



Memorandum

TO: HONORABLE MAYOR AND CITY COUNCIL

FROM: Susana Alcalá-Wood,
City Attorney

SUBJECT: Workforce Housing & Fair Housing Law

DATE: March 6, 2026

INFORMATION

EXECUTIVE SUMMARY

On February 24, 2026, (Council Agenda Item 8.5), the City Council adopted a resolution authorizing the Housing Director, or designee, to negotiate and execute master-lease agreements and related documents to implement the pilot Low Income Voucher and Equity (“L.I.V.E.”) Program.¹

Under the L.I.V.E program, the City of San José (“City”) will master-lease approximately 197 apartment units at the Reed and Market development. The approved program includes a preference for public employees (city, county, state or other public agencies) to receive first priority to apply for available units.

During the City Council deliberations, questions arose regarding the legal distinction between:

- A “set-aside”
- A “preference”
- “Prioritizing” or “specifying” 50 apartment units for San José Police Department (SJPD) personnel for recruitment and retention purposes

City Council also requested legal guidance regarding how federal and state fair housing laws apply to workforce housing programs, including the L.I.V.E. Program.

This Information Memorandum explains:

- The legal distinction between a **set-aside** and a **preference**.
- How federal and state fair housing laws apply.

¹ <https://sanjose.legistar.com/LegislationDetail.aspx?ID=7873264&GUID=5561656A-94F2-40B9-A262-2D239B498FBB>

- Relevant case law addressing housing preferences and disparate impact.
- Legal considerations specific to workforce housing programs, including L.I.V.E.

In summary:

- There are no federal or state statutes or court decisions that prohibit workforce housing programs.
- A **set-aside** (exclusive reservation of units) presents higher legal risk under fair housing law than a **preference** (priority in application but no exclusion).
- Workforce housing programs can be structured to reduce legal risk through careful design, monitoring, and use of less restrictive alternatives.
- The L.I.V.E. program, which is structured as workforce housing and was approved by Council with a public employee preference, complies with applicable law.
- Amending the L.I.V.E. program to include a 50-unit set-aside for SJPD personnel would create additional legal risk than a preference, but is legally defensible with careful design, implementation, and monitoring.

ANALYSIS

A. Distinction Between a Set Aside and a Preference

A **set-aside** dedicates a specific number of housing units exclusively for occupancy by a defined group, to the exclusion of all others.

For example, if 50 units are set aside for SJPD personnel:

- Only SJPD personnel could occupy those units.
- Other income-qualified applicants would be ineligible for those units.
- If insufficient SJPD applicants apply, units could remain vacant unless the restriction is lifted.

A **preference** gives a defined group priority in the application process, all other factors being equal, but does not exclude other applicants.

Accordingly, if 50 units carry a preference for SJPD personnel:

- SJPD personnel would receive priority ranking (or early application access).
- If insufficient SJPD applicants apply, units would be offered to other income-qualified applicants.
- All applicants would remain eligible.

A set-aside limits housing choice and restricts eligibility, while a preference expands priority but preserves broader housing access.

From a fair housing perspective:

- **Set-asides create greater legal risk** because they restrict access.
- **Preferences present lower legal risk** because they maintain open eligibility.

B. Fair Housing Law

The Federal Fair Housing Act (“FHA”) prohibits discrimination in the rental, sale, financing, and other housing-related transactions *because of* race, color, religion, sex, familial status, national origin, or handicap.² California’s Fair Employment and Housing Act (“FEHA”) expands these protections to gender, sexual orientation, marital status, ancestry, source of income, veteran/military status, or genetic information.³

FHA violations can be established by showing either intentional discrimination, discriminatory impact, or refusal to make reasonable accommodations.⁴ Intentional discrimination is motivated by discriminatory intent.⁵ However, even neutral policies or practices may violate the FHA if they cause discriminatory impact on a protected group. A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because of race, color, religion, sex, handicap, familial status, or national origin.⁶ Disparate impact may be permissible if there is a legally sufficient justification because the practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests and there is no less discriminatory way to achieve that interest.⁷

C. Fair Housing Challenges to Housing Preferences

Tenant preferences have existed for decades to prioritize housing. While permissible, preferences are subject to fair housing law and disparate impact claims. For example, in 2002, the court in *Langlois v Abington Housing Authority* found discriminatory disparate impact in Section 8 rental assistance programs in eight Massachusetts suburban public housing authorities located in predominantly white areas because nonresidents were disproportionately minorities and would have applied but for the local preference.⁸

In 2016, Department of Housing and Urban Development (“HUD”) prohibited San Francisco from implementing a neighborhood preference in an affordable housing project in the Western Addition because it limited access to housing and perpetuates segregation.⁹ HUD ultimately agreed to an anti-displacement preference.

² 42 U.S.C. § 3601; 42 U.S.C. § 3604(a).

³ California Government Code Section 12955

⁴ *Anast v. Commonwealth Apartments*, (1997) 956 F.Supp. 792.

⁵ Cal. Code Regs. Tit. 2, § 12041

⁶ Cal. Code Regs. Tit. 2, § 12060

⁷ 24 CFR 100.500

⁸ *Langlois v Abington Housing Authority* (2002) 234 F.Supp.2d 33

⁹ 27 J. Affordable Housing & Community Dev. L. 51

New York City was recently challenged on its community preference ordinance giving a 50% set aside for neighborhood applicants. The Court found triable issues of fact on intentional discrimination and perpetuation of segregation, leading to the parties settling by reducing the community preference to only 15%.

These cases highlight that tenant preferences, while permissible, are subject to fair housing and may be challenged if they create disparate impacts on protected groups.

D. Workforce Housing

Workforce housing programs, like teacher housing, are an emerging recruitment and retention strategy. Whether by preference or a set aside, they should be designed and implemented to promote housing choice and fairness.

Under L.I.V.E.'s pilot program, approximately 197 apartment units will be available for rent to income-qualifying applicants giving preference to public employees. All the units should be rented out to a diverse and representative segment of the income-qualifying population without inadvertently favoring or disfavoring any group that is protected under the law. San José's population by race according to the 2024 American Community Survey data is 42% Asian, 30% Hispanic, 21% White, and 3% Black or African American.¹⁰

Under the disparate impact framework, a facially neutral policy such as L.I.V.E. may raise concerns in two ways: through a *positive* disparate effect or an *adverse* disparate effect. If 50 of the 197 units are reserved for SJPD personnel, those units should not disproportionately benefit individuals of a particular protected class. For example, if a large majority of the applicants who ultimately obtain the set-aside units are men or members of a single race, the program could be characterized as producing a positive disparate effect by disproportionately benefiting that group. Conversely, if the reserved units remain vacant or underutilized, thereby reducing access to the broader affordable housing pool, the policy could create an adverse disparate effect if the individuals otherwise benefiting from the program are disproportionately members of a protected class. In either scenario, members of a protected class who are disproportionately excluded from the housing opportunity may assert a disparate impact claim.

However, even if there is a claim of disparate impact against members of a protected group, the City can assert that the program serves the nondiscriminatory purpose of public safety by addressing one of the leading causes of hiring and retaining SJPD personnel and that there is no less discriminatory alternative available.

Some ways to enhance the program's goals without limiting housing choice are: 1) provide only a preference to SJPD personnel rather than a set aside so that the units are

¹⁰ <https://censusreporter.org/profiles/16000US0668000-san-jose-ca/>

