"Otherwise Unavailable": How Oregon Revised Statutes Section 197.309 Violates the Fair Housing Amendments Act

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Abstract

Inclusionary zoning (IZ) is a land use strategy designed to ensure an adequate affordable housing stock by requiring developers to dedicate a portion of approved residential developments to be sold at an "affordable" rate. Section 197.309 of the Oregon Revised Statutes prohibits jurisdictions within the state from using mandatory IZ to achieve affordable housing goals. Since § 197.309 became law, racial and ethnic minority households in Multnomah, Washington, and Clackamas Counties (Metro Region) have become more concentrated within low- and lower-income brackets. The Federal Fair Housing Amendments Act of 1988 (FHAA) makes it a violation to "otherwise make unavailable or deny" housing opportunities to racial and ethnic minorities. This article argues that because mandatory IZ would make a fair distribution of affordable housing avail-

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able to racial and ethnic minorities in the Metro Region, § 197.309 makes housing "otherwise . . . unavailable" to protected groups in violation of the FHAA and should be repealed.[1]

I. Introduction

Inclusionary zoning (IZ), or "set-aside" requirements, requires a portion of developments to be sold or rented at affordable rates,[2] thereby empowering local jurisdictions with the zoning authority to ensure that communities of color and low-income people are not excluded from certain neighborhoods. IZ can be voluntary, mandatory, or both. Voluntary IZ programs can offer incentives such as a density bonus or tax abatement, a legislative requirement, or a specific exaction in conjunction with a discretionary permit.

In addition to voluntary incentives, some states allow jurisdictions to mandate IZ and use it to implement their affordable and fair housing goals in land use planning. For example, a jurisdiction could implement a mandatory IZ ordinance that requires all developers of large-scale residential units to set aside 20 percent of the units in a development for low-income renters. In California, New Jersey, and Maryland, use of mandatory IZ has been somewhat effective in maintaining an acceptable level of affordable housing.[3] Mandatory IZ conditions the grant of a development permit upon a specified set-aside requirement but can also offset costs, reward greater affordability through bonuses, or both.

In 1999, the Oregon legislature enacted Oregon Revised Statutes § 197.309, which prohibits jurisdictions within the state from using mandatory IZ to achieve affordable housing goals. Section 197.309 provides:

> (1) Except as provided in subsection (2) of this section, a city, county or metropolitan service district may not adopt a land use regulation or functional plan provision, or impose as a condition for approving a permit under ORS 215.427 or 227.178, a requirement that has the effect of establishing the sales price for a housing unit or residential building lot or parcel, or that requires a housing unit or residential building lot or parcel to be designated for sale to any particular class or group of purchasers.
> (2) Nothing in this section is intended to limit the authority of a city, county or metropolitan service district to adopt or enforce a land use regulation, functional plan provision or condition or approval

1. Alternatively, in appropriate cases in which violation of the FHAA has occurred, IZ may form part of the judicial remedy for that violation, notwithstanding the statute.

2. Affordability calculations are based on regional income level distribution.

3. *See, e.g.*, Karen Destorel Brown, Expanding Affordable Housing Through Inclusionary Zoning: Lessons from the Washington Metropolitan Area (Oct. 2001), *available at* www.brookings.edu/research/reports/2001/10/metropolitanpolicy-brown (last visited Oct. 22, 2013).

> creating or implementing an incentive, contract commitment, density bonus or other voluntary regulation, provision or condition designed to increase the supply of moderate or lower cost housing units.[4]

Thus, the statute makes it unlawful for a local jurisdiction to require that a dwelling be designated for sale only to low-income residents. Controls on rent, another tool that could ensure affordable rental housing for low- and moderate-income tenants, are also prohibited in Oregon under § 91.255(2), except under circumstances of natural or man-made disaster or for state-run housing: "a city or county shall not enact any ordinance or resolution which controls the rent that may be charged for the rental of any dwelling unit."

As applied in Multnomah, Washington, and Clackamas Counties (Metro Region), § 197.309 conflicts with the Federal Fair Housing Amendments Act of 1988 (FHAA), which makes it unlawful to "otherwise make unavailable . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[5] Section 197.309 is within the class of land use actions contemplated by the language of the FHAA. Both the Department of Housing and Urban Development (HUD) and federal courts that have considered the question agree that a dwelling can be made otherwise unavailable by an action that limits the availability of affordable housing where potential residents would have been members of a protected class. Legislation that affects local governments' ability to regulate housing practices limits the availability of affordable housing; and because § 197.309 eliminates the availability of a strategy for ensuring an adequate supply of affordable housing, it conflicts with the FHAA.

The inclusionary land use strategies available to jurisdictions within the Portland Metro Region for effectuating the FHAA's purpose have failed to prevent a geographical and statistical lack of housing opportuni-

4. OR. REV. STAT. § 197.309. In May 2011, a hearing was held on House Bill 3531, which was introduced to overturn § 197.309; however, the bill failed to advance in the 2011 legislative session.

5. 42 U.S.C. § 3601. OR. REV. STAT. § 197.309 also conflicts with Oregon's antidiscrimination statute, OR. REV. STAT. § 659A.421–25, amended in 2009, which is substantially equivalent to the FHAA. The regulations interpreting the act provide for disparate impact liability. OR. ADMIN. R. 839-005-0206(3)(a)(A) ("For the purposes of interpreting what relief should be granted, a court or the commissioner will consider . . . [t]he significance of the adverse impact on the protected class."). Section 659A.421–25 is required by statute to be interpreted in a manner consistent with the Americans with Disabilities Act Amendments (ADAA) to the extent possible, and the FHAA and the ADAA are by case law interpreted using the same basic principles. Because the two Oregon statutes conflict, the Oregon antidiscrimination statute is not likely to be effective in litigation. Thus, showing that § 197.309 violates the FHAA is a crucial means of redressing unequal housing opportunities for protected classes in the Metro Region.

ties and income stratification in Oregon's communities of color. Given the link between race, ethnicity, and socioeconomic status in the Metro Region, mandatory IZ could provide a significant tool to address this stratification by making a fair distribution of affordable housing available to racial and ethnic minorities in the Metro Region. Thus, § 197.309 makes housing otherwise unavailable to protected groups in violation of the FHAA and should be repealed.[6]

The first section of this article discusses FHAA violations in general and with respect to § 197.309. The next section presents a prima facie challenge to § 197.309 under the "disparate impact" standard of liability of the FHAA as the statute applies in the Metro Region. This article then contends that § 197.309 violates the FHAA under the "perpetuation of segregation" standard of liability. Finally, after a consideration of some procedural issues, this article responds to potential objections to the arguments involving § 197.309 and the two standards of liability.

