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## MEMORANDUM

**TO:** Katherine Hess, Community Development Administrator  
**CC:** Harriet Steiner, City Attorney  
**FROM:** Matthew Keasling  
**DATE:** January 17, 2018  
**RE:** Analyzing the Legality of the Proposed Davis Based Buyers Program

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The West Davis Active Adult Community (WDAAC or Project) applicant is proposing to implement a local buyers program for the sale of approximately 350 single-family residential units located within the Project. The objective of the program is to ensure that the Project meets the intent of Measure R, which requires the electorate to balance the preservation of agricultural land and/or open space with a civic obligation to provide “an adequate housing supply to meet *internal city needs*”. (Davis Municipal Code section 41.01.010(a), emphasis added.) The WDAAC proponents are ensuring that the housing constructed in the WDAAC Project meets the “internal city need” by implementing the Davis Based Buyers Program. This program promotes the sale of homes to current Davis residents, their families, UCD alumni, those with children in Davis schools, and those working in Davis. Implementation of this program will allow the Project to meet the purpose of Measure R and achieve numerous City policy goals and objectives. Though carefully designed to fulfill the explicit intent of Measure R, the question has arisen as to whether the proposed local buyers program is consistent with fair housing laws. As this memorandum discusses, if done correctly, the answer is “yes.”

Local priority programs are utilized in the context of housing throughout the nation. In fact, the City of Davis already utilizes a local workforce priority program in its distribution of new affordable housing. (Davis Municipal Code section 18.07.) As that municipal code section correctly states, to comply with the Fair Housing Act (FHA), a local preference program may not have the purpose or effect of delaying or otherwise denying housing opportunities to a protected class. (Davis Municipal Code section 18.07.010(f).)<sup>1</sup> The test is two-fold: first, one must ask if the program imposes

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<sup>1</sup> Protected classes are identified under federal and state law as follows: 42 U.S.C. § 3604 (prohibiting discrimination on the basis of race, color, religion, sex, familial status, or national origin, or disability);

disparate treatment or has a discriminatory intent, i.e., is its objective to discriminate against any of the identified protected classes.<sup>2</sup> A discriminatory intent may be inferred from the totality of the circumstances.<sup>3</sup> Assuming that the program is not intentionally discriminatory but was genuinely designed to fulfill a legitimate policy objective of the City, then the second question is whether the program nonetheless has a disparate impact or discriminatory effect.<sup>4</sup> If no discriminatory intent or effect exists, then the program does not violate the fair housing laws and should be allowed to proceed.<sup>5</sup>

In the recent legal discussion surrounding programs that prioritize local populations in the rental or sale of housing, the focus is predominantly on whether the program being implemented has some disparate impact on a protected class.<sup>6</sup> No single test exists for determining disparate impact with respect to local preference programs.<sup>7</sup> This may be, in part, due to the unique nature of each local program, the

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CAL. GOV'T CODE § 12955 (prohibiting discrimination on the basis of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, disability, or genetic information).

<sup>2</sup> *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995) (“a plaintiff can establish a prima facie case by showing that animus against the protected group “was a significant factor in the position taken” by the municipal decision-makers”).

<sup>3</sup> *Id.*

<sup>4</sup> Though the Federal Courts of Appeal unanimously help disparate impact liability applied to the FHA, the U.S. Supreme Court only recognized disparate impact liability under the FHA as recently as 2015 in *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S.Ct. 2507, 2513 (“In contrast to a disparate-treatment case, where a “plaintiff must establish that the defendant had a discriminatory intent or motive,” a plaintiff bringing a disparate-impact claim challenges practices that have a “disproportionately adverse effect on minorities” and are otherwise unjustified by a legitimate rationale.”). *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir.) (“A disparate impact analysis examines a facially-neutral policy or practice, such as a hiring test or zoning law, for its differential impact or effect on a particular group.”). A prima facie case of disparate impact “is established by showing that the challenged practice of the defendant actually or predictably results in racial discrimination; in other words that it has a discriminatory effect.” *Id.* at 934.

