March 29, 2018

Fair Employment and Housing Council
c/o Brian Sperber, Legislative & Regulatory Counsel
Department of Fair Employment & Housing
320 West 4th Street, 10th Floor
Los Angeles, CA 90013

Transmit Via E-Mail: FEHCouncil@dfeh.ca.gov

RE: Proposed Fair Housing Regulations

Dear Mr. Sperber and Members of the Fair Employment & Housing Council:

On behalf of the American Planning Association, California Chapter, California State Association of Counties, League of California Cities, Rural County Representatives of California, and Urban Counties of California, we offer our comments on the Proposed Fair Housing Regulations, particularly the provisions addressing Public Land Use Practices. As set forth in our December 11, 2017 letter, our organizations share the goal of eliminating any form of discrimination affecting housing opportunities, and appreciate the opportunity to participate in developing regulations to achieve this objective. However, we are concerned that the regulatory text currently proposed may not effectively achieve these goals in full accordance with the governing provisions of FEHA. In addition to this correspondence, we would appreciate the opportunity for stakeholders in Northern California to present these and any other concerns to the Council directly at a public hearing in this area.

Our specific concerns are discussed in detail below, and generally fall within the following categories:

- Many provisions written so broadly and vaguely that they do not provide clear guidance to local government officials. These concerns are magnified by the manner in which the regulations often compound multiple broadly defined terms.

- Some provisions go impermissibly beyond the statutory provisions of FEHA, or otherwise exceed the Council's regulatory authority.

- Several provisions deviate from the case law and guidance developed under the federal Fair Housing Act without appropriate legal justification, and with insufficient consideration of the practical consequences.

Overarching Concerns

In order to be effective, such regulations must be carefully tailored, balanced, well-defined and conscious of the many competing responsibilities and mandates affecting local land use decision-making. These include requirements to plan and provide housing for all economic segments of the community; encouragement to site high density housing close to transit in order to reduce vehicle miles traveled; and limitations on the authority to deny market-rate housing. Local governments cannot be placed in the position of violating the Fair Housing and Employment Act in order to comply with the State Planning and Zoning Act and CEQA.

Likewise, to fulfill the spirit and intent of FEHA, we believe the regulations must be revised to avoid what we anticipate to be numerous unintended consequences that would discourage affordable housing development generally and specifically thwart efforts to create economically and socially diverse communities.

In particular, the term "enjoyment of housing" would make possible lawsuits alleging that an affordable housing development or a sober living facility obstructs the "enjoyment" of existing residents, who may well be members of a protected class. Similarly, the ability of one person to pursue a disparate impact claim based only on anecdotal evidence, with no statistical support, could expand individual complaints about low-income neighbors into fair housing issues. Repeated statements that a "failure to act" is a "practice" (including private and public land use practices) overstates the affirmative obligation of local governments to act, disregards real constraints, and could be used, for instance, to file suit if local government fails to pursue complaints against low income residents or low income housing.

Lawsuits and the threat of litigation will unduly harm traditionally marginalized communities by impeding projects meant to promote economically and socially integrated communities. The attached revisions to the proposed regulations are meant to follow the spirit, intent, and current legal constraints of FEHA and the FHA to avoid use of the proposed regulations to challenge the necessary functions of local governments, development of affordable housing, and desired infill development.

As the United States Supreme Court has cogently observed, the fair housing laws were never intended to cause such conflicts – because that would ultimately *disserve* fair housing goals:

> 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.
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> If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free market system.[1]

Moreover, any regulatory action must be cognizant and respectful of the limitations on the Council's rulemaking authority. The Council has repeatedly indicated that *clarity* is the overarching goal of these regulations. Regulations cannot provide clear guidance, and will not achieve their substantive goals, if their legal validity is open to reasonable question. The Council's power to "adopt… suitable rules, regulations, and standards that...[i]nterpret, implement, and apply all provisions of [the FEHA]"[2] does not extend to creating additional bases for liability beyond those provided by the FEHA statute.[3] Where FEHA itself does not prohibit particular conduct, the Council may not do so of its own authority.[4] For this reason, in the many areas where the proposed regulations deviate from the guidance and caselaw applying the federal Fair Housing Act, it is not sufficient merely to note that FEHA *can* provide broader protections than the FHA – but rather it is necessary to demonstrate that the FEHA statute *actually does so*. Several provisions of the proposed regulations appear to disregard these limitations as well, and consequently exceed the bounds of the applicable statutory authority.

We have prepared the attached "red-line" version of the proposed regulations incorporating suggested revisions to address our concerns. Many of these suggestions are self-explanatory, and the remainder of this letter will detail the rationale and concerns underlying our most significant proposals.

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[2] Gov. Code, § 12935, subd. (a).

[2] Gov. Code, § 12935, subd. (a).

[3] *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 269-270, superseded by statute on another point as stated in *Alch v. Superior Court* (2004) 122 Cal.App.4th 339, 396-397.