II. FHAA Violations

Evidence of effect, rather than motivation, has long been an element in establishing a violation of the FHAA. Specifically, evidence that the defendant has denied individuals housing on the basis of race or interfered with the right to equal housing opportunities effectively shifts the burden to the defendant to prove that there has not been an FHAA violation.[7]

Courts have relied on census data on race, ethnicity, and economic status to determine the relative distribution of protected classes affected by land use decisions.[8] Such actions can be FHAA violations if they have dis-

6. To clarify the thesis, it is worth noting what this article does not argue. First, it does not argue that § 197.309 violates the FHAA on its face. Because this article does not articulate a facial challenge, it follows that if local governments in the Metro Region were more successful with voluntary IZ programs, their success would weaken the as-applied argument herein. Second, because the statute's enactment is an action rather than a failure to act, this article does not argue that a state's mere failure to enable local governments to implement IZ would violate the FHAA.

7. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977). The procedural background in *Arlington Heights* included the Supreme Court's consideration of whether the zoning decision at issue could be construed as violating the equal protection clause. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977). The Court ruled that no federal constitutional violation occurred because under its then recent decision in *Washington v. Davis*, 426 U.S. 229, 240–42 (1976), no intent to discriminate was shown. The Supreme Court remanded to the Seventh Circuit to consider whether discriminatory effect violates the FHAA. *See also* United States v. City of Black Jack, Mo., 508 F.2d 1179, 1181 (8th Cir. 1974) (holding that a local ordinance that was shown to have a racially discriminatory effect and was not justified by a compelling governmental interest violated the FHAA).

8. *See, e.g.*, Mt. Holly Gardens Citizens in Action v. Twp. of Mount Holly, 658 F.3d 375 (3d Cir. 2011).

parate impact, i.e., "discriminatory effects" on a protected class such as race, color, or national origin, or if they perpetuate segregation.[9]

The 2010 census results for the Portland Metro Region show a link between race/ethnicity and economic class. Therefore, the exclusion of low- and moderate-income households from these jurisdictions will predictably have an impact on racial and ethnic minorities, which have protected status under the FHAA. Indeed, racial minority households are excluded from a number of neighborhoods and jurisdictions within the Metro Region. This exclusion is based upon two factors: the lower income of this class of households and the cost of housing within the neighborhood or jurisdiction. The result is ethnic and economic stratification in the Metro Region.

III. Disparate Impact on Protected Classes

Courts considering FHAA claims look for a "disparate" impact on protected classes, not an "exclusionary" impact. The former is a larger concept and includes a recognition that lower-income majority households are also denied housing, but in substantially lower amounts given their relative need. For example, if 20 percent of the lower-income households are Hispanic but 50 percent of this population cannot obtain affordable housing, this is substantially different from the 30 percent to 40 percent of lower-income majority households that cannot obtain affordable housing. A plaintiff can meet its initial burden in a disparate impact case by using a statistical analysis to establish that members of a protected class are disproportionately harmed by a challenged practice. In *Mt. Holly Gardens Citizens in Action v. Township of Mount Holly*,[10] the U.S. Department of Justice's Civil Rights Department (DOJ) took the position that this is a flexible standard, stating:

> Courts have accepted a variety of statistical showings as establishing a prima facie disparate impact case, including analyses based on a statistical connection between income and race. This can be shown where the plaintiff establishes that there is a shortage of housing accessible to a protected group, and that the shortage is causally linked to the challenged policy.[11]

In *Mt. Holly*, plaintiffs challenged a redevelopment plan under the FHAA and other antidiscrimination laws. Plaintiffs provided statistical evidence to show that a planned redevelopment affected a neighborhood

9. *See, e.g.*, Cmty. Servs., Inc. v. Wind Gap Mun. Auth., 421 F.3d 170, 176 (3d Cir. 2005). Discriminatory effects can come in the form of a disparate impact or the perpetuation of segregation. Graoch Assocs. No. 33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n, 508 F.3d 366, 378 (6th Cir. 2007).

10. *Mount Holly*, 658 F.3d 375.

11. Brief for the United States as *Amicus Curiae* in Support of Neither Party at 14, *Mt. Holly*, 658 F.3d 375, *available at* www.justice.gov/crt/about/hce/documents/mountholly_amicus.pdf (last visited Oct. 22, 2013).

that was low-income,[12] 46 percent African American, and 29 percent Hispanic. "Only 21% of African-American and Hispanic households in the county [could] afford [to live in] the new [development], compared to 79% of white households."[13] Here, evidence of an exclusionary impact was used to show a disparate impact under the FHAA.

The district court in *Mt. Holly* read the FHAA's disparate impact standard as requiring a housing or land use policy to exclude all or most members of a protected class and thus denied plaintiffs' claim for relief under the FHAA. On appeal, DOJ filed an amicus brief, stressing that "[t]he proper analysis requires a *disproportionate* adverse effect on a protected group, rather than an adverse effect on 'all or most' minority families."[14] The Third Circuit agreed, reversing the lower court. It held that *Mt. Holly* plaintiffs had successfully stated a disparate impact claim because the proposed redevelopment involved the removal of units that were housing primarily lower-income minorities. The proposed replacement housing meant that more white households than minority households would be able to live in the community, resulting in a net loss of housing to a protected class of people that had a greater need for that housing.

Rulings in the Second, Fifth, and Seventh Circuits have followed DOJ's flexible reading of the disparate impact standard, affirming that a statistical showing of a disproportionate adverse effect on a protected group can be sufficient to show liability under the FHAA.[15]

In *Huntington Branch NAACP v. Town of Huntington*, the Second Circuit found that plaintiffs stated a prima facie case where there was a shortage of low-income housing and 24 percent of African American families required such housing, compared with 7 percent of all Huntington families.[16] The *Huntington Branch* court rejected the lower court's reasoning that because a greater absolute number of whites were potentially affected by the shortage (22,160 whites had income below the poverty line, compared with 3,671 minorities), plaintiffs had failed to state a disparate impact claim under the FHAA.[17] Rather, plaintiffs' showing that the low-income housing shortage affected 24 percent of African Americans compared with 7 percent of all families in Huntington was enough to show a disparate impact on African American families even though the low-

12. *Mt. Holly*, 658 F.3d at 378 ("[A]lmost all of its residents earn less than 80% of the area's median income; with most earning much less.").

13. Brief for the United States as *Amicus Curiae* in Support of Neither Party (citing R. 106-2 at 8 (Beveridge, Summ. J., decl.); R. 114 at 12–13 n.9, app. 15–16 (Jan. 3, 2011, opinion)).

14. *Id.* at 12 (emphasis in original).

15. The Supreme Court has also expressed its approval of the use of statistics in establishing a prima facie case of disparate impact in a Title VII case, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–51 (1989).

