severity of such segregation would have been impossible, however, without the active participation of various levels of government). See generally Charles E. Daye et al., *HOUSING AND COMMUNITY DEVELOPMENT*, Chapter 6 (3d ed. 1999) especially pages 545–552.

12. The Housing Act of 1949, 42 U.S.C.A. § 1441 (1999) reaffirmed in the 1968 Housing Act, 12 U.S.C.A. § 1701t (1999) reaffirmed in the Housing and Community Development Act of 1974, 42 U.S.C.A. § 1441a (1999) and again reaffirmed in 1994 legislation. 42 U.S.C.A. § 5301 (1999).

13. Report, U.S. Civil Rights Commission, *Twenty Years After Brown: Equal Opportunity in Housing* 11 (1975); James E. Rosenbaum et al., *Can the Kerner Commission's Housing Strategy Improve Employment, Education, and Social Integration For Low-Income Blacks?* 71 *N.C. L. REV.* 1519 (1993).

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extent that the goal is unrealized, virtually all other domestic social policies are diminished, if not precluded.

Third, the overriding problem that the statute addresses is municipal governmental land-use practices that prevent racial minorities or persons of the lower economic classes from living within the municipality (here the term means any general purpose unit of local government, including counties, towns, and townships). The statute would necessarily define the geographic area as the metropolitan area or housing market area<sup>14</sup> in which exclusion or inclusion would be referenced. To determine whether a land-use practice is exclusionary, the act would compare the extent to which the demographic profile of the municipality varies from the demographics of the metropolitan area or housing market area in which the municipality is situated.<sup>15</sup>

Fourth, in order to make a prohibition on exclusion something more than an empty gesture but still recognize the deep-rooted traditions of local land-use autonomy,<sup>16</sup> the statute should give local governments a substantial opportunity to act to correct the problem on their own. The statute would have two operative approaches: one a prohibition of exclusion by land-use practices<sup>17</sup> and the second a mandate for inclusionary policies and practices.<sup>18</sup> Because local governmental bodies are rarely involved in the direct provision (i.e., production) of housing, the most that can be required of them is that in their land-use plans they make provision for inclusionary housing.<sup>19</sup> To achieve

14. See *Hills v. Gautreaux*, 425 U.S. 284, 299 (1976) for a discussion of housing market areas in the context of metro-wide housing order directed to the Department of Housing and Urban Development, but noting that since compliance with local zoning would be required no coercion of suburban jurisdictions would be involved.

15. This point is explored fully in Charles E. Daye, *Whither "Fair" Housing: Meditations on Wrong Paradigms, Ambivalent Answers, and a Legislative Proposal*, 3 WASH. U. J. OF L & POL'Y 241 (2000) esp. at 250 to 254.

16. See generally Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997).

17. E.g., Janai S. Nelson, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 UCLA L. REV. 1689 (1996).

18. Compare H.R. 3504, 95th Cong., 1st Sess. This is a bill that was introduced on February 16, 1977, by Representatives Edwards and Drinan. Section 206(g) of H.R. 3504 would have amended the 1968 Civil Right Act by adding to § 804, 42 U.S.C.A. § 3604 (1977), a subsection which would have made unlawful the exercise of any governmental powers with respect to "planning, zoning, subdivision controls, building codes or permits or other matters affecting land use or development, to exclude low- or moderate-income housing because of the eligibility of such housing for governmental assistance, or because of the race, color, national origin, or economic status of the prospective occupants of such housing."

19. By way of analogy, the Housing and Community Development Act of 1974 contained a provision conditioning federal community development block grants on a local government's making an assessment of the housing needs of lower-income persons residing in or *expected to reside* in the area of the local government. 42 U.S.C.A. § 5304 (a)(4)(A) (1977), replaced, Pub. L. No. 97-35, § 302(b), 95 Stat. 384 (1981). A court decision eviscerated the requirement by holding that persons

inclusionary objectives in instances in which inclusion is not likely to occur without housing assistance of some kind, the act would make the federal government the "houser of last resort."<sup>20</sup>

Fifth, current legislation and judicial doctrines are seriously deficient with respect to enforcement mechanisms.<sup>21</sup> The proposed act would lodge a power to determine the eligibility of a governmental body for federal funds in a federal agency<sup>22</sup> and would enact effective remedial provisions.