[4] *Ibid.*

Scope of Public Land Use Practices Covered Under FEHA

Many of the regulations' broadest provisions derive from an apparent effort to address any governmental action (or inaction) that might conceivably affect the "use" or "enjoyment" of housing opportunities.[5] For example, this is the crux of the regulations' proposal to make siting decisions for "hazardous land uses" actionable under FEHA.[6] The practicable difficulty of implementing provisions of this breadth cannot be overstated, since even the most conscientious of local governments would find it difficult to predict all the possible effects that each of its actions (or inaction) might have on anyone's "use" or "enjoyment" of their residence – let alone whether such effects might be more heavily concentrated amongst any protected class. As written, these provisions will not reward or encourage conscientiousness – merely litigation.

Perhaps more importantly, the regulations' proposed coverage exceeds the boundaries of FEHA. As one Court of Appeal has concluded, the applicable statute, Government Code section 12955, subdivision (l), "is limited to discrimination that makes housing *unavailable*."[7] "An action taken by an agency that is alleged to have adversely impacted intangible habitability interests and property values does not make dwellings 'unavailable' within the meaning of section 12955, subdivision (l)." While this decision was unpublished, the legal analysis is solid – and consistent with the federal authorities addressing the analogous provisions of the Fair Housing Act.[8] The federal courts (including some in California) have repeatedly held that the FHA, like FEHA, is limited to actions that make housing units *unavailable*, and does not reach "questions of habitability" – let alone the even broader and more nebulous categories of "use" and "enjoyment" proposed in the regulations.[9]

At a minimum, the regulations should be revised consistent with the case law, to clarify that governmental actions affecting the use, enjoyment, etc. of housing

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[5] See, e.g., § 12005, subd. (aa)(3).

[6] See, e.g., § 12161, subd. (a)(10).

[7] *El Pueblo v. Kings County Bd. of Supervisors* (Jul. 3, 2012, F062297 [nonpub. opn.] [2012 Cal. App. Unpub. LEXIS 4984],

[8] 42 U.S.C. § 3604(a).

[9] See, e.g., *Clifton Terrace Assoc., Ltd. v. United Technologies* (D.D.C. 1991) 929 F.2d 714; *Jersey Heights Neighborhood Ass'n. v. Glendening* (4th Cir. 1999) 174 F.3d 180; *Cox v. City of Dallas* (5th Cir. 2005) 430 F.3d 734*; Inland Mediation Bd. v. City of Pomona* (C.D.Cal. 2001) 158 F. Supp. 2d 1120. The ISOR (p. 56) cites *Comm. Concerning Cmty. Improvement v. City of Modesto* (9th Cir.) 583 F.3d 690 for the proposition that the FHA "implicates continuing rights, such as the privilege of quiet enjoyment of the dwelling." This quotation is accurate, but out of context here. The Ninth Circuit was addressing the *timing* of FHA coverage (i.e., whether it extended to post-acquisition claims) - not the *quantum of impact* necessary to establish an actionable violation.

opportunities are covered *only if those effects are sufficiently severe to render the housing opportunities unavailable*.[10] However, it would be preferable – and clearer – to eliminate the potentially misleading terms entirely and replace them with language consistent with the statutory text of both FEHA and FHA and the respective authorities thereunder. The attached draft incorporates these suggested revisions.[11]

"Failure or Failures to Act"

The proposed regulations include "failure or failures[] to act by governmental entities...in connection with development and land use that are related to or have an effect on existing or proposed dwellings or housing opportunities" within the definition of covered land use practices.[12] As written, this expansive language would appear to impose upon government entities an *affirmative duty* to act, in any case where inaction would (for instance) "perpetuate[] segregated housing patterns."[13] Such a duty to

[10] Terms such as "use" and "enjoyment" could, perhaps, be limited by either definition or context in a manner consistent with FEHA's focus on "mak[ing] housing opportunities unavailable." For example, the regulations could incorporate the common law definition of *quiet enjoyment* - which is breached only by impacts severe enough to constitute constructive eviction (*Petroleum Collections Inc. v. Swords* (1975) 48 Cal.App.3d 841, 846-848) - or by requiring that the challenged practice actually *deny* the use of housing opportunities. (Cf. Gov. Code, § 65008, subd. (a) ["…*denies* to any individual or group..."].) However, the regulations contain no such limitation and quite clearly provide otherwise, thereby overstepping FEHA's statutory authority.

[11] The ISOR frequently cites Government Code section 65008 and *Keith v. Volpe* (9th Cir.1988) 858 F.2d 467, 485 in support of those provisions endeavoring to extend FEHA coverage beyond those practices that "make housing opportunities unavailable." (See, e.g., ISOR, pp. 57, 60.) This reliance is puzzling. *Keith v. Volpe* concerned "refused approval of...housing developments" - not municipal services, "toxic" land use siting, or many of the other things for which it has been cited. There is similarly no published authority extending Section 65008 to anything other than the "deni[al]" expressly referenced in the statute itself - and in any event, this section applies only to actions taken under the Planning and Zoning Law (see 87 Ops.Cal.Atty.Gen. 148 (2004); *BCP/Fox Hollow LLC v. Alpha III, Inc.* (Oct. 13, 2006, D045138) [nonpub. opn.] [2006 Cal. App. Unpub. LEXIS 9115]), which does not include many of the matters for which it is cited, such as provision of public services.

[12] § 12005, subd. (aa).