16. 844 F.2d 926 (2d Cir. 1988).

17. *Id.* at 938.

income housing shortage though did not affect "all or most" African American families. Furthermore, a plaintiff may state a prima facie case "even if substantial numbers of minority families clearly are *not* affected by the challenged practice."[18]

In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, the village denied a rezoning that was necessary to allow plaintiffs to build new low-cost housing that would be affordable to racial minorities.[19] The Seventh Circuit held that if the challenged zoning ordinance had the ultimate effect of keeping members of protected classes out of the predominantly white town, the village was obligated under the FHAA to grant the application for a zoning change. At least one jurisdiction within Oregon has noted that zoning that excludes or deters multifamily housing may result in the concentration of protected classes in particular areas of a city.[20]

Finally, in the recent Fifth Circuit case *Inclusive Communities Project v. Texas Department of Housing & Community Affairs*, plaintiffs were awarded summary judgment on their disparate impact claim under the FHAA with respect to defendants' allocation of Low Income Housing Tax Credits.[21] In granting plaintiffs' motion, the court relied on evidence that "from 1999–2008, TDHCA approved tax credits for 49.7% of proposed non-elderly units in 0% to 9.9% Caucasian areas, but only approved 37.4% of proposed non-elderly units in 90% to 100% Caucasian areas."[22]

These cases illustrate a willingness to find an FHAA violation based on actual adverse impacts on minorities. Additionally, courts in the First and Ninth Circuits have also held that certain land use actions violate the FHAA based on projected adverse impacts on minorities. In *Keith v. Volpe*, the Ninth Circuit found that a city's land use decisions preventing the construction of housing developments had a disparate impact on minorities in violation of the FHAA because two-thirds of the potential residents of the two developments were minorities.[23] In *Langlois v. Abington Housing Authority*, the defendant housing authority's policy of preferentially awarding Section 8 housing vouchers to local residents violated the FHAA because it would likely result in a disparate impact that adversely affected minorities.[24]

18. *Id.* (citing Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 703 (9th Cir. 2009)).

19. 616 F.2d 1006 (7th Cir. 1980).

20. City of Portland, Gresham, and Multnomah County, Fair Housing Plan 2011: An Analysis of Impediments to Fair Housing Choice and the Strategies to Address Them (June 17, 2011), http://efiles.portlandoregon.gov/webdrawer.dll/webdrawer/rec/4283924/view/Full%20Report.PDF (last visited Oct. 22, 2013).

21. No. 3:08-CV-0546-D, 2013 WL 598390 (N.D. Tex. Feb. 15, 2013).

22. *Id.*

23. 858 F.2d 467, 484 (9th Cir. 1988).

24. 207 F.3d 43, 50 (1st Cir. 2000).

In all of these cases, courts considering disparate impact cases typically compare the percentage of all people predictably affected by the practice to the percentage of people in the protected class predictably affected by the practice and then measure the ratio of that difference.[25] Such a statistical analysis of how § 197.309 operates on low-income minority residents in the Portland Metro Region shows that the statute has a disparate impact under the FHAA in terms of both its actual and its projected adverse impacts on area minorities.[26] The proper statistical focus of a disparate impact analysis is the group that needs the housing that would otherwise be built if mandatory IZ were permitted. Although low-income people of all races in the Metro Region are affected by a shortage of affordable housing, statistics show that a greater proportion of minority households than white households are otherwise denied housing by the operation of § 197.309. Moreover, based on demographic data on economic class and race, it can be projected that the continued operation of § 197.309 will have an adverse effect on a greater proportion of minorities in the future.

A. Section 197.309: Actual Adverse Impacts on Area Minorities

According to a recent publication, "[i]n terms of household net worth, Latinos own twelve cents for every dollar owned by white households, and African American families own only ten cents."[27] Economic conditions across the United States only exacerbate these differences: a 2011 study shows that most of the country's minorities live in states that have suffered worst from the economic crisis.[28] Nationwide, African Americans and Latinos who took out liens on homes are more than 70 percent more likely than whites and Asians to have lost their homes.[29]

The disproportionate impact on minorities of the recent economic crisis, which caused the nationwide housing and foreclosure crisis, has exac-

25. *See, e.g.*, Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 938 (2d Cir. 1988); *see also* Charleston Hous. Auth. v. U.S. Dep't of Agric., 419 F.3d 729, 740–41 (8th Cir. 2005) (stating that "plaintiffs must demonstrate that the objected-to action results in, or can be predicted to result in, a disparate impact upon a protected class compared to a relevant population as a whole").

26. *See* Smith v. Town of Clarkton, 682 F.2d 1055, 1065 (4th Cir. 1982). In that case, the court considered plaintiff's "statistical picture" to determine whether the African American population was adversely affected by the termination of a housing project.

27. Karen K. Harris & Kathleen Rubenstein, *Eliminating the Racial Wealth Gap: The Asset Perspective*, Clearinghouse Rev. J. Poverty L. & Pol'y, July–Aug. 2011 (citing Corp. for Enterprise Dev., 2009–2010 Assets and Opportunity Scorecard (2009), Data Profile: United States.

28. Center for Soc. Inclusion, 2011 Recession Impact Index (2011).

29. Debbie Gruenstein Bocian et al., Center for Responsible Lending, Foreclosures by Race and Ethnicity: The Demographics of a Crisis 8 (2010), http://bit.ly/iOM6Bx (last visited Oct. 22, 2013).

erbated the racial wealth gap in the Portland Metro Region.[30] Consequently, there is a significant difference between whites and minorities in the Portland Metro Region with respect to homeownership rates. For example, minorities in Multnomah County have lower homeownership rates than whites and have lower median housing values by almost $50,000.[31] Furthermore, homeownership rates for minority and ethnic groups, particularly Latinos, are significantly lower in Washington County than for the population as a whole.[32]

In general, courts considering disparate impact challenges under the FHAA are receptive to information about housing needs.[33] In the Metro Region, potential beneficiaries of mandatory IZ are low- and/or moderate-income homebuyers and renters, a population for which the private market does not normally develop housing. Minorities in the Metro Region disproportionately compose this population.

Furthermore, the number of minorities whose housing costs exceed 50 percent in Oregon points to a very serious lack of affordable housing for this population. According to federal policy, a household should not pay over 30 percent of its income on housing costs; however, since the year 2000, rental rates in Oregon have increased by 35 percent;[34] in the Portland area, 23 percent of households put more than half of their income toward housing, up from 21 percent in 2008.[35] According to 2009 Census data, 40.6 percent of African Americans in Multnomah County spent over 50 percent of their income on rent in 2009, compared with 24.28 percent of whites. For homeowners, 22.02 percent of Hispanics and 28.19 percent of African Americans spent over 50 percent of their income on housing, com-

30. Even before the crisis, Oregon's racial minorities disproportionately lived in poverty compared with whites: in 2007, 28.5 percent of African Americans and 23.6 percent of Hispanics or Latinos lived in poverty, compared with 10.8 percent of white Oregonians. Oregon's minority population grew from 16.5 percent of the total in 2000 to 19.7 percent in 2007.

