

# DISCUSSION DRAFT EFHA

[with EHI edits to September 2023--annotated]

11\_TH CONGRESS  
\_\_ SESSION

S. \_\_\_\_\_

To prohibit regulatory barriers to housing opportunity comprehensively, throughout the United States, due to their discriminatory effects, their adverse effects on housing availability and affordability, on development sprawl and resulting environmental degradation, on commerce among the several States, and for other purposes.

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IN THE SENATE

\_\_\_\_\_ introduced the following bill; which was referred to the Committee on \_\_\_\_\_

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## A BILL

To prohibit regulatory barriers to housing opportunity comprehensively, throughout the United States, due to their discriminatory effects, their adverse effects on housing availability and affordability, on development sprawl and resulting environmental damage, on commerce among the several States, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Economic Fair Housing Act of 202\_”.

**SEC. 2. REGULATORY BARRIERS TO HOUSING OPPORTUNITY.**

(a) IN GENERAL.—The Fair Housing Act (42 U.S.C. 3601 et seq.) is amended by inserting after section 806 the following:

**“SEC. 806A. REGULATORY BARRIERS TO HOUSING OPPORTUNITY.**

“(a) DEFINITIONS.—For the purposes of this section:

“(1) The term ‘close family member’ means, with respect to a person, by birth or adoption, a sibling, a parent, a child, or another direct living ancestor or living descendant, a sibling of a direct living ancestor or living descendant, or another relative who provides the person’s primary personal or economic support.

“(2) (A) The term ‘regulatory barrier to housing opportunity’ means a law, regulation, policy, practice, action, or failure to act, adopted or applied by a government official or agency, or by another person or persons acting under legal authority or color of law, that would have the effect or intent of—

“(i) restricting or substantially delaying, without sufficient justification, the production, preservation, or availability of a suitable housing opportunity; or

“(ii) causing or contributing to their jurisdiction’s failure to provide its fair share of its region’s housing needs.<sup>1</sup>

“(B) For purposes of this paragraph, a law, regulation, or practice, shall be deemed to have an effect or intent described in subparagraph (A) if there is an alternative law, regulation, or practice that would have

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<sup>1</sup> “[R]estrictive techniques of land-use control are both innumerable and interchangeable. If a particular device is invalidated it is often easy for the town to substitute a different device that has the same depressing effect.” RICHARD F. BABCOCK & FRED P. BOSSELMAN, *EXCLUSIONARY ZONING* 7 (1973) (noting potential for regulatory barriers in zoning provisions, building and housing codes, subdivision controls, fees and permit delays). *See also*, e.g., *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project (ICP)*, 576 U.S. 519, 539 (2015) (discussing zoning and non-zoning examples of discriminatory practices that violate federal Fair Housing Act—“Suits targeting such practices reside at the heartland of disparate-impact liability.” *Id.*)

less of a discriminatory effect and serve the legitimate needs of the jurisdiction involved. Regulatory barriers to housing opportunity include, without limitation, the following practices and actions, *where they have economically exclusionary effects without sufficient justification*:

“(i) Zoning regulations.

“(ii) Growth moratoriums, growth caps, and growth phasing schedules.<sup>2</sup>

“(iii) Building and housing code requirements.<sup>3</sup>

“(iv) Subdivision controls.<sup>4</sup>

“(v) Development-related fees, including fees for plan review, permits and inspections, capital facilities, and development impacts.<sup>5</sup>

“(vi) Exactions from developments including, without limitation, required dedication of land to the public, construction or

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<sup>2</sup> See, e.g., Noah Kazis, *Ending Exclusionary Zoning in New York City's Suburbs* 14-15 (2020) (there has been a moratorium on new housing construction in effect since 1976 in the “extremely attractive” suburban village of Bellerose, near Queens on Long Island; and the only housing permitted there is single-family detached housing.) See also, e.g., Edward L. Glaeser, et al., *Regulation and the Rise of Housing Prices in Greater Boston* 16 (2006) (“Cities and towns in the greater Boston area have adopted a number of other measures that restrain new construction, for example, growth caps that limit the number of new units that can be built during a given year, and phasing schedules that limit the number of units per year that can be built within a single subdivision.”)

