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Memorandum

TO:	Members of the City Council, City and County of Denver
FROM:	Brian J. Connolly
CC:	City Attorney's Office, via Kirsten Crawford, Assistant City Attorney
DATE:	June 24, 2019
RE:	City Council Bill No. 19-0401—Proposed Rezoning of Land Area Bounded By West 16th Avenue, Newton Street, West 17th Avenue, and Lowell Boulevard (the "**Property**")—Analysis of Fair Housing Concerns

Our firm represents Zocalo Community Development and its affiliated entities ("**Zocalo**") with respect to the proposed development of a multi-unit residential project (the "**Project**") on the above-referenced Property. The Property is the subject of the above-referenced zoning map amendment application (the "**Application**") to change the classification of the Property from its existing zoning classification(s) to the Planned Unit Development – General zoning district ("**PUD-G District**"). The City Council's approval of the Application will allow the Project to move forward as planned, although the Project will require subsequent site development plan approval under the Denver Zoning Code.

As is relevant to this Memorandum, the Project proposes two elements: (1) a 160-unit for-sale, primarily market-rate condominium project with associated improvements and amenities (the "**Condominium**"), and (2) a 160-unit rental, income-restricted apartment project with associated improvements and amenities (the "**Apartments**"). While these two elements of the Project will not be contained within a common structure and will not share amenities, they will be co-located on the same Property.

Zocalo has recently become aware that individuals in the neighborhood immediately surrounding the Property have posited that the City's approval of the Application and subsequent development of the Project would create potential "disparate impact" liability under the Federal Fair Housing Act, 42 U.S.C. § 3601 *et seq.* (as amended, the "**FHA**"), for either the City or Zocalo. This concern reflects an inaccurate and perverse understanding of both the policy of the FHA and applicable law thereunder. The remainder of this Memorandum addresses this concern. **In summary, the City's approval of the Application and the subsequent development of the Project will not create disparate impact or any other form of liability under the FHA for either the City or Zocalo, and both the approval and the completion of the Project would be fully consistent with the policy goals of the Fair Housing Act.**

The Fair Housing Act: Background and Disparate Impact Liability

The FHA prohibits housing discrimination on the basis of seven "protected classes," including race, ethnicity, national origin, religion, sex, familial status, and disability. 42 U.S.C. § 3604(a), (f). Of special note, neither *income* nor *source of income* is a protected class under the FHA.

Specifically, the FHA prohibits discrimination "in the sale or rental" of housing, or "otherwise mak[ing] unavailable or deny[ing] a dwelling to any buyer or renter because of" one of the protected classes. 42 U.S.C. § 3604(a), (f)(1). Similarly, the FHA prohibits discrimination in "the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of" one of the protected classes. 42 U.S.C. § 3604(b), (f)(2).

Generally, there are three ways in which private parties or local governments may be found liable for violations of the FHA. The first, which applies exclusively in the context of disability discrimination and is not of relevance here, is where a party fails to provide a reasonable modification of premises or reasonable accommodation in rules, policies, or practices so as to afford a person an equal opportunity to use and enjoy a dwelling on the same basis as a non-disabled person. 42 U.S.C. § 3604(f)(3)(A) and (B). Second, where a party engages in *disparate treatment*—that is, where a private party or government intentionally treats a buyer or renter of housing differently from another on the basis of one of the protected classes—a violation of the FHA may be found. *See, e.g., Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995). The third scenario under which a violation of the FHA may be found is where an otherwise nondiscriminatory policy creates a *disparate impact* with respect to a protected class, i.e., where it results in a discriminatory *effect* on one of the protected classes. *See, e.g., Tex. Dept. of Hous. & Cmty. Affairs v. Inclusive Cmtys. Proj., Inc.*, 135 S. Ct. 2507, 2520 (2015).

Disparate impact may be established where the effect of a policy results in making housing unavailable to a member of a protected class, such that the policy perpetuates segregation and limitations on access to opportunity for underprivileged groups. A classic example of actionable disparate impact under the FHA occurs where a locality uses zoning to prohibit multi-family residential uses, yet there is strong statistical evidence that the provision of multi-family residential units would largely serve underrepresented racial and ethnic groups due to well-established correlations between race and income. *See, e.g., Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1288 (7th Cir. 1977). Although the decision to zone solely for single-family units is not intentionally discriminatory, its effect makes the policy actionable under the FHA.

In 2015, in the case of *Inclusive Communities Project*, the Supreme Court affirmed that disparate impact liability is available under the FHA. *Inclusive Communities Project* dealt with Texas's distribution of low-income housing tax credits, whereby the state was effectively encouraging low-income housing development in areas with already-high concentrations of racial minorities. The crux of the plaintiff's argument was that the continued concentration of low-income housing in urban areas deprived prospective residents of educational and other opportunities that existed in suburban areas, and furthered racial and ethnic segregation. While the Court affirmed disparate impact claims' viability generally, it placed several critical limitations on a plaintiff's ability to file and maintain a disparate impact claim. Those limitations include:

- Disparate impact claims cannot be brought in the context of one-time actions, but instead must be entirely based upon broad policies and patterns of actions. *See Inclusive Cmtys. Proj.*, 135 S. Ct. at 2523.