[13] Section 12010, subdivision (a)(1)(C) raises the same concern, as applied to public entities. State and local governments have broad common law and statutory powers to take action against private discrimination within their boundaries; however, they also have well-established legislative and executive discretion with regard to exercising those powers. Read literally, this subdivision could be interpreted to render the Attorney General "directly liable" for "failing to take prompt action to correct" any and every known act of private housing discrimination in the State (as they surely "had the power" to do) - which likely was not the Council's intention. The cases cited in the ISOR and in the HUD rule adopting the analogous FHA regulation uniformly involve conduct by "owners" and "housing providers" – not government entities possessing regulatory and enforcement powers. (ISOR pp. 19-20; HUD Final Rule on Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act, 81 Fed.Reg. 63067-63068 (Sep. 14, 2016).)

affirmatively further fair housing is presently under consideration by the Legislature,[14] but is not currently part of state law.

The authority cited by the ISOR for this provision, Government Code section 12955.8, subdivision (a),[15] includes only failures to act that are "otherwise covered by this part." However, FEHA's substantive mandate against land use discrimination does not extend to all such failures to act. As HUD explained when articulating the federal "Affirmatively Furthering Fair Housing" rule, this sort of requirement "to take the type of actions that undo historic patterns of segregation and other types of discrimination" goes above and beyond the basic "mandate to refrain from discrimination"[16] that is currently provided by FEHA.

Such an affirmative duty is not yet part of FEHA, and it is beyond the purview of the Council to add by regulation.[17] To avoid inconsistency with current statute, and respect the ongoing Legislative process, the proposed regulations should be narrowed to include only on those “failures to act” that actually are covered by FEHA.[18] The attached draft incorporates these suggested revisions.

Discriminatory Effects – Statistical and Other Evidence

Section 12061, subd. (b) sets forth a lengthy list of non-exclusive "[t]ypes of evidence that may be relevant in establishing or rebutting the existence of a discriminatory effect..." This appears to have been based upon the suggestion of another commenter that "[t]he analysis of disparities bearing more heavily on one group of people than another includes, for example, numerical disparities based on statistical studies or anecdotal evidence." With respect, this represents grave legal error.

Federal FHA caselaw has unequivocally "recognized the *necessity* of statistical evidence in disparate impact cases."[19] California decisions applying FEHA likewise hold that "[s]tatistical proof is *indispensable* in a disparate impact case."[20] Contrary to some

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[14] Assem. Bill No. 686 (2017-2018 Reg. Sess.) as amended Jul. 17, 2017, available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB686

[15] ISOR, p. 13.

[16] HUD Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Red. 42274 (Jul. 16, 2015).

[17] *Esberg v. Union Oil Co., supra,* 28 Cal.4th at pp. 272-273.

[18] The principal types of “failures to act” covered by FEHA are further well addressed in Section 12010, subdivisions (a)(1)(B)-(C) of the regulations.

[19] *Budnick v. Town of Carefree* (9th Cir. 2008) 518 F.3d 1109, 1118.

[20] *Alch v. Superior Court* (2008) 165 Cal. App. 4th 1412, 1428; *Carter v. CB Richard Ellis, Inc.* (2004) 122 Cal.App.4th 1313, 1323–1324.

suggestions, "anecdotal evidence" is absolutely *not* sufficient to establish a prima facie case of discriminatory effects.[21] Further, in the context of general housing discrimination claims, preference must be given to local, rather than state or national statistics.[22] The proposed regulations should be revised to accurately describe the types of evidence necessary to support a prima facie case that a land use practice has discriminatory effects. The attached draft incorporates these suggested revisions.

Discriminatory Effects – Prima Facie Case (Causation)

The proposed regulations addressing the prima facie case of "discriminatory effects" liability[23] expressly aim to "maintain consistency between the federal FHA and the FEHA, which both provide that Plaintiff shall bear the initial burden of proof in a case involving discriminatory effect"[24] – and largely achieve this goal, with one very significant exception.

While the proposed regulations elaborate most elements of the prima facie case in considerable detail,[25] they omit any such detail regarding one of the critical

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[21] See, e.g., *Fair Hous. Opportunities of Northwest Ohio v. Am. Family Mut. Ins. Co.* (N.D.Ohio 2010) 684 F.Supp.2d 964, 969 ["The Court is aware of no case sustaining a disparate impact claim solely on the basis of anecdotal evidence of a claimed adverse effect]; *Townsend v. United States* (D.D.C. 2017) 236 F.Supp.3d 280, 309 ["Complaints that fail even to include a hint that the plaintiff has or can obtain statistical evidence" of a disparate impact are insufficient and mere "anecdotal evidence . . . would not—under D.C. Circuit case law—permit a reasonable inference of disparate impact"]; *Ramirez v. Greenpoint Mortg. Funding, Inc.* (N.D.Cal. 2010) 268 F.R.D. 627, 641-642 ["Plaintiffs identify GreenPoint's policy as the basis for the disparate impact. Such claims are proven not by sifting through every incident and weighing anecdotal justifications for each, but by considering how a common policy collectively affects a group. The inquiry will focus on "statistical disparities," not "specific incidents . . .Proof of disparate impact is based not on an examination of individual claims, but on a statistical analysis of the class as a whole"].

