

# The Law of Fair and Affordable Housing

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# Sources of Fair and Affordable Housing Law

- Federal law provides limitations on governmental authority, civil rights law, and funding mechanisms
- State law enables and limits local authority and provides additional protections for home seekers
- Local law restricts particular types of development while demanding other forms of development

# Sources of Fair and Affordable Housing Law

- Federal
  - Constitutional limitations
    - Takings Clause, Equal Protection Clause, Due Process Clause
  - Civil rights laws
    - Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.*
    - Fair Housing Amendments Act, 42 U.S.C. § 3601 *et seq.*
    - Rehabilitation Act, 29 U.S.C. § 701
    - Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*
  - Funding sources
    - Housing and Community Development Act of 1974 (CDBG): 42 U.S.C. § 5301 *et seq.*
    - Cranston-Gonzalez National Affordable Housing Act of 1990 (HOME Investment Partnership Program): 42 U.S.C. § 12703 *et seq.*

# Sources of Fair and Affordable Housing Law

- State
  - Constitutional limitations: mirror federal
  - Civil rights laws: mirror federal
  - Limitations on local government authority
    - “Group home” statutes, C.R.S. § 30-28-115; 31-23-303
    - Rent control statute, C.R.S. § 38-12-301
    - Housing Authority Law, C.R.S. § 29-4-201 *et seq.*
  - Consumer/landowner protection laws
    - Construction Defect Action Reform Act of 2001
    - Colorado Common Interest Ownership Act, C.R.S. § 38-33.3-101 *et seq.*
  - Funding programs
    - Colorado Affordable Housing Construction Grants Fund

# Sources of Fair and Affordable Housing Law

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- Local
  - Zoning codes
  - Building, housing codes
  - Mandatory inclusionary housing
  - Affordable housing funds
  - Public housing authorities

# Barriers to Fair and Affordable Housing: Legal

- Local government
  - Zoning regulations
    - Minimum lot, house sizes
    - Restrictions on multi-family development, density
    - Design, site development restrictions (parking, landscaping, open space, etc.)
    - Conditions of approval: improvements obligations, dedication requirements, etc.
    - Procedural requirements (cost, time, etc.)
    - Standing/empowerment of NIMBY
  - Building regulations
    - Minimum house/unit sizes
    - Safety code requirements
    - LEED requirements, other environmental regulations
- Private legal barriers: covenants, etc.

# Barriers to Fair and Affordable Housing: Practical

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- Land availability
- Land cost
- Market demand
- Environmental conditions
- Construction costs
- Financing
- Accessibility to commerce, employment centers
- NIMBYism

# Federal Fair Housing Act

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- Seven protected classes
  - Race, national origin, ethnicity, religion, sex, familial status, disability
- Private and public compliance required
- Prohibition on discrimination, affirmative requirements for accommodation
- Broad application to dwelling units



# Federal Constitutional Limitations: Unconstitutional Conditions

*Dolan v. City of Tigard*, 512 U.S. 374 (1994)

- In addition to having an “essential nexus” between the condition and the impact to be mitigated, conditions on development approval must be “roughly proportional” to impact

*Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013)

- *Nolan* and *Dolan* “heightened scrutiny” essential nexus and rough proportionality analysis apply to exactions involving money and/or services
- **Policy consequence:** question mark as to whether mandatory inclusionary set-asides are constitutional

*See Calif. Bldg. Indust. Ass’n v. City of San Jose*, 351 P.3d 974 (Cal. 2015)

- Found that mandatory inclusionary rule does not violate *Nollan/Dolan*; Supreme Court denied cert

# Statutory Prohibitions on Rent Control

*Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000)

- State statutory prohibition on rent control (C.R.S. § 38-12-301) prohibits mandatory affordable housing set-asides for rental properties
- **Policy consequence:** Colorado jurisdictions cannot require developers to deed-restrict affordable rental units
  - Virtually zero rental affordable activity since 2000
  - Statute amended in 2010 to provide limitations
- Subsequent amendment enabled voluntary agreements between property owners and local governments to limit rent

# Construction Defect Litigation

## Construction Defect Action Reform Act, C.R.S. § 13-20-801 *et seq.* (2001)

- Notice of Claim process: notice, physical inspection, offer of settlement
  - Stay any case until the NOC process is completed
  - Failure by construction professional to make offer disqualifies construction professional from liability protections
  - Limitation to actual damages if construction professional complies with CDARA
- Colorado Consumer Protection Act provides potential for treble damages
- **Policy consequence for affordable housing:** attempted to curb frivolous lawsuits, but NOC process has provided shakedown opportunities