## CONCLUSION

Legislative action such as the statute proposed below, if combined with thrusts to revitalize America's central cities, would provide the vehicle for America to seize the opportunity to become, indeed, one nation. The only thing that would make so bold an effort worth undertaking is the extremely high stake each of us has in the unfinished evolution of America from a society that has held out the promise of being just and decent to a society that keeps that promise.

and municipalities outside the area of the local government whose *expected to reside* figures they were challenging had no standing to sue HUD or the allegedly offending local government with respect to the figures. *City of Hartford v. Town of Glastonbury*, 561 F. 2d 1032 (2d. Cir. 1976). The specific *expected to reside* requirement was deleted from the legislation later. See Housing and Community Development Act of 1981, Pub. L. No. 97-35, § 302(b), 95 Stat. 384 (1981).

20. A limited aspect of this concept is contained in the Uniform Relocation Act governing residential displacement by federal agencies or state or local entities using federal financial assistance, in which funds from the *displacing project* may be used to provide replacement housing. See Uniform Relocation and Real Property Acquisition Policies Act, 42 U.S.C.A. § 4626 (1999) (entitled "Housing replacement by Federal agency as last resort").

A provision was contained in the House bill that reported out the Housing and Community Development Act of 1974 that would have enabled direct HUD action in local areas that failed to implement housing activities. But it was not enacted. See, CONF. REP. NO. 93-1279, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE. CONG. & AD. NEWS 4499.

However, under the Section 8 program the Secretary is authorized to act at the local level if local agencies do not exist or cannot act. 42 U.S.C.A. § 1437f (1999) providing that, "In areas where no public housing agency has been organized or where the Secretary determines that a public housing agency is unable to implement the provisions of this section, *the Secretary is authorized to enter into such contracts and to perform the other functions assigned to a public housing agency by this section.*" [Emphasis added.]

21. This matters of doctrines and remedies are discussed more fully in Charles E. Daye, *Whither "Fair" Housing: Meditations on Wrong Paradigms, Ambivalent Answers, and a Legislative Proposal*, 3 WASH. U. J. OF L & POL'Y 241 (2000), esp. 244-266.

22. One possibility would be the Department of Housing and Urban Development. I am not wed to this agency. If placing these responsibilities in HUD were regarded as a political or administrative problem then some other agency could be designated, such as the Office of Management and Budget, or even a new agency. However, HUD is the most logical current choice.

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## THE ONE AMERICA ACT

### Section 1. Congressional Findings

The Congress finds and declares that:

- (a) The Nation faces critical social and economic problems arising in significant measure from the exclusion of racial and ethnic minorities and persons of lower income from the opportunity to exercise choice in selecting where to live and work;
- (b) It is in the fundamental interest of the Nation to employ federal resources to eliminate the exclusion of and to mandate the inclusion of racial and ethnic minorities and persons of lower income in order to establish justice, ensure domestic tranquility, promote the general welfare, and secure the blessings of liberty for all persons;
- (c) The absence of opportunity to exercise choice in selecting where to live and work has led to the concentration of racial and ethnic minorities and persons of lower income in geographic areas within cities and other areas and such concentration has created pressures that have diminished the Nation's ability to achieve truly integrated and open living patterns;
- (d) Exclusion of racial and ethnic minorities and persons of lower income denies decent housing, a suitable living environment, and economic opportunities to such an extent that racial and ethnic minorities and persons of lower income cannot make their maximum potential contribution to the Nation's general welfare and to the common good; and
- (e) Systematic and sustained action by Federal, State, and local governments is required to eliminate the exclusion of and to mandate the inclusion of racial and ethnic minorities and persons of lower income in all communities that engage in land-use practices.

### Section 2. Purposes

The purposes of this chapter are

- (a) To develop viable communities in which decent housing, a suitable living environment, and economic opportunities are available to all persons by prohibiting the use of land-use practices that exclude racial and ethnic minorities and persons of lower income;
- (b) To develop truly integrated and open residential living patterns by mandating inclusionary land-use practices as a condition of any State's or local government's receipt and use of Federal financial assistance; and
- (c) To more effectively enforce both the nondiscrimination and the desegregation objectives of the Fair Housing Act in mutually consistent and supportive ways thereby eliminating instances in which pursuit of nondiscrimination objectives conflict with desegregation objectives because racial and ethnic minorities and persons of lower income lack the opportunity to exercise choice in selecting where to live and work.