[22] *Budnick, supra,* 518 F.3d at p. 1119 quoting *Mountain Side Mobile Estates P'ship v. Sec. of Housing and Urban Dev.* (10th Cir. 1995) 56 F.3d 1243, 1253 ["In this case, the appropriate comparables must focus on the local housing market and local family statistics. The farther removed from local statistics the plaintiffs venture, the weaker their evidence becomes"]. Some of the language in Section 12061, including the references to utilizing state and national statistics (among other evidence), appears to derive from HUD's Criminal Records Guidance. (Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 4, 2016).) Whatever merits state and national statistics may have in the specialized context of criminal history (which raises unique, pervasive, and well-documented racial disparities), they are not – and cannot be – treated as equivalent to local statistics with regard to other challenged land use practices.

[23] Specifically, §§ 12060 and 12061.

[24] ISOR, p. 5.

[25] For example, § 12060, subd. (b) expansively describes the range of practices that might have a discriminatory effect, utilizing language adapted from the HUD discriminatory effects rule (24 C.F.R. §

"safeguards" emphasized heavily in the federal authorities – namely the element of causation. As the Supreme Court recently explained, "[a] robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus *protects defendants from being held liable for racial disparities they did not create* . . . Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision." The Court specifically cautioned that without such safeguards, "disparate-impact liability might displace valid governmental and private priorities . . ."[26] At least one California court has recently applied these causation safeguards to a housing discrimination claim. [27]

The proposed regulations' neglect of the robust causality requirement, coupled with their expansive descriptions of potential discriminatory practices and supporting evidence, threatens to mislead the public regarding the evidentiary showing necessary to establish a prima facie case.[28] The regulations should provide similar clarity emphasizing the content and importance of the causation element, to ensure that this necessary safeguard is not undervalued or overlooked.

Discriminatory Effects – Prima Facie Case ("Single Action")

Section 12005, subdivision (aa) emphasizes that public land use practices include "a single action" and "single or multiple" planning actions. This emphasis was not included in the original draft regulations circulated in February 2017, and appears to

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100.500(a)), and § 12061, subd. (d) elaborates the possible supporting evidence in great detail (apparently based upon input from another commenter).

[26] *Tex. Dep't of Hous. & Cmty. Affairs, supra,* 135 S.Ct. at pp. 2523-2525. The practical realities underlying this concern were frankly and accurately described by the District Court in *Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo*: "The inconvenient truth is that OTC's racial imbalance is endemic to affordable housing, as such housing caters to a disproportionately higher percentage of racial minorities. Regrettably, these vestiges of racial inequality remain today; but this fact does not establish the crucial element of causation . . . This principle is well-illustrated here, as the Demographic Survey fails to demonstrate the City's responsibility for the racial imbalance present in OTC. As such, Plaintiffs' statistical evidence fails to draw the requisite causal connection between the imposition of the 2012 Policy and its impact on racial minorities. (*Oviedo Town Ctr. II, L.L.L.P. v. City of Oviedo* (M.D.Fl. 2017) 2017 U.S. Dist. LEXIS 134930, at pp. 18-19.)

[27] *Rampersad v. City of Thousand Oaks* (Mar. 13, 2017, B269065) [nonpub. opn.] [2017 Cal. App. Unpub. LEXIS 1722]

[28] For example, Section 12161, subdivision (a) might be misinterpreted to establish a prima facie case based *solely* on the mere occurrence of one of the stated examples – e.g., "inadequate...governmental infrastructure" – without any demonstration that a disparate impact was *caused by* governmental action, rather than by pre-existing conditions the government did not create.

have been suggested by another commenter, based ostensibly on a federal decision applying the FHA.[29]

This provision requires clarification as applied to discriminatory effects claims. The seminal Supreme Court decision addressing discriminatory effects in the land use context, *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.,* articulated the appropriate focus for such claims – i.e., upon government policies, *not* one-time decisions: "For instance, a plaintiff challenging the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact because such a one-time decision may not be a policy at all." [30] Two federal Courts of Appeals that actually addressed this issue likewise held that "[d]isparate-impact analysis looks at the effects of policies, not one-off decisions, which are analyzed for disparate treatment."[31] The federal litigation referenced by the previous commenter is consistent with this framework, clarifying that a single land use decision can give rise to a disparate impact claim *only where it constitutes "an act of policy making."* [32]

The question here is not whether FEHA *can* or *should* reach farther, to "one-off" non-policymaking actions – but whether it *does*. As discussed in greater detail below, FEHA's "discriminatory effects" provision was enacted in 1993 for the "sole purpose" of bringing California housing law into conformity with federal law. There is consequently no opportunity for the proposed regulations to create greater coverage in this instance. In sum, "not all one-time decisions are equal,"[33] and this should be reflected in the regulations.

Discriminatory Effects – Prima Facie Case ("Single Person Suffers Harm")

Section 12060, subdivision (b) would provide that "[a] discriminatory effect may exist even if only a single person suffers harm from the Practice." This provision is

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[29] The commenter mis-cited *Ave. 6E Invs., LLC v. City of Yuma* (9th Cir.) 818 F.3d 493 for the proposition that "[s]ingle decision denying rezoning application constitutes discrimination under Fair Housing Act." The Ninth Circuit did not consider this issue, and the correct reference is to the subsequent District Court decision where this subject was addressed. (*Ave. 6E Invs., LLC v. City of Yuma* (D.Ariz. 2018) 2018 U.S. Dist. LEXIS 14913, discussed below.)

