Affordable Housing, Fair Housing and Community Development: Joined at the Hip, We Need to Learn to Walk Together

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I am very happy to celebrate the twenty-fifth anniversary of the Journal of Affordable Housing and Community Development Law.1 And I am grateful for the invitation to share my reflections on this great occasion. In this brief essay, I will share my particular reasons for celebration and I will call for the Journal to give a more concentrated and consistent focus to the myriad, complex relationships among affordable housing, fair housing, and community development in the future.

First, reasons for celebration. One reason to celebrate is obvious: the important contributions of the Journal to the field of affordable housing over the last twenty-five years. The Journal is the only professional law publication that is dedicated to affordable housing.2 And it has provided a critical service to the field, especially as the practice and particularly the financing of affordable housing has become so technical.3

A second basis for rejoicing is that the Journal has not lost its relevance. While the particular needs for affordable housing vary from state to state and jurisdiction to jurisdiction, I think attorneys, elected officials, policy makers, and informed citizens generally agree on the importance of the availability of decent, affordable housing. While we are far from reaching *196 national housing policy goal of “the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family” set by Congress in the American Housing Act of 19494 (and lawmakers have at times appeared to waver from it), I believe it is still a widely shared objective. The platforms of both major parties5 articulated specific housing policies. And Governor Tim Kaine, Secretary of State Hillary Clinton's pick for Vice Presidential running mate, even has a background in litigating fair housing cases.6 The importance of housing is not a matter of debate; the conflicts are all about the practical issues: what kinds of housing to produce, what populations to serve, how development should be financed, where housing should they be located, and who should decide each of these questions.

A third reason to celebrate is the farsightedness of Journal's founders. If they had not initiated and organized the publication decades ago, we would not have the reliable, go-to publication that exists today. And, despite the widespread current acknowledgment of the need for affordable housing, it may have been more difficult to start such a journal now when it is so needed.
Relatedly, the founders were prescient to name and frame the Journal’s subjects as not just affordable housing but affordable housing and community development. They realized that the two practice areas are intimately connected. And, by naming the Journal as they did, they created a space for discussion, debate, and creative problem-solving on the complex relationships between affordable housing and community development. 7

Now, on the Journal’s twenty-fifth anniversary, I call for the Journal to give a more concentrated and consistent focus on the myriad complex relationships among affordable housing, community development, and fair housing. In fact, if the twenty-fifth anniversary were an occasion for renaming the Journal, I would recommend renaming it the Journal of Affordable Housing, Fair Housing, and Community Development to call out this additional focus. Granted this title is an even bigger mouthful than the current one, but changing the Journal’s title would be an important and valuable way to acknowledge the importance of these relationships and to again create space to invite thoughtful reflection, debate, and problem-solving on the issues. This expansion would complete the range for full complexity.

There are numerous important and recurring tensions and conflicts among fair housing, affordable housing, and community development, especially regarding the development and siting of affordable housing, that are particularly complex and thorny. (I identify some of these issues later in this essay.) These problems cause inefficiencies, unnecessary litigation, distortions in the developments and programs created and, in some cases, deter or limit the volume of developments and programs that would otherwise be produced. To date, no publication has offered attorneys and other professionals working in these fields a practical guide to addressing these problems in the complete context of affordable housing and community development. 8 This new deliberate focus of the Journal would fill that void. As has been the Journal’s practice, it could provide a forum for education and advocacy around legal issues, policy recommendations, suggestions for resolution of difficult issues, and practical guidance.

To be clear, I am not suggesting that the Journal has ignored fair housing law or the relationships among affordable housing, community development, and fair housing. 9 Indeed, it has done some very good work on this area. By my rough count, about fifty of the approximately 655 articles that the Journal has published in its twenty-five years have focused on some aspect of fair housing. 10 While my categories are contestable, approximately twelve articles reviewed or analyzed fair housing law (current or proposed), ten articles explored the relationship between affordable housing development and fair housing (e.g., conflicts embedded in the HOPE VI program), ten dealt with some aspect of segregation or the duty to affirmatively further fair housing, seven considered overlaps between fair housing and community development, five focused on fair lending issues, five discussed disability-related issues, and two discussed funding for fair housing. Some of the problems covered by these articles are well recognized, e.g., the siting of Low Income Housing Tax Credit projects that allegedly perpetuate racial segregation that led to the Inclusive Communities Project case. 11 But there are other, relatively neglected but important, relationships and issues among fair housing, affordable housing, and community development that I will identify below.

My point is that the Journal has a unique opportunity to provide a forum for integrating fair housing issues into affordable housing and community development, which is an important and historic task. Attorneys and professionals who operate from an affordable housing development or community development framework can conflict with others operating primarily from a fair housing framework in terms of how to approach a problem as well as what facts are important and what processes are useful for resolving it. The
Journal could raise fair housing up as an additional focal point that is constantly in view, rather than as an (often inconvenient) add-on or afterthought. The Journal could begin to provide this additional important service by including fair housing in its title.

There are four reasons why the Journal is well placed to perform this role. First, it already has the right readership, in part, due to the recognized overlaps and its prior coverage of fair housing issues. There are publications that offer guidance for general fair housing compliance, but none like the Journal, which is dedicated to cover the entire spectrum of intersecting issues.

Second, it has already been a home for some of this discussion, attracting leading lights in the fair housing area, for example (in alphabetical order), Michael Allen, Willis Caruso, Charles Daye, Deborah Kenn, Elizabeth K. Julian, Henry Korman, Rigel Oliveri, Mary Patillo, Alexander Polikoff, John A. Powell, Richard Rothstein, Peter Salsich, Jr., Stacy Seicshnaydre, Philip Tegeler, and many more, to publish their articles in the Journal.