<sup>5</sup> *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S.Ct. 2507, 2522 (“Disparate-impact liability mandates the “removal of artificial, arbitrary, and unnecessary barriers,” not the displacement of valid governmental policies. (*citation omitted.*) The FHA is not an instrument to force housing authorities to reorder their priorities. Rather, the FHA aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects... An important and appropriate means of ensuring that disparate-impact liability is properly limited is to give housing authorities and private developers leeway to state and explain the valid interest served by their policies.” (*emphasis added.*)). *See also* *Huntington Landmark Adult Cmty. Assn. v. Ross*, 213 Cal. App. 3d 1012, 1019 (Ct. App. 1989) (finding that “age qualifications as to a housing facility reserved for older citizens can operate as a reasonable and permissible” as an act of legitimate public policy.).

<sup>6</sup> *Langlois v. Abington Hous. Auth.*, 234 F. Supp. 2d 33, 41-42 (D. Mass. 2002) (stating that federal regulations permit residency preferences in affordable housing programs when they are in accordance with equal opportunity requirements.).

<sup>7</sup> *Id.* at 56-57 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 108 S. Ct. 2777 (1988)). As indicated in *Watson* and *Langlois*, several cases have utilized statistical discrepancies or the “four-fifths” rule to

unique composition of each community, the validity of the policy advanced, and/or the specific aggrievement of the individual asserting discrimination. It is, however, clear that the disparate impact must be substantial to violate the Fair Housing Act.<sup>8</sup>

In applying this two-part analysis to the proposed Davis Based Buyers Program, we must first examine the intent of the program. As stated, the intent of the Davis Based Buyers Program is to ensure that the homes being built in WDAAC are helping the City of Davis to address its dramatically insufficient housing supply while, simultaneously, providing the aging residents of Davis an opportunity to move into “right sized” housing while staying in the community. The program is NOT intended to, nor will it, discriminate against any potential buyer based upon a protected class. In fact, the program has been carefully crafted to include a broad array of qualifying local connections to evidence a clear intent to avoid any misconception that the program is a veiled attempt at discrimination. For example, the program offers its priority status to graduates of the Davis school system including UC Davis. California’s local schools and the University of California have long been at the forefront of imposing anti-discriminatory policies in the context of admissions. Thus, by including any UC Davis alumni or family with a child enrolled in local schools within the local buyers preference, the developer’s intent is to make the local preference program as inclusive as possible with respect to any and all protected classes.

The non-discriminatory intent of the program is further evidenced through consideration of the legitimate City goals and objectives the program seeks to achieve. Foremost, the program is designed to fulfill a clear objective of Measure R, which was approved in 2010 by 75% of the local electorate. Measure R balances preservation of agricultural land and open space with the need to meet the *internal* housing needs of the City. Based upon a plain reading of the measure, it was not the intent of the proponents of Measure R to even consider greenfield development for the sake of attracting new residents to Davis; Measure R effectively opposes expansion of the City simply for the sake of growth. Rather, Measure R aims to preserve agricultural lands unless urbanization is necessary to serve the City’s internal housing needs. The Measure makes no mention of regional housing needs or the demand for housing generated by outside forces. Instead, it directs voters to consider only the “internal housing need,” which can be interpreted to mean demand generated by the natural growth from within the City. By implementing a program that prioritizes local buyers, WDAAC seeks to develop a project that serves the internal housing needs of Davis and thereby achieves this clearly stated and strongly supported growth policy.

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evidence a discriminatory effect. However, the Supreme Court has now discouraged imposing any disparate impact liability based solely on a showing of statistical disparity, instead placing a greater emphasis on the importance of a robust causality requirement. *Tex. Dep’t of Hous. & Cmty. Affairs* at 2522-2533.

<sup>8</sup> *Langlois* at 56 (citing *Fudge v. City of Providence Fire Dep’t*, 766 F.2d 650, 657–58 (1st Cir.1985)).