[30] *Tex. Dep't of Hous. & Cmty. Affairs, supra,* 135 S.Ct. at p. 2523.

[31] *City of Joliet, Illinois v. New West, L.P.* (7th Cir. 2016) 825 F.3d 827, 830; *Ellis v. City of Minneapolis* (8th Cir. 2017) 860 F.3d 1106, 1113-1114.

[32] *Ave. 6E Invs., LLC v. City of Yuma, supra,* 2018 U.S. Dist. LEXIS 14913 at pp. 15-18. *Mhany Mgmt., Inc. v. Cnty. of Nassau* (2nd Cir. 2016) 819 F.3d 581, relied upon by the District Court, likewise noted that the challenged action in that case "falls well within a classification of a 'general policy.'" (*Id.* at p. 619.)

[33] *Ibid.*

confusing and appears to conflate disparate treatment with discriminatory effects, contrary to the FEHA statute.

The federal courts, applying the same caselaw routinely relied upon by California courts interpreting FEHA, have cautioned against just such conflation. A discriminatory effects claim "requires a demonstration of causation through 'statistical evidence of a kind and degree sufficient to show that the practice in question . . . caused' individuals to suffer the offending adverse impact 'because of their membership in a protected group.' *As a result, one-time decisions that affect only one person are not typically actionable.* This limitation makes sense because if disparate-impact claims were available based on the impact of a single incident on a single person, anyone could convert a failed discriminatory-intent claim into one for disparate impact."[34]

The ISOR indicates that this provision was intended to "make explicit that while a practice has discriminatory effect when it has a disparate impact *on a group of individuals* based on membership in a protected class, liability may exist even if only a single person who is a member of a protected class has actually suffered an injury from the practice."[35] This both (1) suggests limitations not contained in the proposed regulatory text, and (2) is even further confusing. A "disparate impact on a group of individuals" necessarily affects the group as a whole – not just one single individual.

The proposed regulations should be revised to remove the inaccurate suggestion that a practice injuring only one person may give rise to discriminatory effects liability. Rather, the legally correct formulation, drawn from such FEHA cases as *Sisemore v. Master Financial, Inc.* and its FHA predecessors, is that a single person *may pursue a claim* based upon a practice that actually has *disparate impact on a group* of individuals, if that person has *individually been injured* by the practice. [36] Suggested language has been included in the attached draft.

“Less Discriminatory” Alternative – Burden of Proof

Section 12062 "differ[s] from the FHA and implementing regulations on the issue of which party carries the burden of proof on the existence of less restrictive

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[34] *McCaskill v. Gallaudet Univ.* (D.D.C. 2014) 36 F.Supp. 3d 145, 157. See also *Martinez v. United States Sugar Corp.* (M.D..Fl. 1995) 880 F.Supp. 773, 780 ["Neither does one person make up a group" for disparate impact purposes]; *H.P. v. Naperville Cmty. Unit Sch. Dist. #203*, 2017 U.S. Dist. LEXIS 191700, at p. 15 ["a disparate impact claim must be based on a policy (or practice), not on a decision that is specific to one person"].

[35] ISOR, p. 25.

[36] *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386. See also *2922 Sherman Ave. Tenants' Ass'n v. District of Columbia* (D.C.Cir. 2006) 444 F.3d 673, 680-681 [explaining when and how an injured individual may challenge a policy disproportionately affecting a protected class under FHA].

alternatives"[37] – by relieving the complainant of that burden, and imposing it upon the respondent. This is indeed a dramatic departure from the federal guidance. HUD specifically considered and rejected proposals to "place the burden of proving no less discriminatory alternative on the defendant or respondent," because such an allocation would effectively require the respondent "to prove a negative."[38] HUD further noted that every federal court but one to consider the question had similarly declined to place this ultimate burden on the respondent.[39]

The ISOR asserts that this change is necessary because "Government Code section 12955.8, subd. (b)(1) sets out a different allocation of the burden of proof on less restrictive alternatives than 24 CFR 100.500(c)(3)."[40] However, this is simply not accurate. Government Code section 12955.8, subdivision (b)(1) merely provides that "[a]ny determination of a violation pursuant to this subdivision *shall consider* whether or not there are feasible alternatives that would equally well or better accomplish the purpose advanced with a less discriminatory effect," without assigning this consideration to a particular phase of the case, or allocating the burden of proof to either party. As the ISOR itself acknowledges mere sentences later, FEHA "does not explicitly place the burden of proof for establishing a less restrictive alternative on complainants or respondents." [41]

Moreover, the other authorities cited in the ISOR actually support conformity with the federal guidance, not this drastic departure. Both the FEHC precedential decision in *DFEH v. Merribrook Apts.* and the legislative history behind Government Code section 12955.8 continuously reiterate that the "adverse impact analysis in federal housing discrimination law [is] a sound and persuasive guide for interpretation of California law."[42] Indeed, the explicit purpose of the legislation adopting this provision was "to conform state housing discrimination law with federal law."[43] (Indeed, our Supreme

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[37] ISOR, pp. 30-31.