### Section 3. Definitions

- (a) **Land-use practice.** "Land-use practice" includes:
  - (1) any and all restrictions, regulations, or controls on the usage of real property for residential purposes, including zoning, lot size requirements, dwelling square footage requirements, setback requirements, density requirements, platting, land-use plans, watershed regulations, subdivision regulations, floodplain regulations, comprehensive plans, official maps, and any qualitatively similar acts, rules, regulations, laws, ordinances, programs, plans, or practices, and
  - (2) any and all acts, rules, regulations, laws, ordinances, programs, plans, practices, or activities directly related to any land-use restriction, regulation, or control on the usage of

real property, for residential purposes, including any referendum requirement, limitation on residential construction, limitation on the issuance of building permits, limitation on sewer or water hookups, limitation on the provision of any service furnished by a governmental body or with the permission of a governmental body, or furnished within the jurisdiction of a governmental body by or with the permission of another governmental body or a state, the conditioning of any permission to build any dwelling unit upon the availability of any service furnished by or with the permission of a governmental body, by or with the permission of another governmental body or a state, or by the builder of any dwelling unit, and any qualitatively similar act, rule, regulation, law, ordinance, program, plan, practice, or activity.

#### (b) *Exclusionary land-use practices:*

- (1) An "exclusionary land-use practice" is any land-use practice of a governmental body that results in, or causes, the exclusion of a disproportionate number of persons of any racial group, ethnic group, group of any national origin, or income group from residing within the geographic or political jurisdiction of that governmental body.
  - (2) The "number of persons" of any race, ethnic group, national origin, or income group shall be determined by comparing the ratios of
    - (A) the number of persons of that race, ethnic group, national origin, or income group and the total number of persons residing in the metropolitan area or housing market area, as applicable, with
    - (B) the number of persons of that race, ethnic group, national origin, or income group and the total number of persons residing within the geographic or political jurisdiction of a governmental body.
  - (3) A "disproportionate number of persons" shall be deemed to have been excluded by any land-use practice when the ratio of the number of persons of any race, ethnic group, national origin, or income group residing within the geographic or political jurisdiction of a governmental body is below, by fifty percent (50%), or more, the ratio of such persons residing in the metropolitan area or housing market area, as applicable, in which that governmental body is included.
  - (4) A "proportionate number of persons" shall be deemed to exist when the ratio of the number of persons of any race, ethnic group, national origin, or income group residing within the geographic or political jurisdiction of a governmental body or the number of dwelling units available for occupancy by such persons equals or is within ten percent (10%) of equaling the ratio of such persons residing in the metropolitan area or housing market area, as applicable, in which that governmental body is included.
  - (5) "Income group" means persons whose individual income, or who are members of a household whose income, places a person or household within either that group of persons whose income equals or is below the poverty line established by the United States government, or that group of persons whose income equals or is less than eighty percent (80%) of the median income for the metropolitan area, or housing market area, as applicable, in which that person, or the household of which that person is a member, resides.
- (c) **Inclusionary land-use plan.** An "inclusionary land-use plan" is a plan submitted by a governmental body to, and approved by, the Secretary.

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- (d) *Federal financial assistance.* "Federal financial assistance" means any monetary assistance provided by the United States government or any agency thereof to a governmental body for any governmental activity, plan, or program including all grants, loans, contracts of insurance or guaranty, matching grants, or funding of any kind for any governmental purpose or for any proprietary purpose carried out by a governmental body.
- (e) *Governmental body.* "Governmental body" means the District of Columbia, any political subdivision of any state, and any entity which is a public body corporate and politic authorized by a state to exist or created by a state, and any entity which carries out functions traditionally carried out by public bodies.
- (f) *Metropolitan area.* A "metropolitan area" is any area defined as a standard metropolitan statistical area by the Office of Management and Budget, and any other urbanized area not included within a standard metropolitan statistical area, which is determined by the Secretary to be a metropolitan area.
- (g) *Housing market area.* A "housing market area" is any geographic area (within or outside of a metropolitan area) in which comparable housing units are in competition based on working, commuting, and residential patterns, and any area within which residences and jobs are customarily regarded as within commuting distances from home to work, as shall be determined by the Secretary.
- (h) *Secretary.* The "Secretary" means the Secretary of the Department of Housing and Urban Development.
- (i) *Assisted housing.* "Assisted housing" means any dwelling unit for which federal assistance is provided in whole or in part, or any person determined to be eligible for assistance for housing purposes, under any program of the federal government.