- A plaintiff alleging a disparate impact is required, at the outset of a case, to provide an objective, statistical showing of causality between the policy in question and the actual impact of the policy. *See id.*

- Even where a disparate impact is established, a defendant is not liable under the FHA where the defendant establishes a non-discriminatory, legitimate justification for the underlying policy. *See Inclusive Communities Project*, 135 S. Ct. at 2522.

In practice, these limitations established by *Inclusive Communities Project* have severely limited the viability of disparate impact claims. *See, e.g.*, David L. Callies & Derek B. Simon, *Fair Housing and Discrimination After* Inclusive Communities, 40 ZONING & PLAN. L. REP., NO. 9 (Oct. 2017). In fact, following the Supreme Court's decision, the district court in *Inclusive Communities Project* itself dismissed the plaintiff's claims for failing to make the required statistical showing of disparity.

The Project Does Not Create A Disparate Impact

We understand the neighbors' concern to be that the colocation of the Apartments and Condominium on the Property, but in separate structures with separate amenities, creates a disparate impact. This concern is apparently based upon the notion that placing affordable units in a separate structure from market-rate units segregates and stigmatizes individuals residing in the affordable units.[1] There is no legal support for that proposition, however, and the construction of the Project will in fact further many of the goals of the FHA.

As an initial matter, the City Council's approval of the Application will have no bearing on the FHA analysis below. The rezoning of the Property does not approve the Project. The Project will require approval through the site development plan procedures under the Denver Zoning Code. Thus, the rezoning cannot create FHA liability one way or another.

Even assuming the Application's approval were to allow the Project, the development of the Apartments will not have the effect of "mak[ing] unavailable or deny[ing] housing" to any member of a protected class. 42 U.S.C. § 3604(a), (f)(1). In fact, the development of the Apartments *increases* access to housing for lower-income individuals, including members of protected classes. Contrary to the example where a municipality zones out multi-family development or where a state's allocation of tax credits precludes members of racial and ethnic minority groups from relocating to wealthier communities, constructing the Apartments in the mixed-income Sloan's Lake neighborhood will advance the anti-segregation goals of the FHA.

Additionally, the Application represents a one-time action, and the construction of the Project does not reflect a broad-based policy of the type that gives rise to disparate impact liability. In order to sustain a disparate impact claim, any plaintiff would need to demonstrate that the City maintained an official or unofficial policy of concentrating affordable housing units in a particular, disadvantaged neighborhood *and* that the concentration of units resulted in denying housing or services to one or more of the protected classes. *See Inclusive Cmtys. Proj.*, 135 S. Ct. at 2523. There is zero statistical support for the notion that the Project, in which market-rate

[1] The neighbors' legal arguments may be premised upon arguments made in a student-authored law review note, *see* Conor Arpey, *The Multifaceted Manifestations of the Poor Door: Examining Forms of Separation in Inclusionary Housing*, 6.3 AM. UNIV. BUS. L. REV. 627 (2017), which suggests, without citing any case law support, that the separation of market-rate and affordable units may create a disparate impact. The legal analysis in that note does not, however, take account of the recently-announced limitations of *Inclusive Communities Project* set forth above.

and affordable units are collocated on the same Property, denies housing or services to any one of the protected classes. Any prospective plaintiff would be required to show, at the time of the filing of a complaint, that due exclusively to constructing two separate buildings on the Property, members of a protected class were denied housing or services *because of* the protected class (race, ethnicity, etc.). That showing would be nearly impossible to make.

Although the amenities offered will differ as between the Condominium and the Apartments, no provision of law requires that equal amenities be provided as between lower- and higher-priced dwelling units. Income is not a protected class under the FHA. That a market-rate housing project contains below-grade parking and a swimming pool does not mandate that an adjacent affordable housing project contain such amenities. The logical effect of the neighbors' argument is that all housing projects would be required to contain identical amenities, regardless of unit price, for a developer to avoid FHA liability.[2] That result would mean that every single-family housing development would contain virtually identical homes, and would effectively punish—rather than encourage—developers that construct affordable housing.

The Supreme Court, in its analysis of *Inclusive Communities Project*, wrote as follows:

> It would be paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalizing dilapidated housing in our Nation's cities merely because some other priority might seem preferable. Entrepreneurs must be given latitude to consider market factors. Zoning officials, moreover, must often make decisions based on a mix of factors, both objective (such as cost and traffic patterns) and, at least to some extent, subjective (such as preserving historic architecture). These factors contribute to a community's quality of life and are legitimate concerns for housing authorities. The FHA does not decree a particular vision of urban development; and it does not put housing authorities and private developers in a double bind of liability, subject to suit whether they choose to rejuvenate a city core or to promote new low-income housing in suburban communities. As HUD itself recognized in its recent rulemaking, disparate-impact liability "does not mandate that affordable housing be located in neighborhoods with any particular characteristic."

(internal citations omitted). The same logic applies here. Where the City and a developer have elected to provide affordable housing in a mixed-income neighborhood, albeit in different structures, the FHA does not bar that choice.

Conclusion

On behalf of Zocalo, we respectfully request the City Council's approval of the Application. We will be available to answer any questions at the June 24, 2019 City Council hearing on this matter.

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[2] While the FHA requires equality in the provision of *services* as between protected classes, this provision is squarely aimed at housing providers and governmental entities that discriminate in their terms of service *on the basis of* the protected class. *See, e.g., Cmty. Svcs., Inc. v. Wind Gap Mun. Auth.*, 421 F.3d 170 (3d Cir. 2005).