[38] HUD Final Rule on Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed.Reg. 11473-11474 (Feb. 15, 2013).

[39] *Id.* at p. 11462, fn. 34

[40] ISOR, p. 31.

[41] *Ibid.*

[42] *Dept. Fair Empl. & Hous. v. Merribrook Apartments* (1988) No. 88-19, FEHC Precedential Decisions 1988–1989 CEB 7, p. 1.

[43] Sen. Rules Comm., Off. of Senate Floor Analyses, 3d reading analysis of Assem. Bill No. 2244 (1993-1994 Reg. Sess.), hrg. Sept. 1, 1993 [http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_2201-2250/ab_2244_cfa_930901_141925_sen_floor].

Court has described the bill enacting Section 12955.8 as "a 1993 amendment whose ***sole purpose*** was to bring California housing law into conformity with federal law.") [44]

The ISOR disregards this consistent analysis and intention, and instead focusses on isolated statements that appear to be misconstrued or taken out of context. Contrary to the suggestion in the ISOR, *Merribrook* did not address this particular issue. As relevant here, *Merribrook* set forth a two-part inquiry, holding that "[a] housing practice that has adverse impact on children and households with children, therefore, will be found lawful only if *we determine* that *the practice is necessary to serve a compelling and well-established public purpose* and that *there is available no reasonable alternative means of serving the same need with less discriminatory impact*." The Commission plainly never reached the "reasonable alternative" stage of its "determin[ation]", because as the respondent in that case entirely failed to demonstrate "a compelling and well-established public purpose" as required under the first prong.[45] Decisions of the Commission, like those of a court, "are not authority for propositions not considered"[46] – and there is no indication whatsoever that the Commission considered the burden of proof with regard to the latter "reasonable alternative" criterion. There is certainly nothing in the decision to suggest any intended departure from the federal law endorsed by the Commission *mere paragraphs earlier*.

Similarly, as the ISOR notes, a few of the committee reports for Assembly Bill 2244 (which enacted Section 12955.8) provide a brief summary of the FHA, and include a statement that under federal law "the cases generally have required a respondent/defendant to prove that no less discriminatory practice or policy exist." However, this was, at best, a misreading of the federal caselaw (as demonstrated by HUD's thorough analysis, discussed above). [47] More importantly, relying on a

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[44] *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 217. See also *Broadmoor San Clemente Homeowners v. Nelson* (1994) 25 Cal.App.4th 1, 8 [" It is therefore clear it was the intent of the Legislature, in amending Government Code sections 12955 and 12955.6 to conform California's housing statutes to federal law"].

[45] This is readily apparent from the Commission's description of the deficiency: "All respondents but Ellen Reiley stipulated that the occupancy limits set by state and local rules to protect health and safety would all permit up to 10 persons to reside in two-bedroom apartments at Merribrook, a level far above the two-person limit imposed by respondents. And respondents have shown no link between their general one-person-per-bedroom standard and any other social concern that would remotely qualify as a well-established and compelling public purpose." (*Merribrook,* at p. 15.) The existence or absence of alternatives was plainly not the issue under consideration.

[46] *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.

[47] For example, the Third Circuit caselaw mentioned in the committee reports (i.e., *Resident Advisory Board v. Rizzo* (3rd Cir. 1977) 564 F.2d 126) has been interpreted by the Third Circuit itself as placing the "burden of proving less discriminatory alternative ultimately on plaintiff." (*HUD Discriminatory Effects Rule*, 78 Fed.Reg. at p. 11462, fn. 34 citing *Mt. Holly Gardens Citizens in Action Inc. v. Twp. of Mount Holly* (3rd Cir. 2011) 658 F.3d 375, 382.)

summarized description of federal law to justify departure from the *actual federal law* is plainly contrary to the explicit and repeatedly stated legislative objective of conformity.

The approach proposed in the regulations is not merely inconsistent with FEHA's actual legislative intent, but also represents unworkable policy. HUD declined to obligate respondents to prove the negative for good reason. Particularly in the context of public land use regulation, requiring local governments to preemptively identify and affirmatively disprove the efficacy of every possible alternative action (or inaction) will not promote any action to improve the community or eliminate discrimination – but rather will result only in delay, paralysis, and perpetuation of the status quo. By contrast, obligating the complaining party to identify some potentially better alternative, which the local government may then analyze and address, is a reasonable provision that will not hamper the prosecution of meritorious discriminatory effects cases.[48]

The proposal to reverse the burden of proof on this issue contravenes the Legislature's intent for "conformity," and exceeds the Council's authority. The regulations should retain consistency with the federal authorities, and assign the burden of proof on this element to the complainant. The attached draft incorporates these suggested revisions.