<sup>3</sup> Building codes “often include provisions that add time and expense but do not improve the quality or safety of construction.” Richard M. Haughey, *Workforce Housing: Barriers, Solutions, and Model Programs* 9 (Urban Land Inst. 2002), posted at: [https://www.tbrpc.org/wp-content/uploads/ULI\\_Workforce\\_Housing.pdf](https://www.tbrpc.org/wp-content/uploads/ULI_Workforce_Housing.pdf). See also, e.g., Paul Emrath, Ph.D, *Government Regulation in the Price of a New Home* (NAHB, May 2016) (changes in codes/standards over past 10 years average 9.2% of homebuilder’s construction costs).

<sup>4</sup> “Local subdivision regulations . . . establish specifications for streets, sidewalks, water and sewer, drainage, curbs and gutters, street signs [and] landscaping.” NAHB Research Center, *Study of Subdivision Requirements as a Regulatory Barrier*, i (2007). “It has been clear for some time that the principal direct public controls over land use (including subdivision controls) are often employed to exclude large groups of people from access to good residential areas, on racial and/or on economic grounds.” Norman Williams, Jr. and Thomas Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 Syracuse L. Rev. 475 (1970-1971).

<sup>5</sup> The most prominent exclusionary practices include high development fees (“impact fees”), which may be imposed on new housing developments to pay some or all of the cost of new public infrastructure (schools, libraries, and other public facilities) in the jurisdiction. Those upfront fees discourage the production of housing affordable to low- and moderate-income people. B. Katz & M. Turner, *Rethinking Local Affordable Housing Strategies* 68 (Brookings 2003) (emphasis added), posted at:

[http://www.planningcommunications.com/housing/rethinking\\_local\\_affordable\\_housing\\_strategies\\_brookings.pdf](http://www.planningcommunications.com/housing/rethinking_local_affordable_housing_strategies_brookings.pdf).

maintenance of public infrastructure, or provision of public services.<sup>6</sup>

“(vii) Delays and other impediments to obtaining ministerial permits.<sup>7</sup>

“(viii) Housing-related restrictions by non-governmental officials authorized by law to restrict residents’ housing rights (including, without limitation, associations of homeowners and their officials).<sup>8</sup>

“(ix) Undue administrative burdens on affordable housing management.<sup>9</sup>

“(3) The term ‘exclusionary zoning’ means any land use control regulation that excludes, or is likely to exclude, a low- or moderate-income person from dwelling in the zoned area, without sufficient justification. Among the more common examples, without limitation, are the following:

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<sup>6</sup> “Exactions most commonly take the form of contributions of money or dedications of land. Exactions enable local governments to transfer the costs associated with new development to the developers and future residents of the projects. Exactions for streets, sidewalks, and utilities within a subdivision are common examples” J. Owley & S. Tulowiecki, *What Exactly Are Exactions?*, 33 *New York Environmental Lawyer* 31-32 (2013).

<sup>7</sup> The building permit process “tends to be lengthy and expensive, adding time and costs to the development process and thus making it harder for developers to produce affordable housing.” Haughey, *supra* n. 3. A “ministerial” act here means one that requires no special discretion, judgment, or skill, but merely involves the application of a specific law to undisputed facts. *See, e.g., Black’s Law Dictionary*, posted at <https://thelawdictionary.org/ministerial/>.

<sup>8</sup> Associations of homeowners can have detailed authority over land uses and even matters of aesthetics in their neighborhoods. In particular, single-family housing developments with such associations can, and sometimes do, ban structures on a lot other than one single family dwelling and perhaps a garage or carport for cars. Those restrictions generally “run with the land”—that is, they binding on both the original property owners and all subsequent owners—unless a law is enacted by the local, state or federal government that is inconsistent with the ban.