Third, the timing is right for adding this additional focus. The promulgation of HUD's Final Rules on Disparate Impact and on Affirmatively Furthering Fair Housing as well as the U.S. Supreme Court's (substantially hedged) affirmation of disparate impact claims under the federal Fair Housing Act in the Inclusive Communities Project (ICP) case have placed fair housing on a different footing in affordable housing development and community development. We are at a crossroads: either the affordable housing industry will take up the challenges posed by prior discrimination and the opportunities offered by these new tools, or it can continue a mostly business-as-usual approach with minimal attention to these challenges and opportunities. A well-established journal can take advantage of the current moment of fervor and interest in fair housing to promote the engagement alternative.

Fourth, because the issues are so difficult, they need an on-going professional space for discussion. Anyone who has been involved with these issues will attest that they are hard. The Journal offers the space where good-willed legal practitioners, policymakers, and academics whose jobs, professions, and personal commitments might place them in different positions--and even at times at odds with one another--can foster mutual understanding and greater collaboration. It could be the place where thoughtful and critical analysis and proposals can be articulated and responded to and successful strategies and solutions can be highlighted and shared. With some marketing, the additional focus could increase readership.

In the balance of this essay, I will identify some of the pressing issues that such an additional focus could cover.

The now widely known history of decades-long housing discrimination, exclusionary zoning, and residential segregation by governments, individuals, businesses, and the market has produced residential settlement patterns in many cities and metropolitan areas that make conflicts among affordable housing, community development, and fair housing not only likely, but inevitable. The ICP litigation and Justice Kennedy's opinion in that case exemplify the predicament facing states distributing Low Income Housing Tax Credit funds and developers using them: the Fair Housing Act seeks both to remedy the situation in which people of color are excluded from areas of opportunity (the integration mandate) and forbs the containment of people of color in areas subjected to persistent disinvestment (the anti-discrimination mandate). But in a world of limited funds and difficulties surrounding comprehensive community revitalization, well-intentioned funders, developers, and community advocates face a quandary. Moreover, any
new affordable housing initiatives, such as the Rental Assistance Demonstration program, the Choice Neighborhoods program, and mixed finance redevelopment of multifamily Section 8 housing through Section 8(bb), will be implemented in this complex context. These initiatives are fraught with fair housing issues because they focus on existing subsidized properties that were sited under intentionally segregative policies.

In addition, the current situation is one of regulatory uncertainty, unfinished policy-making, and confusion in governmental mandates, goals, and metrics. Plus, there is conceptual muddle, including: What do we mean by “residential integration?” These challenges are compounded in difficulty by limited information and uncertainty, limited resources, and the fact that we are serving populations with complex needs. We did not create the mess, but we need to “own” it together because it is our shared world for the foreseeable future.

In some cases, there may be apparent conflicts that turn out to not be actual conflicts or at least are relatively easily resolved. In other cases, there are clear and sometimes longstanding tensions that can turn into serious problems, but can be managed with appropriate understanding, foresight, and sensitivity. Some affordable housing developments combine housing and services that often have distinct funding sources with regulatory requirements that are in tension, if not conflict. Where laws include unclear mandates or policies identify competing goals, sometimes regulatory authorities (e.g., Department of Justice and HUD) can be engaged to craft useful guidance, e.g., Q&As, Deeming Notices, or other guidance. But, unfortunately, there are areas, such as the goal of making the built environment accessible to people with disabilities, that have become so complex and difficult to administer that it almost no one knows how to do it without risking legal liability.

Some of the brewing and already hot topics that need more attention are the implementation of the Fair Housing Act's Duty to Affirmatively Further Fair Housing, the specification of site and neighborhood standards, affirmatively fair housing marketing, architectural access, the possibility the HUD's Office of Fair Housing and Equal Opportunity (FHEO) might update the Section 504 rules, and FHEO's new guidance on the use of criminal history in housing decisions.

In conclusion, I express my sincere appreciation for the Journal and its important work over the last twenty-five years. I call on affordable housing, fair housing, and community development practitioners and advocates to work together more closely and consistently to address the complexities that face our work, including by writing more articles for the Journal. Finally, I call on the Journal's leadership to consider renaming the publication the Journal of Affordable Housing, Fair Housing and Community Development as a means to promote and encourage this important collaboration.

Footnotes

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1 Full disclosure: I owe a personal debt to the Journal for publishing my very first attempt at legal scholarship, Managing Local Opposition to Affordable Housing: A New Approach to NIMBY, 12 J. AFFORDABLE HOUSING & CMTY. DEV. L. 78 (2003).
For example, *Housing Policy Debate*, published by the Fannie Mae Foundation, provides an important service by providing “an outlet for cutting edge, original research that informs U.S. housing and community development policy.” See http://www.tandfonline.com/action/journalInformation?show=airnsScope&journalCode=rhpd20. However, its scope is much more limited than that of the *Journal*.


*See Elizabeth K. Julian, Fair Housing and Community Development: A Time to Come Together, 41 IND. L. REV. 555 (2007)* (initiating a conversation to promote collaboration between fair housing advocates and community development organizations). While this article was not published in the *Journal*, it certainly could have been.

Relatively, the Forum on Affordable Housing and Community Development Law, which sponsors the *Journal*, has also done good work in this area, including sponsoring a Fair Housing Committee that organizes at least one workshop for every annual Forum conference as well as brown bags. The Forum recently published a primer on fair housing law: *AMY GLASSMAN & NYDIA MANOUCHKA POUYES, BEGINNER'S GUIDE TO THE FAIR HOUSING ACT (ABA 2016).*

I coded all of the articles published in the *Journal* since 1991 by reading only the title to determine if they dealt primarily or substantively with fair housing and other issues.


*See, e.g.*, ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW & LITIGATION (2015); JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL (2015).
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