In addition to fulfilling the objectives of Measure R, the local buyers program will also assist the City with its housing crisis, generally. First of all, as a primarily senior housing community with smaller units, the project offers the City's aging population an opportunity to downsize while staying in the City.<sup>9</sup> In turn, by encouraging existing Davis residents 55 years of age and over to move out of their traditional single-family homes and into the WDAAC, the program helps to free-up the existing housing stock for families living, working, or bringing children to school in Davis to purchase a family home in the City. In effect, implementing the local priority program not only builds new homes in Davis for current residents but also opens-up existing homes in Davis, thereby doubling the housing impact of the project. In short, the program is intended to provide badly needed housing opportunities for Davis residents or others with a strong local connection who are currently struggling to find the type of housing that they desire within the City. Second, it is frequently stated that the lack of housing in Davis results in those raised and educated in Davis being denied the opportunity to remain there. The proposed program will provide opportunities to these buyers, both within the portion of the project not age restricted and in the resale of existing homes, in an effort to retain the next generation of Davis families. Third, the program helps to better serve an aging population by encouraging family caregivers and those individuals that they assist to live in close proximity. Fourth, allows families with children enrolled in Davis schools and/or people employed in Davis who currently commute in and out of the City each day, to also live within the City of Davis. Altogether, the program will increase civic involvement, improve student and employee productivity, allow the City to retain those it has educated, once again fill Davis schools and shops with local residents, reduce medical care costs, create an opportunity for alternative modes of travel, reduce commuter traffic and VMT, and improve the quality of life for all involved.

Having established that the local buyers program is not intended to discriminate against any protected class of individual but is, instead, crafted to achieve legitimate policy goals and objectives of the City, the second question becomes whether the program will nonetheless have an unintentional discriminatory effect. By carefully reviewing the legal decisions and academic discussions on local preference programs, the WDAAC applicant has incorporated numerous 'best practices' as program components to avoid any unintended disparate impact. These components include:

1. Crafting a local preference program with a highly inclusive definition of what constitutes a qualifying local connection. The program benefits *existing Davis residents* with no time duration associated with length of City residency. The program also includes *family members of current residents* to foster and encourage family caregivers. Broader still, the preference is given to several groups not currently residing in the City of Davis and without a family

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<sup>9</sup> The WDAAC Project is 80% age-restricted to those 55 and older, and 20% unrestricted.

connection, including: *local employees, families or individuals with children enrolled in Davis grade schools, or alumni of UC Davis or Davis Joint Unified.*

2. The program does not draw from a narrow geographic area or specific neighborhood but includes the entire City and even expands its geographic preferences area beyond the municipality's jurisdiction to include the Davis Joint Unified School District boundary and the UC Davis campus, as well as City-adjacent unincorporated County communities. As such, the demographics of the program area are reflective of and similar to the demographics of the larger Yolo-Sacramento region.
3. The local buyers program only applies to a portion of the for-sale units, ensuring that an adequate opportunity exists for potential buyers that do not qualify for the local preference. Furthermore, the local preference does not apply to the Project's 150 senior affordable rental units nor to the continuing care community.
4. Finally, by prioritizing the housing in WDAAC for local seniors, the homes that buyers vacate within Davis then become open to the population at-large. This, in turn, affords many opportunities for any would-be buyer to purchase a home in Davis that will not be subject to the local buyers program.

The enumerated program details are specifically crafted to comply with direction provided by the Department of Housing and Urban Development and the courts to be in compliance with the Fair Housing Act. Furthermore, they meet and exceed identified best practices implemented by housing authorities nationwide.

As described herein, it is clear that the intent of the Davis Based Buyers Program is to implement Measure R and, in so doing, help to meet a broad array of the internal housing needs of the City. The intent of the program is not to discriminate against any protected class of individuals, but to achieve numerous legitimate public policy goals. Furthermore, with the numerous safeguards in place and broad qualifications for program inclusion, no protected class will be deprived reasonable opportunity to obtain housing in Davis. As such, there is no discriminatory intent and there will be no significant disparate impact as a result of implementing the Davis Based Buyers Program. Therefore, the program complies with state and federal fair housing laws.