31. A. Curry-Stevens & A. Cross-Hemmer, Coalition of Communities of Color, Communities of Color in Multnomah County: An Unsettling Profile 67 (Portland State Univ. 2010).

32. *Id.* at 44.

33. *See* Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 929 (2d Cir. 1988) (noting the lower court's general finding that "the Town has a shortage of affordable rental housing for low and moderate-income households"); United States v. City of Black Jack, 508 F.2d 1179, 1179 (8th Cir. 1974) (considering the percentage of African Americans in the city who lived in substandard or overcrowded units).

34. Chris Thomas, *Report: Critical Need for Affordable Housing in OR*, Pub. News Serv. (Feb. 21, 2012), www.publicnewsservice.org/index.php?/content/article/24902-1.

35. Elliott Njus, *More Working-Class Oregonians Dig Deep to Pay for Housing*, Oregonian (updated Feb. 24, 2012), www.oregonlive.com/front-porch/index.ssf/2012/02/more_working-class_oregonians.html.

pared with 11.61 percent of whites.[36] In addition, according to a housing market analysis/assessment, African Americans and Hispanics in the Metro Region each had more housing problems than whites, where *housing problems* are defined as paying over 30 percent of income on housing, overcrowding, or lack of kitchen or plumbing facilities. In Washington County, for example, 62 percent of Latinos had housing problems, as did 34 percent of African Americans and 42 percent of Native Americans and Pacific Islanders. In the same area, only 29 percent of whites had housing problems.[37]

Clearly, a greater proportion of minorities than whites in the Metro Region would benefit from the lower-cost housing that mandatory IZ could provide. Thus, § 197.309 violates the FHAA by adversely affecting the availability of affordable rental housing for low-income and minority residents of the Metro Region.

B. Section 197.309: Projected Adverse Impacts on Area Minorities

Given that a disparate proportion of minorities in the Portland Metro Region is low-income, there is data to support a projection that § 197.309 will continue to adversely impact low-income minorities at a disproportionate rate.

According to a 2012 report of the National Low Income Housing Coalition, the amount of affordable and available rental housing units for low-income groups declined between 2009 and 2010. In 2010, for every 100 households in Oregon classified as "extremely low income" (ELI), only 22 rental units were both affordable and available. For the ELI group, there was a deficit of affordable units of 66,457 in 2009. In just one year, that deficit rose to 72,507 for affordable units within the ELI income category. ELI is defined as the group earning 0 percent to 30 percent of the median income in a metropolitan area.[38] For "very low-income" (VLI) people, forty-four rental units were available per every 100 households. For this group, the number of affordable units went from a surplus of 7,766 in 2009 to a deficit of 8,186 in 2010. The VLI population earns 31 percent to 50 percent of median family income in a metropolitan area. Oregon is one of a handful of states whose rates of affordable and available rental housing are worse than the national average.[39]

It could be argued that the population affected by § 197.309 is not certain because the needed affordable housing has not actually been built. It was under similar circumstances that the Second Circuit in *Huntington*

36. *Portland Housing Needs Assessment*, 2009 CENSUS 44 (2009).

37. HOUSING MARKET ANALYSIS AND NEEDS ASSESSMENT PREPARED FOR WASHINGTON COUNTY CONPLAN WORK GROUP 46 (July 2009), www.co.washington.or.us/CommunityDevelopment/Planning/loader.cfm?csModule=security/getfile& pageid=346918.

38. NAT'L LOW INCOME HOUS. COAL., 12:1 HOUSING SPOTLIGHT (Feb. 2012), *available at* http://nlihc.org/sites/default/files/HousingSpotlight2-1.pdf.

39. *Id*.

Branch had to predict the demographic composition of residents who would occupy the housing at issue.[40] The court did so by examining the racial composition of local households having incomes below 200 percent of the poverty line, which were eligible to live in the subsidized housing at issue in the case.[41] Similarly, the Fourth Circuit in *Smith v. Town of Clarkton* studied proportions of whites and African Americans who were living in poverty and eligible for low-income housing to predict the effect of terminating construction of a low-income housing project.[42] The Seventh Circuit has also examined the racial composition of households eligible for certain housing types to determine the effect of a decision not to rezone plaintiff's property.[43] In finding that defendant's refusal to allow plaintiff's proposed low-cost housing development would have a disparate effect based on economic differences between area African Americans and whites, the court reasoned that "[b]ecause a greater number of black people than white people in the Chicago metropolitan area satisfy the income requirements for federally subsidized housing, the Village's refusal to permit MHDC to construct the project had a greater impact on black people than on white people."[44]

These statistics show that a greater proportion of minorities than whites in the Portland Metro Region would benefit from strategic use of mandatory IZ in the future. Accordingly, by its operation in the Metro Region, § 197.309 violates the FHAA under the disparate impact standard based on actual and projected adverse impacts on minorities.

IV. Perpetuation of Segregation

A plaintiff can also make a prima facie case under the FHAA by showing that a defendant's action perpetuates segregation. To state a claim under the "perpetuation of segregation" prong, the plaintiff must show that the challenged practice tends to reinforce patterns of segregation by excluding minorities from predominantly white areas.[45]

For example, in *Dews v. Town of Sunnyvale*, the town's large-lot zoning ordinance was found to perpetuate segregation in violation of the FHAA by keeping minorities out of a town that was 94 percent white.[46] In *Dews*, the ordinance's effects of excluding multifamily housing from the town was sufficient to show an adverse impact on a protected class based

40. Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 928 (2d Cir. 1988).

41. *Id.* at 938.

42. 682 F.2d 1055, 1060–61 (4th Cir. 1982).

43. Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1286 (7th Cir. 1977).

44. *Id.* at 1288.

45. *See Huntington*, 844 F.2d at 929.