By 2020, an estimated 74+ million Americans lived under an association of homeowners (“community association”), and the number of such associations has increased tremendously in recent decades. For more information and sources, *see, e.g., EHI, The EFHA and non-governmental officials authorized by law to restrict housing rights* (April 2023), posted at <https://www.equitablehousing.org/images/PDFs/PDFs--2021-HOAs and other pvt controls-EHI memo-4-2023.pdf>.

<sup>9</sup> It has become increasingly difficult to manage affordable housing developments, due to the increasing number of funding sources needed to finance such developments. Each funding source has its own compliance and inspection requirements, so the result can be a great increase in the time and expense of managing affordable housing. Brian Rogal, *Affording Affordable Housing* (J. of Property Mgt., Nov. 1, 2006).

“(A) Regulations requiring unjustifiably large lot or building sizes, building setbacks, lot widths, or parking setbacks.

“(B) Regulations prohibiting, or placing unjustifiable restrictions on, accessory apartments or multifamily housing, including rental apartments and condominiums.

“(4) The term ‘government official’ includes an official of any governmental agency at any level of government, including Federal, State, and local governments.

“(5) The term ‘major workplace in the jurisdiction’ means any of the five largest places of employment in the jurisdiction, as well as any other places of employment there to which 50 or more workers commute.<sup>10</sup>

“(6) The term ‘primary support system’ means, with respect to a person, the primary source of needed, material assistance to the person.

“(7) The term ‘region’ means the metropolitan statistical area, if any, and the micropolitan statistical area, if any, within which the jurisdiction is located, based on official, United States Census Bureau standards.

“(8) The term ‘subregion’ means an area from which a worker normally can commute in 30 minutes or less by automobile or public transit, whichever takes less time, between the worker’s residence and one or more major workplaces, during the height of rush hour; a subregion may include an area beyond the jurisdiction of the

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<sup>10</sup> There is support for the “50 or more workers” definition of a “major workplace” in employment statistics. For example, in 2018 (a fairly normal, recent year economically), about 94.4% of business establishments in the United States had fewer than 50 employees, according to the U.S. Census Bureau. However, the 5.6% of workplaces that had 50 or more employees accounted for about 60% of the nation’s employees. U.S. Census Bureau, 2018 *County Business Patterns, Share of Number of All Employer Establishments and Employment by Establishment Employment Size: 2018* (“2018 Census Bureau Chart”), posted at: <https://www.census.gov/library/stories/2021/01/what-is-a-small-business.html#:~:text=It%20defines%20small%20business%20by,of%20%2416.5%20million%20or%20less.> For more sources and specifics, see, e.g., EHI, *Prohibiting regulatory barriers that interfere with the achievement of jobs-housing balance* (April 2023), posted at [https://www.equitablehousing.org/images/PDFs/PDFs--2021-/Subregional\\_JHB--EFHA--EHI-4-2023.pdf](https://www.equitablehousing.org/images/PDFs/PDFs--2021-/Subregional_JHB--EFHA--EHI-4-2023.pdf).

metropolitan and micropolitan statistical area (if any) where such major workplace is located.<sup>11</sup>

“(9) The term ‘regional housing needs’ means the amounts and types of housing that would be necessary in the region and each of its subregions, in order to house suitably all the people who work, live, have a close family member living, or have their primary support system in one of those subregions, or who likely would move to the subregion if it accommodated a fair share of the region’s housing needs.