# HUD Funding: *Westchester County*

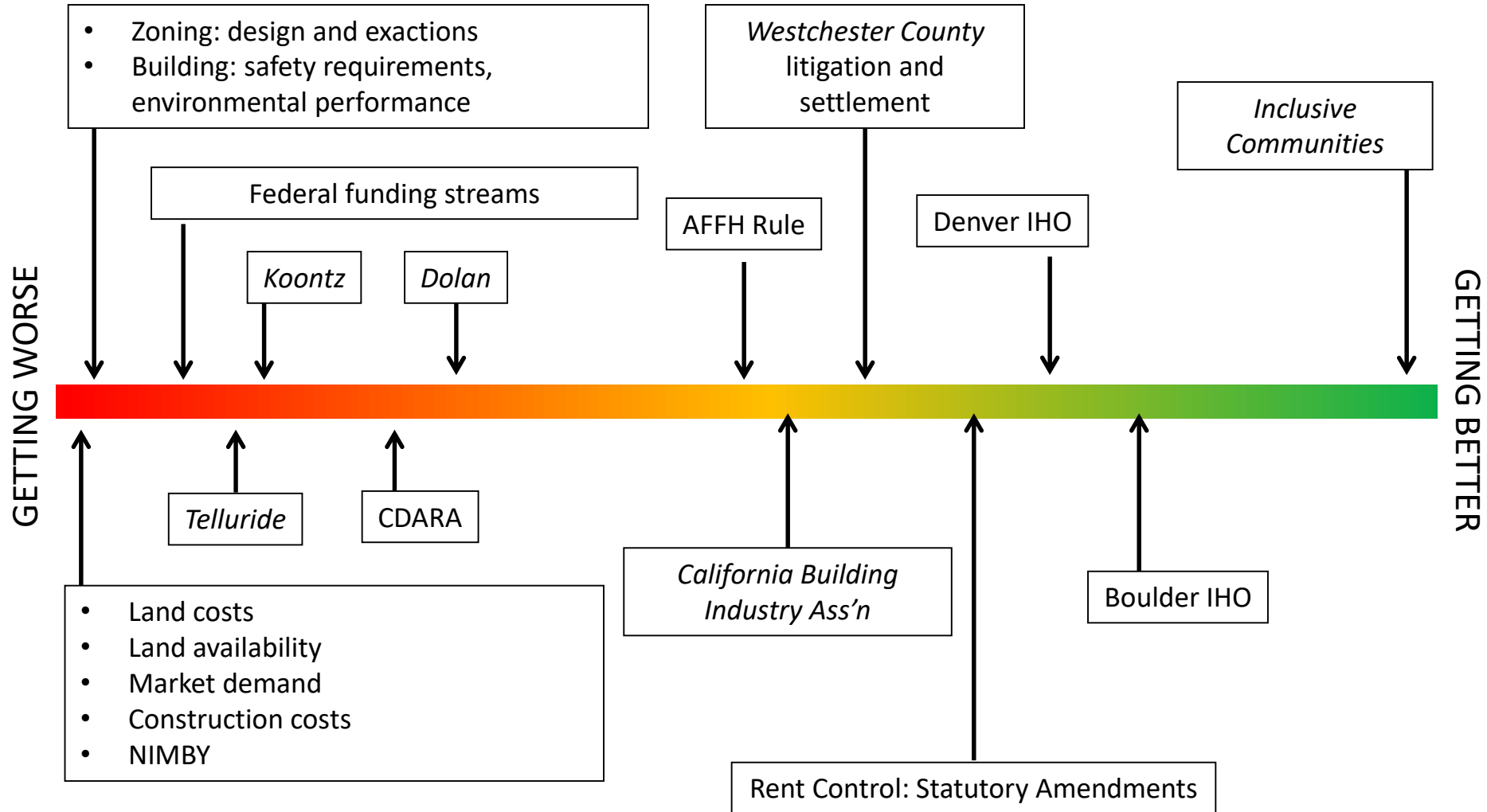
*United States ex rel. Anti-Discrimination Ctr. of Metro New York v. Westchester Cty.*, 668 F. Supp. 2d 548 (S.D.N.Y. 2009)

- Summary judgment entered against County in False Claims Act suit relating to County's certification that it would use HUD funds to affirmatively further fair housing
  - \$62M settlement: County must build 750 units in non-minority areas, affirmative marketing obligations, etc.
- **Policy consequence for affordable housing**
  - Potential new vehicle for civil rights plaintiffs to challenge local governments' use of federal housing funds
  - Increased federal policing of HUD grants

# AFFH Rule

- Codified the result of *Westchester Cty.* litigation and settlement: recipients of HUD funds must take steps to affirmatively further fair housing
  - New Assessment of Fair Housing process, tools
  - Closer focus on regulatory approach, i.e., zoning
- **Policy consequence:** vehicle for FHA enforcement against HUD grantees, but will local governments opt out?
  - Total CDBG disbursements dropped from \$4.7B in FY2001 to \$3.3B in FY2014
  - Total HOME projects authorized dropped from \$1.094B in 1994 to \$893M in FY2014
- **Uncertain future in the post-Obama era**

# Where are we now?





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