46. 109 F. Supp. 2d 526 (N.D. Tex. 2000).

upon regional economic and demographic data.[47] Similarly, in *United States v. City of Black Jack*, the city's ordinance prevented construction of low-income multifamily housing and thus "would contribute to the perpetuation of segregation in a community which was 99% white."[48] In *Inclusive Communities Projects, Inc. v. Texas Department of Housing & Community Affairs*, where the state was found to disproportionately grant housing tax credits to elderly housing and deny the credits to other forms of housing in predominantly white neighborhoods, the court held that the state's practice perpetuated racial segregation in the affected communities.[49] Finally, in *Huntington Branch*, the Town of Huntington was found to perpetuate segregation in violation of the FHAA through its zoning ordinance that relegated multifamily housing construction to minority neighborhoods.[50]

Between 1984 and 2007, before the economic downturn, the wealth gap between whites and minorities had quadrupled,[51] and this gap has been particularly evident in Oregon. According to the Brookings Institute's "segregation index," which indicates the degree of physical separation between racial groups based on Census data, African Americans in Oregon were segregated from whites by 51.3, and Latinos and Hispanics were segregated from whites by 38.1.[52] In 2000, Oregon's African Americans and Latinos were more segregated from whites than their counterparts were segregated from whites in over half of the United States—ranking thirty-first out of fifty for African American–white segregation and a dismal thirty-eighth out of fifty for Hispanic-white segregation. As of 2010, Portland had the highest rate of Hispanic-white segregation among metropolitan areas in Oregon, which remained virtually the same from 2000 to 2010 (34.2 versus 34.3).

47. *Id*. at 567.

48. 508 F.2d 1179, 1186 (8th Cir. 1974).

49. 749 F. Supp. 2d 486, 500 (N.D. Tex. 2010).

50. *Huntington*, 844 F.2d at 938.

51. Thomas M. Shapiro et al., The Racial Wealth Gap Increases Fourfold (May 2010). Part of the disparity can be attributed to racial disparities in credit scores, which impact access to housing loans and thus impact housing choice for minority homebuyers. *See* Geoff Smith & Sara Duda, Bridging the Gap: Credit Scores and Economic Opportunity in Illinois Communities of Color 2 (Sept. 2010). One result of systematically low credit scores is the gentrification of urban renewal areas and subsequent expulsion of minorities. IZ can be a tool to keep gentrifying neighborhoods open to their historically minority residents and open up historically white neighborhoods to minority residents via set-asides for low-income buyers in new developments. Indeed, Oregon's most populated city, Portland, has experienced a disturbing trend of gentrification resulting in the displacement of minorities, especially African Americans, from historically African American neighborhoods.

52. Based on 2000 Census data by the Brookings Institute (accessed Dec. 26, 2011). One way to think about the ratio is as a measurement of how many whites would have to physically move in order to achieve an equal population distribution by race in the state.

The 2010 Census revealed that thirty-eight census tracts within the City of Portland alone became less diverse in the last decade, with more whites moving in and many people of color, especially African Americans, moving out.[53] In north and northeast Portland, both homeowner and rental rates for African Americans declined by over 30 percent.[54]

This displacement has caused not only the loss of the benefits of public investment by minorities; it has also caused increased economic and racial segregation. This segregation manifested in a greater concentration of whites in Portland's center city, where transportation and amenities are also concentrated and quality of life is higher.[55] Consequently, the minorities forced out of the center city by high home and rent prices have disproportionately moved to the outer eastern edges of the city, which lack amenities like sidewalks and adequate transportation.[56] The result is not a mere "perpetuation" of existing segregation at a constant rate; rather, segregation in these Portland neighborhoods actually increased.

Inability to mandate IZ in private development is an essential part of the problem. North and northeast Portland neighborhoods serve as a good example of areas where the use of IZ would decrease segregation and concentration of low- and lower-income households in far east Portland, which has its own set of social and equitable impacts. If the local government overseeing the development of the neighborhoods identified by the 2010 Census had the option of mandating a set-aside for low-income residents, the minority residents of inner Portland neighborhoods could have remained in their traditional communities and would not have been forced to relocate to less expensive housing in less desirable neighborhoods.

In the Metro Region, there is a connection between the value of housing and the geographic distribution of minority households. As previously mentioned, minorities in Multnomah County have lower homeownership rates (45 percent) than whites (62 percent). Nationally, homeownership rates are 53 percent for people of color. Minorities also have lower median housing values by almost $50,000.[57] In comparison, within Clackamas County, the City of Lake Oswego, for example, has high homeownership and high-value housing with a low minority population.

Clearly, barriers to housing development that have impacted low-income people in the Metro Region generally have had disparate adverse

53. U.S. CENSUS 2010, www.census.gov/2010census/ (last visited Nov. 2, 2013).

54. Nikole Hannah-Jones, *In Portland's Heart, 2010 Census Shows Diversity Dwindling*, OREGONIAN (updated May 6, 2011), www.oregonlive.com/pacific-northwest-news/index.ssf/2011/04/in_portlands_heart_diversity_dwindles.html.

55. *Id*.

56. *Id*.

57. A. CURRY-STEVENS & A. CROSS-HEMMER, COAL. OF CMTYS. OF COLOR, COMMUNITIES OF COLOR IN MULTNOMAH COUNTY: AN UNSETTLING PROFILE 67 (Portland State Univ. 2010)

effects on minorities. Without IZ, the result is continuing segregation of low- and lower-income minority households in certain areas and a lack of such housing opportunities in other areas. In other words, we will continue to see a growing segregation of housing opportunities by race, class, and income without IZ. Strategic use of mandatory IZ could bring about a more equitable distribution of housing opportunities across the Portland region by requiring developers in predominantly white, higher-income neighborhoods to set aside housing for low-income people who are disproportionately African American and Hispanic. Conversely, the unavailability of mandatory IZ to state and local governments allows private market developers to continue to exacerbate the level of racial segregation in the state, which violates the second prong of HUD's liability standard under the FHAA.

V. Procedural Issues

A. Legal Supremacy: Magner v. Gallagher

In 2011, the U.S. Supreme Court granted certiorari in *Magner v. Gallagher* to decide whether a discriminatory effects standard was appropriate for cases arising under the Fair Housing Act. The case was originally brought by a group of landlords to contest enforcement of the local housing code, which, they argued, had the downstream effect of adversely impacting minorities disproportionately compared with nonminority renters. In the Eighth Circuit, the landlords successfully made a prima facie case of disparate impact under the FHAA.[58] Before the Supreme Court could hear oral arguments in the case, however, it was dismissed by agreement of both parties.[59] To date, the Court has not provided the federal circuit courts with any guidance on how to implement the disparate impact standard of liability under the FHAA. This is significant because the circuit court decisions are thus the highest legal authority on the application of the disparate impact standard.

B. Exhaustion of Remedies and Ripeness

Claims of failure to meet exhaustion or ripeness requirements should not be substantial barriers to a claim that § 197.309 violates the FHAA. As the New Jersey federal district in *Torres v. Franklin Township*[60] recently reiterated, facial claims of discriminatory effect under the FHAA are exempt from ripeness defenses. Thus, the claim could be filed in federal court assuming that exhaustion requirements are met—and courts considering FHAA challenges have waived exhaustion requirements. For example, in *Huntington Branch*, the Second Circuit held that plaintiffs "were not required to exhaust local remedies by filing a formal application for rezoning."[61]

58. Gallagher v. Magner, 619 F.3d 823 (8th Cir. 2010).
59. 132 S. Ct. 1306 (2012).
60. No. 09-6282, 2011 WL 6779596 (D.N.J. Dec. 22, 2011).
61. 689 F.2d 391, 393 n.3 (2d Cir. 1982).