Reasonable Accommodation – Process and Examples

The proposed regulations include a number of mandates relating to requests for reasonable accommodation, including (1) requiring local government to establish new reasonable accommodation procedures, separate from existing variance and use permit processes; (2) requiring that reasonable accommodation requests be kept confidential; (3) prohibiting government agencies from seeking or obtaining input from neighbors or other interested parties; and (4) prohibiting charging any fee in connection with such a request, under any circumstances. These provisions, although apparently well-intentioned, are well beyond the requirements of FEHA and beyond the Council's authority to prescribe.[49]

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[48] The ISOR appears to flatly disagree with HUD, asserting that "[t]his placement of the burden does not require a respondent to 'prove a negative.' Rather, this allocation of the burden only requires the respondent to identify what policy options *it considered* and how and why *it decided* to select the policy it chose as the least discriminatory alternative." This fundamentally misunderstands the legal effect of placing the burden of proof on this issue upon the respondent. Affirmative proof that "[t]here is no feasible alternative practice" will necessarily require more than simply explaining the respondent's own thought process. (Such a mandate would raise its own concerns – but if that is what the Commission intended, the proposed regulations should make that clear.)

[49] See *Esberg, supra,* 28 Cal.4th at pp. 269-270 [regulation may not allow plaintiffs to establish FEHA claims where the FEHA statute itself would not].

More specifically, Section 12061, subdivision (a)(8) prohibits "using a variance or conditional use permit process rather than a reasonable accommodation process to respond to a request for a reasonable accommodation if the process takes into consideration different criteria or uses different processes than those required for consideration as a reasonable accommodation." [50] To begin with, the reference to "using a variance or conditional use permit process . . . *if the process . . . uses different processes* than those required for consideration as a reasonable accommodation" is circular and nonsensical, making it unclear what exactly the Council intended to prohibit.

Moreover, this prohibition, however construed, disregards virtually unanimous authority holding that a government entity may, in fact, process requests for reasonable accommodation "through the entity's established procedures used to adjust the neutral policy in question"[51] – including multiple cases from the Ninth Circuit and District Courts in California,[52] and guidance from HUD and DOJ.[53] As the Attorney General articulated in 2001, there may often be good reasons for local governments to avoid "'exclusive reliance" upon variance or use permit processes to consider reasonable accommodation requests. However, the Attorney General was also careful to note "that several courts called upon to address the matter have concluded that requiring people with disabilities to use existing, non-discriminatory procedures such as these is not of itself a violation of the FHA" - and was equally careful to avoid suggesting that the best practices they "urge[d]" were mandated by federal or state law.[54]

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[50] See also § 12176, subd. (c)(3) ["A request for a reasonable accommodation need not be made in a particular manner..."]

[51] *Tsombanidis v. W. Haven Fire Dep't* (2nd Cir. 2003) 352 F.3d 565, 578-579. See also *United States v. Village of Palatine* (7th Cir. 1994) 37 F.3d 1230; *Oxford House-C v. City of St. Louis* (8th Cir. 1996) 77 F.3d 249.

[52] See, e.g., *Enriching, Inc. v. City of Fountain Valley* (9th Cir. 2005) 151 Fed. Appx. 523 ["The City had no obligation to exempt Enriching from its normal procedures for obtaining a conditional use permit...see also *United States v. Vill. of Palatine*...holding in a zoning case that a municipality 'must be afforded an opportunity to make such an accommodation pursuant to its own lawful procedures'"]; *Solid Landings Behavioral Health, Inc. v. City of Costa Mesa* (C.D.Cal. 2015) 2015 U.S. Dist. LEXIS 52475; *AKI Family Ltd. P'ship v. City of San Marcos* (S.D.Cal. 2007) 2007 U.S. Dist. LEXIS 12986.

[53] Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *State and Local Land Use Laws and Practices and the Application of the Fair Housing Act* (Nov. 10, 2016), at p. 16 ["Where a local land use or zoning code contains specific procedures for seeking a departure from the general rule, courts have decided that these procedures should ordinarily be followed*"]; HUD/DOJ Updated Related Q&A re Group Homes, Local Land Use* (Aug. 6, 2015 ["Where a local zoning scheme specifies procedures for seeking a departure from the general rule, courts have decided, *and the Department of Justice and HUD agree*, that these procedures must ordinarily be followed"].

[54] *Letter to All California Mayors from the Office of the Attorney General*, Bill Lockyer, A.G., re: "Adoption of a Reasonable Accommodation Procedure" (May 15, 2001) at pp. 2-3.

Like the Attorney General, the Council may certainly encourage, but cannot require local governments to develop a new process separate from their existing variance or use permit procedures to consider reasonable accommodation requests.[55] Of course, regardless of the process used, a local government may not deny a requested accommodation inconsistent with FEHA's substantive mandates. The aforementioned authorities provide an appropriate formulation for this principle, which has been incorporated into the attached draft.

