



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

- **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

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

Federal Fair Housing Act

- **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 *Nolan/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*

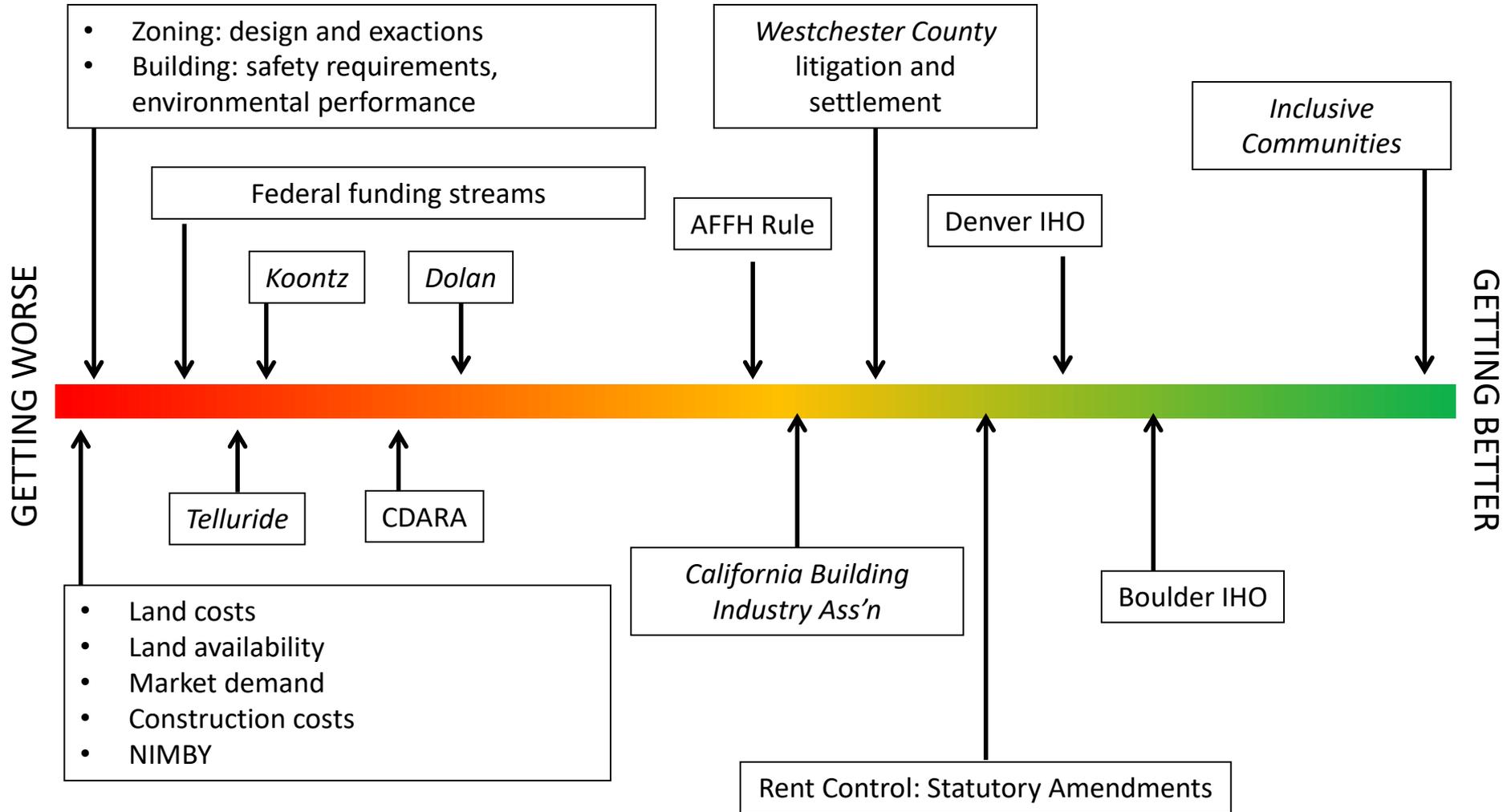
United States ex rel. Anti-Discrimination Ctr. of Metro New York v. Westchester Cty., 668 F. Supp. 2d 548 (S.D.N.Y. 2009)

- 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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