A challenge to § 197.309 could also be raised in state court. For example, if a jurisdiction in the Metro Region passed an ordinance mandating IZ, that action would be challenged in front of Oregon's Land Use Board of Appeals (LUBA), which has very broad jurisdiction. All LUBA decisions are appealable to the Oregon Court of Appeals. Alternatively, an entitlement jurisdiction receiving federal funds in the form of Community Development Block Grants (CDBGs) could seek a declaratory judgment that § 197.309 prevents it from meeting its duty to affirmatively further fair housing, which attaches to all CDBG recipients under Executive Order No. 12,869.[62]

VI. Objections and Responses

A. Causation

The most significant objection to the argument that § 197.309 violates the FHAA is that such an argument does not sufficiently show a causal relationship between the alleged disparate effects and § 197.309. In disparate impact analysis articulated in *Wards Cove Packing Co. v. Antonio*[63] for liability under Title VII of the Civil Rights Act of 1964,[64] a disparate impact case must focus on the impact of particular practices; it is not enough to show that, within Oregon, there is a disparate pattern of housing opportunities provided to racial minorities.[65] Accordingly, it could be argued that the claim in this article fails to show a causal relationship between the adoption of § 197.309 and the inequitable distribution of housing opportunities in the Portland region.

Indeed, land use strategies besides IZ are available to local jurisdictions to encourage affordable housing development. The Metro Region's regional government, Metro, promotes several methods to create incentives for development that increase the stock of affordable housing, including density bonuses and expedited permit procedures, voluntary IZ, and incentives to communities that document progress toward their affordable housing goals via preservation or additions to the supply of income-restricted housing.[66] Although Metro already urges cities and counties within its jurisdiction to utilize these tools to achieve affordable housing production goals, as the data shows,[67] the strategies have not been effec-

62. *See* George D. Brown, *Federal Funds and Federal Courts: Community Development Litigation as a Testing Ground for the New Law of Standing*, 21 B.C. L. Rev. 525 (1980), *available at* http://lawdigitalcommons.bc.edu/bclr/vol21/iss3/1.

63. 490 U.S. 642 (1989).

64. 42 U.S.C. § 2000e.

65. *See also* Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971).

66. *See also* Tim Thompson, *Understanding Affordable Housing Planning Requirements: Metro Area Cities Are Required to Plan to Produce Their Fair Share of Needed Affordable Housing*, TCHousingPolicy.org (updated Mar. 2011), http://tchousingpolicy.org/understanding/index.php?strWebAction=article_detail& intArticleID=182.

67. *See id.*

tive in the Metro Region. Indeed, areas within Metro's jurisdiction are precisely where the evidence of segregation and disparate effects is strongest. Voluntary implementation is too difficult, and the local jurisdictions are not motivated to use such methods.

A case study from Clackamas County counteracts the causation objection by illustrating one way that the ban on mandatory IZ has caused a disproportionate adverse impact on Latinos within Metro's jurisdiction. Lake Oswego, a predominantly white suburb, "adopted a policy to limit . . . growth within its urban service boundary (USB) to 49,000 through the year 2000."[68] Although the growth-limiting policy was deemed unlawful and removed by a decision of the Land Conservation and Development Commission (LCDC), regulatory barriers remained in Lake Oswego and "have kept housing prices high with the effect of excluding a disproportionate number of [lower-income] minorities."[69] The three main regulatory barriers are (1) large-lot zoning, especially in relatively flat areas near major streets and I-5; (2) discretionary review standards that apply to most residential development in the city; and (3) costly design review standards that result in pretty buildings but expensive housing. The effect has been exclusion of a disproportionate number of lower-income minorities.

Moreover, the City of Lake Oswego "permits a maximum density of 5.5 dwelling units per net buildable acre within its USB."[70] Lake Oswego's maximum density violates the "Metro Rule," which specifically obligates Lake Oswego, as an urban area with a population projection of 50,000 or more, to have ten dwelling units per acre.[71] Lake Oswego's rules also lack

68. Letter from Ellen Johnson, Housing Land Advocates, to Rules Docket Clerk, Regulations Div., Office of Gen. Counsel, HUD (Jan. 17, 2012), http://housinglandadvocates.files.wordpress.com/2011/12/di-comments-2012.pdf. "The City's 1979 comprehensive plan projected a population of 54,000 by the year 2000; in 1984, the city's comprehensive plan projected that 50,000 people would be living within the USB by that date. In reality, there were an estimated 43,412 people living within Lake Oswego's USB in 2008." *Id.*

69. *Id.*

70. *Id.*

71. Or. Admin. R. 660-007-0035.

> Minimum Residential Density Allocation for New Construction
>
> The following standards shall apply to those jurisdictions which provide the opportunity for at least 50 percent of new residential units to be attached single family housing or multiple family housing: . . .
>
> (3) Multnomah County and the cities of Portland, Gresham, Beaverton, Hillsboro, Lake Oswego and Tigard must provide for an overall density of ten or more dwelling units per net buildable acre. These are larger urbanized jurisdictions with regionally coordinated population projections of 50,000 or more for their active planning areas, which encompass or are near major employment centers, and which are situated along regional transportation corridors.

clear and objective standards,[72] which, together with cost and delay, has exacerbated Lake Oswego's housing problem.

"Concerned about the regional effects of its neighbor's growth policy," the adjacent City of Tigard wrote

> to Lake Oswego in 1978, warning that the policy would effectively force Tigard to absorb more than its fair share of the region's growth. Oregon's statewide land use planning law, as interpreted by Oregon courts in the 1981 case *1000 Friends of Oregon v. Lake Oswego*, requires each metropolitan city to accept its regional fair share of housing and population growth.[73]

"Despite this warning and the requirements of Oregon law," Lake Oswego has not removed the regulatory barriers to fair housing for protected groups like Latinos.[74] As a result, in the last twenty years, Tigard's overall population grew at a faster rate than that of Lake Oswego. Lake Oswego's population in 2010 was below its stated, but unlawful, population cap of 49,000 that the city imposed in the 1970s.[75]

"Disaggregated by race, the differences between the cities [over the past twenty years] are dramatic."[76] In 2010, Tigard's Latino population growth, at 12.7 percent, exceeded that of Lake Oswego by a staggering 9 percent and was 3.3 percent higher than "the Latino population growth

72. The relevant rule and statute are OR. ADMIN. R. 660-008-0015 and OR. REV. STAT. § 197.307. OR. ADMIN. R. 660-008-0015, "Clear and Objective Approval Standards Required," specifies that local approval "standards, [special] conditions and procedures regulating the development of needed housing" must be clear and objective, and must "not have the effect, either in themselves or cumulatively, of discouraging needed housing through unreasonable cost or delay."