## Section 4. Exclusionary Land-Use Practices Prohibited

All exclusionary land-use practices are prohibited to the maximum extent Congress has the power to do so under any provision, clause, or amendment of the Constitution.

## Section 5. Federal Financial Assistance Prohibited

- (a) No governmental body that is engaged in any land-use practice that receives federal financial assistance shall engage in any exclusionary land-use practice.
- (b) Every agency of the United States government is prohibited from granting any federal financial assistance directly or through any state to a governmental body which engages in any exclusionary land-use practice, or to any governmental body which is in whole or in part subject to the jurisdiction of any other governmental body or a state which engages in any exclusionary land-use practice within the geographic jurisdiction of the governmental body which would be granted federal financial assistance, except as authorized in subsection (c) of this section.
- (c) No agency of the United States government may provide federal financial assistance to any governmental body which on [date] was engaged in any exclusionary land-use practice, or which at any time after the effective date of this act has engaged in any exclusionary land-use practice, unless
  - (1) the governmental body that would be granted federal financial assistance is located within a state which by statute prohibits exclusionary land-use practices within that state in terms substantively identical to the terms of this act and which statute provides remedies to exclusionary land-use practices substantively and procedurally iden-

tical to those specified in Section 7 of this act, or

- (2) the governmental body that is to receive federal financial assistance
  - (A) has ceased to engage in any exclusionary land-use practice, or in the case of another governmental body or a state, such other governmental body or state, has ceased to engage in any exclusionary land-use practice within the geographic jurisdiction of the governmental body which would be granted federal financial assistance,
  - (B) has undertaken to remove any continuing effects on any person of the exclusionary land-use practice, and
  - (C) has submitted an inclusionary land-use plan which plan has been approved by the Secretary.

## Section 6. Administrative Provisions

- (a) *Certifying eligibility for federal financial assistance.* The Secretary shall be responsible for certifying, for purposes of Section 5 of this act, whether a governmental body is eligible to receive federal financial assistance, and upon request of any agency of the United States government, shall certify whether the governmental body is eligible to receive federal financial assistance, and such certification shall be binding on the requesting agency.
- (b) *Presumptions and method for certifying eligibility.* For the purpose of making the certification of eligibility under this act:
  - (1) in the case of a governmental body which is engaged, or on or after [date] has engaged, in any land-use practice, or of a governmental body which is in whole or in part subject to the jurisdiction of any other governmental body or a state which, within the geographic jurisdiction of the governmental body, has engaged in a land-use practice, the Secretary shall presume that the governmental body has engaged in an exclusionary land-use practice when a disproportionate number of persons would be deemed to have been excluded under Section 3(b)(3) based on the most recent data available to the Secretary at the time the certification is made; or
  - (2) in the case of a governmental body which has not engaged in a land-use practice at any time specified under subsection (b)(1) of this section, or in the case of a governmental body from which a disproportionate number of persons would not be deemed to have been excluded under Section 3(b)(3), but within which a proportionate number of persons under Section 3(b)(4) does not reside, the Secretary shall make the certification based on the most recent data available to the Secretary at the time the certification is made, provided that the Secretary shall consider the ratio of the proportions determined under Section 3(b)(3) and shall evaluate any exclusionary effects of any land-use practice engaged in at any time, the continuing effects of such land-use practice, any exclusionary tendencies of such land-use practice, as well as any other relevant factors of which the Secretary has knowledge.
- (c) *Rebutting a determination of ineligibility.* Any governmental body determined to be ineligible may rebut such finding by
  - (1) meeting the provisions of Section 5(c) of this act; or
  - (2) presenting evidence satisfactory to the Secretary that neither has it engaged in any exclusionary land-use practice, nor has any governmental body or state engaged in any exclusionary land-use practice within its geographic jurisdiction in that in engaging in any land-use practice, provision was made for the number of housing units which

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would be occupied by a proportionate number of persons within its geographic jurisdiction.

- (d) **Elements of an inclusionary land-use plan.** The Secretary shall not approve any land-use plan as an inclusionary land-use plan unless the plan makes provisions for the numbers of housing units that would be occupied by a proportionate number of persons.