“(10) The term ‘suitable housing’ means housing that is affordable to the person, that is of a type, price, size, condition, and location that are reasonably suited to the person’s circumstances, and that meets applicable standards of health and safety; but only regulatory barriers that would adversely affect housing opportunities for low- and moderate-income persons may be challenged through the provisions of this Act.<sup>12</sup>

“(11) The term ‘without sufficient justification,’ with respect to a zoning, housing, or land use restriction, means that:

(A) the restriction is not necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the person or entity that creates or applies the restriction; or

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<sup>11</sup> The standard of a commute of 30 minutes or less has been used by numerous planning groups, such as the Maricopa County, Arizona, Association of Governments, the Southern California Association of Governments (SCAG), and The Housing Partnership (King County, Washington). Such a standard would promote an improved housing supply reasonably close to major workplaces. That standard also would promote a marked reduction in fuel consumption, road building and maintenance in rural areas, and related environment degradation. *See, e.g.,* EHI, *Subregional jobs-housing balance and regulatory barriers* (April 2023), posted at <https://www.equitablehousing.org/images/PDFs/PDFs--2021-/Sub-regional-JHB--EFHA--EHI-4-2023.pdf>.

<sup>12</sup> The intent of this provision is to clarify that, although anyone—including a high-income person—may challenge a regulatory barrier to housing opportunity that adversely affects them, only those regulatory barriers that also adversely affect persons of low- and moderate-income challenged through the provisions of this Act.

As to the standards for suitable housing: “Ideally, the jobs available in a community should match the labor force skills, and housing should be available at prices, sizes, and locations suited to workers who wish to live in the area.” APA Report 516, p. 4. This provision promotes the goal of the 1949 Housing Act of “a decent home and suitable living environment for every American family.” Pub. L. 81-171, 63 Stat. 413, § 2 (1949)

(B) if a restriction is shown to be necessary to achieve such an interest, that interest could be served by another practice that has a less discriminatory effect.<sup>13</sup>

“(12) The term ‘works in the jurisdiction’ means that a person—

“(A) performs work in that jurisdiction, other than at that person’s own home, for which the person receives compensation at the monetary equivalent of the minimum wage or higher, for an average of at least 1,000 hours per year; or

“(B) is a student in good standing at an institution in the jurisdiction above the grade level of high school, where the person receives in-person instruction and carries at least half of a full academic course-load.

“(b) IN GENERAL.—It shall be unlawful for a government official or agency, or other person acting under legal authority or color of law, to create or apply any regulatory barrier to housing opportunity.

“(c) OPPORTUNITIES FOR SUITABLE HOUSING.—The opportunities that shall be provided free of regulatory barriers to housing opportunity include, among others:

“(1) opportunities for suitable housing, within the jurisdiction and subregion, that are as close as feasible—consistent with sound planning—to where a person protected by this section works, resides, has a close family member residing, or has the person’s primary support system in the jurisdiction; and

“(2) in the case of persons who are not employed in, do not reside in, do not have a close family member residing in, and do not have a primary support system in the jurisdiction, opportunities for suitable housing within the jurisdiction shall be sufficient to accommodate a fair

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<sup>13</sup> See U.S. Dep’t of Housing and Urban Development (HUD), *Disparate Impact Standard* (24 C.F.R. §100.500 (2013)). See also *Texas Dep’t of Hous. and Comm’ity Affairs v. Inclusive Communities Project, Inc.* (“*Inclusive Communities*”), 576 U.S. 519, 527 (2015). The Court did not criticize that rule but added its interpretation of the rule and of the burden of proof of a disparate impact violation of the Fair Housing Act. That rule was formally reaffirmed by HUD in March 2023, without change. 88 FR 19,500, Mar. 31, 2023.

During the Trump Administration, HUD proposed a revision to that rule, but it never took effect. See, e.g., *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 961 n. 6 (9<sup>th</sup> Cir. 2021).

share of the regional housing needs, and shall be located as close as feasible, consistent with sound planning, to the major workplaces in the jurisdiction.

“(d) NONDISCRIMINATION ON BASIS OF SOURCE OF PAYMENT.—No housing provider shall discriminate among prospective owners or renters based on their source of funds, payment, or income, from any lawful source.

(b) CONFORMING AMENDMENT.—Section 802(f) of the Fair Housing Act (42 U.S.C. 3602(f)) is amended by inserting after “806,” the following: “806A,”.

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