OR. REV. STAT. § 197.307 states thus:

> Effect of need for certain housing in urban growth areas; approval standards for certain residential development; placement standards for approval of manufactured dwellings . . .
>
> (3)(b) A local government shall attach only clear and objective approval standards or special conditions regulating, in whole or in part, appearance or aesthetics to an application for development of needed housing or to a permit, as defined in ORS 215.402 . . . or 227.160 . . . , for residential development. The standards or conditions may not be attached in a manner that will deny the application or reduce the proposed housing density provided the proposed density is otherwise allowed in the zone.

73. Letter from Ellen Johnson (citing 2 L.C.D.C. 138, 151 (1981).

74. *Id.*

75. Tigard's population rose from 30,360 in 1990 to 47,968 in 2010, an increase of 7,608 individuals. In contrast, Lake Oswego's population was 36,502 in 2010, up from 31,511 in 1990, an increase of 4,991 individuals. Tigard's rate of population growth thus exceeded Lake Oswego's by 2.1 percent between 1990 and 2000, and by 1.1 percent between 2000 and 2010.

76. Letter from Ellen Johnson, *supra* note 73.

in the nearby urban center of Portland."[77] It is clear there is a need for affordable housing within the Latino population, and Latinos are finding it in Tigard but not Lake Oswego. The result is a segregation of housing opportunities by race, class, and income between the two communities and the region as a whole.

The inability of local and regional governments to require set-asides for low-income residents in new developments and infill projects is a barrier to equal housing opportunities for racial minorities, and it perpetuates racial segregation. This leaves cities like Lake Oswego mostly white with higher-income households, while cities like Tigard absorb more than the regional average of protected classes because they lack or have chosen to adopt fewer regulatory barriers to affordable housing development.

This example demonstrates that there is a causal link between housing patterns and the inability to mandate IZ. If mandatory IZ were legal and appropriately implemented, the disparities documented above would not exist or would be minimized.

B. Chilled Development

Another significant objection to the argument that IZ violates the FHAA is that IZ actually reduces the stock of affordable housing within a jurisdiction by raising development costs and chilling development. The alleged chill on development decreases the overall housing stock, thereby driving up housing prices and further reducing the availability of affordable housing. Thus, the argument goes, mandating IZ actually decreases a jurisdiction's compliance with the FHAA.

This argument fundamentally misunderstands the goals of the FHAA, which are twofold: (1) increase integration within a community and (2) prevent or ameliorate the effects of segregation. The FHAA does not aim to increase the quantity of affordable housing but rather the fair quality of housing. Thus, under the FHAA, a jurisdiction with ten units of affordable housing for protected classes that are integrated into the community in a way that decreases segregation is better than a jurisdiction of the same size with 100 units of affordable housing that are segregated from the rest of the community.

Second, this argument exaggerates the imagined effects of mandatory IZ. In jurisdictions within states like California that have implemented mandatory IZ ordinances, there is no evidence that mandatory IZ has had a chilling effect on residential development. A look at California's

77. *Id.* Average household income continues to be higher in Lake Oswego than in the city of Tigard. In 2007, Tigard's average household income was $61,331; Lake Oswego's income was $76,883. In 1990, Tigard's income was $35,669, whereas Lake Oswego's income was $51,499. In the same time period (1990–2007), Tigard's home values rose from an average of $90,400 to $301,300. Lake Oswego's home values rose from $142,500 in 1990 to $507,800 in 2007.

housing market proves that developers continue to build there regardless of the state's widespread use of mandatory IZ.

C. "Substantial" Effects

Another objection involves a perceived lack of substantial effects. Although there is no single test for substantiality of disparate impacts, some FHAA decisions have borrowed the Equal Employment Opportunity Commission's four-fifths rule in the employment context.[78] However, most courts recognize that the particular facts of a given case ultimately control because rigid rules like the four-fifths formula are more reliable in some contexts than in others, especially where the statistical data is limited or the numbers are small. Recall that in *Huntington*, plaintiffs stated a prima facie case where there was a shortage of low-income housing affecting 24 percent of African American families in the region, and an impact on 24 percent of African American families was enough to show a disparate impact.[79] As DOJ argued, a plaintiff may state a prima facie case "even if substantial numbers of minority families clearly are *not* affected by the challenged practice."[80]

D. Exactions

An independent criticism of mandatory IZ is that it is an exaction and may raise constitutional issues. An exaction is a condition placed on a permit by a local jurisdiction.

In *Nollan v. California Coastal Commission*[81] and *Dolan v. City of Tigard*,[82] the Supreme Court considered the constitutionality of exactions in the form of a dedication of real property. Those cases yielded the current constitutional rule that there must be not only a nexus between an exaction and the regulatory goals of the permitting authority's ordinance but also "rough proportionality" between the exaction and benefit conferred on the developer by grant of a permit.

In *Nollan*, defendant allowed plaintiffs to rebuild their house on the condition that they grant a public easement across beach front property. To determine the constitutionality of this condition, the Supreme Court introduced the nexus test, which requires that permit conditions must serve

78. 29 C.F.R. § 1607(d); Langlois v. Abington Hous. Auth., 207 F.3d 43, 50 (1st Cir. 2000).

79. Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 929 (2d Cir. 1988).

80. Brief for the United States as *Amicus Curiae* in Support of Neither Party at 14, *Mt. Holly*, No. 11-1159, *available at* www.justice.gov/crt/about/hce/documents/mountholly_amicus.pdf (last visited Oct. 22, 2013) (citing Comm. Concerning Cmty. Improvement v. City of Modesto, 583 F.3d 690, 703 (9th Cir. 2009)) (emphasis in original).

81. 483 U.S. 825, 107 S. Ct. 3141 (1987).