## Section 7. Remedial Provisions

- (a) **Private actions authorized.** Any person who is a member of a group or class specified in Section 3(b)(1) of this act, and any governmental body within the political or geographic jurisdiction of which reside a number of persons which exceeds a proportionate number of persons by ten percent (10%) or more, may sue any other person, any governmental body or any agency of the United States government to enforce any provision of this act in the United States District Court, without regard to the amount in controversy, provided
- (1) that in the case of suit brought against a governmental body, suit may be brought only if the person bringing the suit resides in, or governmental body bringing the suit is located within, the same metropolitan area or housing market area, as applicable, as the governmental body being sued; and
  - (2) that in the case of suit brought against a person as an official of a governmental body, suit may be brought only if the person bringing the suit resides in, or governmental body bringing the suit is located within, the same metropolitan area or housing market area, as applicable, as the governmental body of which the person being sued is an official.
- (b) **Prima facie evidence of exclusionary land-use practice.** A prima facie case of an exclusionary land-use practice may be made against a governmental body upon proof
- (1) that a disproportionate number of persons would be deemed to have been excluded under Section 3(b)(3) of this act; or
  - (2) that any land-use practice engaged in by, or within the geographic jurisdiction of, a governmental body had either an exclusionary effect, or a natural tendency to exclude any person who is a member of a group specified in Section 3(b)(1).
- (c) **Rebutting a prima facie case.** A prima facie case of an exclusionary land-use practice may be rebutted only by a showing by a preponderance of the evidence, with the burden of proof being on the governmental body against which a prima facie case is made, that
- (1) the governmental body clearly satisfies the provisions of Section 5(c)(1) or (2), or Section 6(c)(2) of this act; or
  - (2) the land-use practice of the governmental body clearly had no effect of excluding, and clearly has no tendency, direct or indirect, to exclude, any person specified in Section 3(b)(1) of this act.
- (d) **Secretary may be made a party.** The Secretary may be made a party
- (1) to any action in which there is drawn into question the Secretary's compliance with any provision of this act; or
  - (2) to any action not specified in subsection (1) of this section in which there is drawn into question any provision of this act, and if made a party, the Secretary shall provide to the court and to the other parties to the action any relevant information the Secretary may have regarding any issue raised under this act.

- (e) **Standing to sue.** In any action in which there exists a case or controversy under Article III of the Constitution, any person who suffers injury directly or indirectly so long as the injury is not completely conjectural, or who would benefit directly or indirectly so long as the benefit is not completely speculative, shall have standing to sue to determine whether any governmental body is eligible to receive federal financial assistance, whether the Secretary is complying with any provision of this act, or to determine whether any provision of this act is being violated.
- (f) **Judicial remedies.** Upon a determination that any provision of this act has been violated the court shall grant that remedy, so long as the remedy is within its statutory power under this act or its general equitable power, which will most effectively result in enforcing the provisions of this act.

## Section 8. Federal Government as Houser of Last Resort

- (a) **Houser of last resort.** To the extent of appropriations, the federal government, acting through the Secretary, shall be the houser of last resort, and shall make available housing for any person who does not live in a decent home in a suitable living environment, as determined by the Secretary.
- (b) **Studies and reports.** The Secretary shall make appropriate studies to determine, under criteria to be developed by the Secretary, the extent to which any person does not live in a decent home in a suitable living environment, and shall, at least annually, issue a report, on a state-by-state basis, to the President and the Congress, that contains the results and findings of such studies, which report shall contain an evaluation of the extent to which any person is not living in a decent home in a suitable environment by reason of
- (1) any exclusionary land-use practice;
  - (2) the unavailability of sufficient authorizations or appropriations by the Congress;
  - (3) any rescission, impoundment, or refusal to authorize the spending of funds appropriated by the Congress; and
  - (4) any inadequacy in any legislation passed by Congress which would further the ends of this act.
- (c) **Studies of and funding to meet housing assistance needs—**
- (1) The Secretary shall make appropriate studies to determine, under criteria to be developed by the Secretary, the housing assistance needs of any person specified in Section 3(b) in each metropolitan area or housing market area, as applicable.
  - (2) Based upon the studies required under subsection (1) of this section, but not later than eighteen (18) months after the effective date of this act, the Secretary shall notify every governmental body that engages in a land-use practice within the metropolitan area or housing market area, as applicable, to which the study relates of
    - (A) the housing assistance needs of any person specified in Section 3(b) of this act who resides within that metropolitan area or housing market area, as applicable, and the number of assisted housing units needed, and
    - (B) the number of assisted housing units available to any person specified in Section 3(b) which are needed in the political or geographic jurisdiction of the governmental body to which the notice is sent to bring the number of units occupied by such persons up to an amount which equals the proportion of such persons who reside in the metropolitan area or housing market area, as applicable, to which the study relates.

