

Tiny Homes and Disparate Impact Under the Fair Housing Act
By Lisa T. Alexander

ABSTRACT

Typically, less than 400 square feet per unit, tiny homes have become a big solution to America's growing affordable housing problem.¹ Tiny homes can be a cost-effective way to provide shelter for the homeless and affordable housing for the hard to house, since the costs of producing a tiny home are often less than the costs of producing traditional affordable and supportive housing.² Yet, most state and local zoning ordinances and building codes mandate minimum residential building sizes that are greater than 400 square feet per unit, since the typical American home is approximately 2,500 square feet.³ In January 2018, the International Residential Code (IRC), a model code adopted by many states and cities, was amended to provide specific guidelines on how to build tiny homes.⁴ Some cities have changed their building codes to permit dwellings less than 400 square feet, to sanction tiny homes as accessory dwelling units, or to approve tiny homes villages as planned unit developments or special zoning designations. While these efforts legalize and sanction tiny homes villages, potential developers, communities, and municipalities still face not-in-my-backyard opposition from middle- and high-income communities when they try to create tiny homes villages.

This section analyzes how the federal Fair Housing Act (FHA) might apply to local government ordinances prohibiting tiny homes developments. First, it is unclear whether a tiny home is a dwelling for purposes of the Fair Housing Act. Second, under the standards articulated by the United States Supreme Court in the *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* case, a local government that has adopted an ordinance prohibiting tiny homes could be found to violate disparate impact under the FHA, if statistical evidence can be obtained showing few low-income minorities in the jurisdiction and large numbers of whites. Third, if a municipality builds or finances the creation of tiny homes villages on city-owned land, and the villages are segregated, the city's decision to create tiny homes could be found to perpetuate segregation or create a discriminatory disparate impact under the FHA. This analysis of tiny homes and the FHA resurrects longstanding debates between fair housing advocates and community development practitioners regarding whether integration, revitalization, or community self-help and determination should be the primary drivers in affordable housing creation and production.

¹ Scott McFetridge, *Tiny Houses are trendy — unless they go up next door*, USA Today.com, (Updated 2:12 p.m. ET Nov. 15, 2017), <https://www.usatoday.com/story/money/personalfinance/real-estate/2017/11/14/tiny-houses-trendy-unless-they-go-up-next-door/862342001/>.

² Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 Neb. L. Rev. 245 (2015).

³ See *id.*; Tulia Contributor, *Average Price, Average Size – Not Your Average Home*, Forbes.com, (Jan 24, 2017 11:28am), <https://www.forbes.com/sites/tulia/2017/01/24/average-price-average-size-not-your-average-home/#5b833f9b49a1>.

⁴ Randy Rieland, *The Legal Scoop on Tiny-Home Living*, AARP.com (April 5, 2018), <https://www.aarp.org/home-family/your-home/info-2018/tiny-home-laws.html>.