82. 512 U.S. 374, 114 S. Ct. 2309 (1994).

the same governmental purpose as the development ban that required application for a permit in the first place. The Court found that the condition imposed by defendant "utterly fail[ed]" to further the regulatory end of allowing the public physical access to beach. Thus, the exaction in *Nollan* was a taking because no real nexus existed between the exaction and the development ordinance's purpose—that is, physical access to the beach for the public.[83]

Dolan expanded on the rule in *Nollan* by adding that the value of property exacted must be "roughly proportional" to the benefit conferred on the developer and that local jurisdictions must make some effort to quantify the value of the benefit versus the value of the exaction.[84] In *Dolan*, the City of Tigard required plaintiff developer to dedicate part of its land as a public greenway as a condition of the requested development permit. Led by Justice William Rehnquist, the Court held that the city's requested exaction was not roughly proportional to the value of the putative benefit conferred on the developer in exchange for the greenway.[85]

In a recent article, David Callies argued that mandatory IZ is a form of exaction and thus must satisfy the requirements set forth in *Nollan* and *Dolan*.[86] Assuming for the sake of argument that IZ is properly thought of as an exaction, this means that a municipality that wishes to mandate IZ from a developer must show that the proposed development "contributes to the housing problem the . . . exaction is intended to remedy."[87] In general, to avoid constitutional issues, IZ requirements must be "development driven," meaning that set-aside requirements are imposed "at some development permit or subdivision approval step" rather than as, for example, conditions for rezoning a tract of land.[88] Without contesting Callies's position, we can note his point without detracting from the argument that IZ is a valuable tool for local jurisdictions in ensuring an equitable distribution of affordable housing opportunities when it is properly imposed at the development, as opposed to rezoning, stage.

E. Legally Sufficient Justification

Because the aim of this section is to simply make a prima facie case that, as applied in Multnomah and Washington Counties, § 197.309 violates the FHAA, this article will not consider affirmative defenses. How-

83. *Nollan*, 483 U.S. at 837.

84. 512 U.S. at 398.

85. *Id.* at 385.

86. David Callies, *Mandatory Set-Asides as Land Development Conditons*, 42/43 URB. LAW. 307 (Fall 2010 / Winter 2011).

87. *Id.* Thus the "local government must demonstrate that the development generates a need for such housing, generally of the work-force variety, and that the amount to be set aside is proportionate to that need." *Id.*

88. *Id.*

ever, it is worth noting that HUD's proposed rule on implementing the disparate impact standard under the FHAA recommends a burden-shifting approach: once the plaintiff meets its initial burden of a making a prima facie case of disparate impact, the defendant must justify its actions by presenting a "legally sufficient justification" of a necessary and manifest relationship between the challenged action and the defendant's legitimate nondiscriminatory interest.[89] The defendant's justification cannot be "hypothetical or speculative."[90] If the defendant meets this burden, it shields itself from liability unless the plaintiff can show that a less discriminatory alternative exists. Using HUD's recommended method of analysis, the defendant can satisfy its burden of presenting a legally sufficient justification even if the plaintiff has established liability under the FHAA.

It is unlikely, however, that there is a legally sufficient justification for § 197.309 that could meet this test. In *United States v. City of Black Jack*, the city attempted to justify an ordinance limiting the construction of multifamily housing based on concerns for property values or devaluation of homes; the ordinance was shown to have racially discriminatory effects.[91] The Eighth Circuit found this justification inadequate because there was no factual basis for the assertion that any such interest was furthered by the ordinance. The court also rejected the local government's claim to a compelling interest in road and traffic control and prevention of overcrowding of schools.[92] Furthermore, when a plaintiff seeks to require a governmental defendant to eliminate an obstacle to housing like the IZ ban, the standard for justifying an adverse action is higher.[93]

VII. Conclusion

Under the Fair Housing Act, "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice . . . shall . . . be invalid."[94] Accordingly, a permanent injunction should be issued against the enforcement of § 197.309.

An injunction against enforcement of § 197.309 would not merely protect against discriminatory housing; it would remove regulatory barriers to meeting the affirmative duty to further fair housing. In *Otero v. New York City Housing Authority*, the Second Circuit recognized that the requirements of the Fair Housing Act go beyond a mere proscription against

89. 24 C.F.R. § 100.500(b).

90. *Id*.

91. 508 F.2d 1179, 1187–88 (8th Cir. 1974).

92. *Id.* at 1187.

93. Huntington Branch NAACP v. Town of Huntington, 844 F.2d 926, 936 (2d Cir. 1988).

94. Fair Housing Act, 42 U.S.C. § 3615 (pertaining to § 3603(a)).

discrimination, imposing an affirmative duty to integrate housing.[95] Thus, "[a]ction must be taken to fulfill, as much as possible, the goal of open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat."[96] Furthermore, under Executive Order No. 12892, recipients of federal funding for "all programs and activities related to fair housing and development" have a duty to affirmatively further fair housing.[97] Jurisdictions are required to meet this affirmative duty by taking certain steps to identify and rectify barriers to fair housing choice. By prohibiting mandatory IZ, § 197.309 bars jurisdictions from taking one appropriate step to rectify such barriers and thus prevents jurisdictions from fulfilling their duty to affirmatively further fair housing in both the private and publicly assisted housing markets.

Finally, enjoining enforcement of § 197.309 would enable more effective compliance with Oregon's Statewide Planning Goals. Statewide Planning Goal 10 requires that cities and counties provide "needed housing units," which are "housing types determined to meet the need shown for housing within an urban growth boundary at particular price ranges and rent levels."[98] This includes, for cities with a population over 2,500 and counties with a population over 15,000, "attached and detached single-family housing, multiple-family housing, and manufactured homes."[99] Despite this mandate, § 197.309 not only prohibits mandatory IZ but also effectively encourages private developers to choose not to take advantage of voluntary incentives[100] provided by jurisdictions to spur development of affordable housing. Empirical data presented in this article highlights the fact that the private market does not operate to "meet all the housing needs of Oregonians" as required by Statewide Housing Goal 10.[101] Fur-

95. 484 F.2d 1122 (2d Cir. 1973).

96. *Id.* at 1134.

97. Exec. Order No. 12892, Leadership and Coordination of Fair Housing in Federal Programs: Affirmatively Furthering Fair Housing (Jan. 17, 1994):

> . . . [A]ll 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 the [Fair Housing Act]. . . . [T]he phrase "programs and activities" shall include programs and activities operated, administered, or undertaken by the Federal Government; grants; loans; contracts; insurance; guarantees; and Federal supervision or exercise of regulatory responsibility (including regulatory or supervisory authority over financial institutions).

98. Or. Admin. Reg. 660-015-0000(10).

99. ***Id.***

100. Examples of such voluntary incentives include expedited permitting and density bonuses.

101. Or. Admin. Reg. 660-015-0000(10).

thermore, the operation of the private market displaces low- and moderate-income minorities from traditional communities of color via the process of gentrification, which has recently been well documented[102] in northeast Portland. Thus, § 197.309 conflicts with effective implementation of Oregon's expectations and standards.

102. *See* Melissa Navas, *North Williams Traffic Safety Plan Gives Neighbors a Chance to Delve into Deeper Issues of Race, Gentrification*, OREGONIAN, Aug. 11, 2011, www.oregonlive.com/portland/index.ssf/2011/08/north_williams_traffic_safety.html.