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- (3) Any governmental body notified under subsection (c)(2) of this section, if the number of units stated under subsection (c)(2)(B) of this section is more than two percent (2%) of the existing housing units within the political or geographic jurisdiction of that governmental body, shall be notified that it has ninety (90) days to prepare an inclusionary land-use plan, except that in the Secretary's discretion the period may be extended for an additional period not to exceed ninety (90) days.
- (4) Upon receipt and approval of an inclusionary land-use plan under subsection (c)(3) of this section, the Secretary shall, to the extent of funds authorized and appropriated for housing assistance under any federal housing program, make available, for the area within the political or geographic jurisdiction of the governmental body submitting the plan, funds for housing assistance sufficient to assist the number of housing units determined under subsection (c)(2)(B) of this section.
- (5) After an interval of at least twelve (12), but not more than eighteen (18) months, the Secretary shall ascertain whether the housing units for which funds were made available under subsection (c)(4) of this section are occupied or available for occupancy, or subject to construction contracts, and
- (A) if such housing units are not occupied or available for occupancy, but are subject to construction contracts, the Secretary may extend the period for making units available for occupancy for a period not to exceed six (6) months beyond eighteen (18) months from the date housing assistance funds were made available; or
- (B) if such housing units are not occupied, available for occupancy or subject to construction contracts, within twenty-four (24) months from the date housing assistance funds were made available the Secretary shall notify the governmental body for which funds for housing assistance were made available that the Secretary may take such action as is authorized under subsection (c)(6) of this section.
- (6) In the case of a governmental body which fails to submit an inclusionary land-use plan under subsection (c)(3) of this section, after notice under subsection (c)(2), or in the case of any governmental body notified under subsection (c)(5)(B) of this section, the Secretary may take such action as is necessary and appropriate to make the housing units available which were determined under subsection (c)(2) of this section.
- (7) In making units available under subsection (c)(6) of this section, the Secretary may consider any reasons justifying a failure to submit an inclusionary land-use plan or the delay on the part of the governmental body in making housing units available and if the circumstances, as determined by the Secretary, warrant, the Secretary may provide a further period to the governmental body to make the housing units available, but such additional period shall not extend beyond thirty (30) months from the date funds were first made available under subsection (c)(4); and in any event at the expiration of a period of thirty six (36) months, the Secretary shall take such action as is necessary and appropriate to make housing available under subsection (c)(6) of this section; and in so doing may disregard any land-use practice of any governmental body, provided that the Secretary's actions shall not be inconsistent with sound housing planning; and provided further that any governmental service shall be extended to housing made available by the Secretary on the exact terms and conditions that such service is made available by the governmental body to other residential users.

## Section 9. The Secretary Is Authorized To Issue Rules and Regulations

The Secretary is authorized to issue rules and regulations, not inconsistent with this act, which are reasonable and necessary to accomplish the purposes of this act.

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## Comment on

### ***East Bay Asian Local Development Corporation v. The State of California:* To What Extent May Religious Uses be Constitutionally Exempt from Historic Landmark Regulations?**

By Nancy E. Stroud

On December 1, 2000, the California Supreme Court upheld a California statute that grants religiously affiliated organizations the authority to declare themselves exempt from historic landmark preservation laws. *East Bay Asian Local Development v. The State of California*, 13 P. 3d 1122, 53 ZD 99 (Cal. 2000) was decided adversely to the municipal and nonprofit organizations that challenged the statute on

the grounds that it violated the state<sup>1</sup> and federal<sup>2</sup> Establishment clauses, which prohibit the making of laws "respecting an establishment of religion." The breadth of the statute's exemption and the potential impact on not only historic preservation but also on other land-use laws makes

1. Article I, Section 4 of the California Constitution provides "free exercise and enjoyment of religion without discrimination or preference are guaranteed. . . . The legislature shall make no law respecting an establishment of religion."

2. The First Amendment to the U.S. Constitution provides in part "Congress shall make no law respecting an establishment of religion. . . ."

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# Commentary

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this decision one of the more important First Amendment land-use cases in many years. The unsuccessful challengers (together “East Bay”)<sup>3</sup> have petitioned the United States Supreme Court for a writ of certiorari to review the California Supreme Court’s decision.

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PLEASE REFER TO THE CASE, *EAST BAY ASIAN LOCAL DEVELOPMENT V. THE STATE OF CALIFORNIA*, 13 P. 3D 1122, 53 ZD 99, ON PAGE 12 OF THIS ISSUE.

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## SELF-EXEMPTION FROM LOCAL LANDMARK REGULATION

The legislation at issue, Assembly Bill 133 (“AB 133”), creates an exemption from California historic landmark preservation law for “non-commercial property owned by any association or corporation that is religiously affiliated and not organized for private profit, whether the corporation is organized as a religious corporation, or as a public benefit corporation.” In order for the exemption to apply, the association must determine “in a public forum” that landmarking of its property would cause “a substantial hardship, which is likely to deprive the association . . . of economic return on its property, the reasonable use . . . (or) appropriate use of its property in furtherance of its religious mission.”<sup>4</sup>

East Bay challenged the law as granting constitutionally impermissible preferential treatment to religious organizations, by giving those organizations a substantial economic advantage over secular owners of historic landmark properties, to the detriment of the community’s ability to preserve its cultural and historic treasures. Moreover, East Bay argued, the law unconstitutionally delegated governmental power to private entities in that religiously affiliated organizations are authorized to determine, independent of a public legislative body, their own eligibility for exemption.

The California trial court found that the law violated the state and federal Establishment clauses, but the court of appeals reversed.<sup>5</sup> The appellate court concluded that the exemption does not endorse religion, but “only restores to religious organizations the power to affect their own interests” by offering those organizations an option to forego the

exemption if they so choose.<sup>6</sup> The appellate court rejected out of hand the delegation argument, on the basis that the law “merely exempts from landmark designation the non-commercial property of religious organizations to the extent such entities conclude they are adversely affected and choose not to be covered.”<sup>7</sup>

Upon review, the California Supreme Court, by a 4 to 3 majority, agreed that there was no constitutional violation and let the law stand. The court analyzed the law with a view as to whether it furthers any “sponsorship, financial support and active involvement” of the state in religious activity.<sup>8</sup> The court rejected East Bay’s argument that the law gives preference to religious organizations, concluding that the exemption itself has a secular purpose aimed at preserving government neutrality in religious matters. It also concluded that the effect of the law neither advances nor inhibits religion, but simply relieves religious institutions of burdens on their ability to disseminate their religious messages. It agreed with the state’s argument that the legislature had a rational basis for believing that landmark preservation laws could potentially burden the free exercise of religion. Against East Bay’s argument that a *potential* burden was not sufficient to sustain the legislation, but that the law must create an *actual* burden to specific property, the court deferred to the legislature, stating the legislative belief was reasonable, even though it was based only on anecdotal evidence. As an example of potential financial burdens, the court noted that religious organizations must preserve landmarked structures without having access to governmental disaster or other financial assistance.

The California Supreme Court found “not relevant” the argument that the landmark exemption provides economic advantages to religious groups at the expense of neighboring property owners. Explaining that the exemption does not force other property owners to be “vicarious donors” to the religion, the court stressed that the exemption “does no more than permit use of the property as it was before landmark designation.” Because no community is required to have a historical landmark ordinance, and those ordinances need not designate all eligible properties, the court reasoned that there is no measurable or identifiable cost to others that can be attributed to the exemption. Finally, the court found that the exemption did not excessively entangle government with religion by delegating governmental authority to religious entities, because the state simply leaves religious entities alone if the owner seeks an exemption. It concluded that exercise of the legislative power thus ends with the enactment of the enabling statute.

The three dissenting justices, in two opinions, vigorously disputed that the law did not provide economic benefits to religious, as opposed to secular organizations.<sup>9</sup> They asserted that there was insufficient evidence to support a finding that the landmark law created a burden, especially in regard to the

3. East Bay Asian Local Development Corporation is one of several nonprofit corporations that are plaintiffs in the state case. Others include the National Trust for Historic Preservation in the United States, California Chapter of the American Planning Association (APA), the Los Angeles Conservancy, and the City and County of San Francisco, among other California cities and preservation associations. National APA was granted status in the state court proceedings as *amicus curiae* on behalf of the plaintiffs. The APA also has petitioned the Supreme Court in support of plaintiffs’ petition for writ of certiorari. The author and her colleague Susan Trevarthen represented the APA in the *amicus curiae* briefings.

4. Cal. Gov’t Code §§ 37361 (c) and 25373(d), applying to California cities and counties, respectively.

5. East Bay Asian Local Development Corporation v. The State of California, 81 Cal. Rptr. 2d 908 (Cal. App. 3d Dist. 1999).

6. *Id.* at 918

7. *Id.* at 920.

8. East Bay Asian Local Development v The State of California, 13 P. 3d 1122, 1141 (Cal. 2000).

9. *Id.*, at 1141 (Mosk, J., dissenting); and *id.*, at 1144 (Werdegar, J., dissenting, joined by George, C.J.).

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# Commentary

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religious *practice* of individuals. Instead, the dissents concluded, the law impermissibly favors religious organizations with economic benefits not given to other organizations. Furthermore, the self-exemption provisions of the law through the organizations' "own, unreviewable, declaration of hardship"<sup>10</sup> is an abdication of a governmental function to private religious groups, maintained one dissent.

The California court's closely split decision reflects a more general confusion in the courts about how to treat legislative accommodations to religious practices. Just before the *East Bay* opinion was issued, the federal circuit court for Maryland in *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 382, 53 ZD 108 (4th Cir. 2000) upheld a Montgomery County ordinance exempting schools located on land owned or leased by religious organizations from special exception requirements otherwise imposed on owners seeking to build non-residential facilities in a residential zone. The court determined that by allowing the exemption the county "simply stepped out of the way of religion." The unsuccessful plaintiffs in *Renzi*, as in *East Bay*, have asked the Supreme Court to grant certiorari in order to provide more guidance regarding to what extent religious exemptions may be granted to land-use regulations.

## RAISING THE STAKES ON LOCAL REGULATION OF RELIGIOUS USES

Both *East Bay* and *Renzi* have raised the stakes for local government regulation of religious uses by upholding laws that arguably give special preference to religion. Additionally, the congressional enactment of the Religious Land Use And Institutionalized Persons Act of 2000<sup>11</sup> has brought the issue further to the forefront of land-use law. While not creating land-use exemptions per se, the act prohibits land-use regulation that causes a substantial burden on a person's religious exercise, unless the regulation furthers a compelling state interest in the least restrictive way. Local governments are just beginning to realize the impacts of this act as religious groups use it to support land-use applications for religious properties.

The Supreme Court in the past has authorized legislative bodies to exempt religious institutions or individuals from generally applicable statutes, but it has been on the basis that

the same exemption is conferred upon a larger group, including religious and non-religious organizations. For example, in *Waltz v. Tax Commission*, 397 U.S. 664 (1970), the Court let stand a tax exemption applicable not only to houses of worship but also to other nonprofit organizations, such as hospitals, libraries and playgrounds. The Court also has gone further in some cases to allow exemptions not widely available to other secular groups, but only if the exemption "alleviates significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) (upholding exemption from Title VII ban on religious discrimination in employment). However, as has been stated by Justice Antonin Scalia, at some point "accommodation slides over into promotion and neutrality into favoritism." *Texas Monthly, Inc., v. Bullock*, 489 U.S. 1, 40 (1989) (Scalia, J., dissenting) (tax exemptions for religious publishers are impermissible economic favoritism to religion). The question is whether an exemption goes too far and, instead of lifting an identifiable burden on the exercise of religion, conveys a message of endorsement of religion, which is prohibited by the Establishment Clause.

In *City of Boerne v. Flores*, 521 U.S. 507, 49 ZD 285 (1997), the Court struck down the federal Religious Freedom Restoration Act, under which plaintiff church challenged the city of San Antonio's denial of a building permit to enlarge a church within a historic district. The Court invalidated the act as an unauthorized exercise of federal power over the states. However, in regard to the city historic preservation ordinance, the Court stated "[I]t is a reality of the modern regulatory state that numerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs." *Id.* at 535.

The *East Bay* case gives the Supreme Court an opportunity to clarify the extent to which exemptions for religious organizations cross the constitutional line from a reasonable accommodation of religion to a violation of the Establishment Clause.

**Editor's Note:** The U.S. Supreme Court denied the petition for a writ of certiorari on April 30, 2001, letting the California Supreme Court decision stand.

10. *Id.*, at 1155 (Werdegar, J., dissenting, joined by George, C.J.).

11. Pub. L. No. 106 - 274, 114 Stat. 803 (to be codified at 42 U.S.C. §§ 2000 bb to 2000 bb-4).