In the same vein, Section 12176, subdivision (b) mandates that (among other things) "[a]ll information concerning an individual's . . . . request for an accommodation . . . must be kept confidential." As applied to public land use practices, this provision fails to account for the wide array of laws designed to promote governmental transparency and accountability, including but not limited to the California Public Records Act[56] and Ralph M. Brown (Open Meetings) Act.[57] The HUD/DOJ guidance documents clearly acknowledge that public land use practices differ in this regard from the actions of a housing provider, and the Council should do likewise.[58]

More specifically, the Public Records Act provides that any record in the custody of a public agency is presumptively open for public inspection. Neither state agencies nor local governments have the power to create exceptions to this mandate by regulation. The Act itself contains no blanket exclusion for records relating to

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[55] Although most of the authorities on point were decided under the FHA, there is no indication of a different rule in the FEHA statute – and the Council cannot step ahead of the Legislature and create one. Further, such an action – even if otherwise permissible – would constitute a reimbursable state mandate under Article XIII B of the California Constitution – which is not reflected in the Council's rulemaking materials. (See *In re Medi-Cal Eligibility of Juvenile Offenders* (Dec. 6, 2013) Comm. on State Mandates Dec. No. 08-TC-04, p. 17 [" the test claim statute in this case imposes a new process on counties that does not fit within an existing framework of minimum program requirements. Accordingly, the Commission finds that the test claim statute mandates a new program or higher level of service on counties"], available at https://www.csm.ca.gov/decisions/08-TC-04_AdoptedSOD120613.pdf; *In re Williams Case Implementation I, II, III* (Dec. 7, 2012) Comm. on State Mandates Dec. No. 05-TC-04, pp. 63-64, available at https://www.csm.ca.gov/decisions/506.pdf).

[56] Gov. Code, §§ 6250 et seq.

[57] Gov. Code, §§ 54950 et seq.

[58] The ISOR explanation for this provision (pp. 66-67) cites only the *HUD/DOJ Statement on Reasonable Accommodations, supra*. However, that guidance is directed at "housing providers," *not* public land use practices. (See *Nikolich v. Arlington Heights* (N.D.Ill. 2012) 870 F.Supp.2d 556, 566 [Joint Statement reference to "a 'housing provider'...says nothing about imposing such a duty on municipalities..."].) The applicable guidance document for these activities is the HUD/*DOJ Statement on State and Local Land Use Laws and Practices and the Application of the Fair Housing Act, supra*. This guidance quite clearly contemplates the prospect and permissibility of public involvement in reasonable accommodation requests. (*Id*. at pp. 14, 16.)

reasonable accommodation requests or "private" information; rather, where privacy interests are implicated, the Act requires a careful case-by-case analysis balancing those interests against the public interests in disclosure (and the strong presumption of government transparency).[59] Similarly, where a request for accommodation is considered by a collective body[60], the Brown Act generally requires that any materials provided to the body be made available for public inspection. As before, administrative agencies lack the authority to create blanket exclusions from this rule.

The proposed regulations fail to accommodate these legal requirements – or basic principles of good government and accountability. Section 12176, subdivision (b)(1)(D) acknowledges that disclosures must be permitted if "required by law" – but in practical effect, the regulations would place local governments in an untenable position. If they make any disclosure not absolutely required by law, they face litigation, liability, and attorneys' fees under FEHA – but if they err on the side of caution and refuse disclosure, they face litigation, liability, and attorneys' fees under the Public Records Act. The regulations should be revised to ensure that a city or county does not face unnecessary exposure where it reasonably determines that disclosure is required by law, or is necessary to process the request in accordance with the entity's established non-discriminatory procedure.

Moreover, the proposed confidentiality and procedural requirements would necessarily preclude the local government from seeking or obtaining input from potentially interested parties regarding the requested accommodation. This appears to be a deliberate effort to modify existing law,[61] arising from the concern expressed by the Attorney General regarding "community opposition to projects involving needed housing for the disabled…often grounded on stereotypical assumptions about people with disabilities…[62]

However, in the context of government decision-making, the prospect that some interested persons might make inappropriate comments is no warrant to silence those

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[59] Gov. Code, §§ 6254, subd. (c), 6255. See *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319.

[60] For example, the model reasonable accommodation ordinance circulated by the California Department of Housing and Community Development (available at http://www.hcd.ca.gov/community-development/building-blocks/program-requirements/address-remove-mitigate-constraints/docs/MODEL_REASONABLE_ACCOMODATION_ORDINANCE.pdf) provides for appeal of adverse decisions to the jurisdiction's Planning Commission - a collective body subject to the Brown Act.

[61] Compare *Kulin v. Deschutes County* (D.Or. 2012) 872 F.Supp. 2d 1093, 1099 ["Courts have held that the zoning process*, including hearings on applications for conditional use permits*, serves the purpose of enabling a city to make a reasonable accommodation in its rules, policies and practices"].

[62] *Letter to All California Mayors from the Office of the Attorney General*, supra, at p. 4.

who could have constructive input.[63] The local government may not, of course, acquiesce in any stereotypical assumptions, or base reasonable accommodation decisions on substantive criteria other than those set forth in FEHA; however, these principles are well-addressed in numerous other provisions of the regulations, and can be achieved without creating an opaque and unaccountable governmental process. As above, privacy and transparency interests are both of unquestionable importance, and must be balanced carefully where public land use decisions are concerned.

Similarly, the blanket prohibition upon "charging a fee for seeking or processing a reasonable accommodation"[64] goes beyond the provisions of either the FHA or FEHA. While fees themselves may be subject to waiver, if such waiver is necessary to achieve reasonable accommodation[65], they are not inherently impermissible for municipalities processing requests through established non-discriminatory land use procedures.[66] Indeed, the California Department of Housing and Community Development guidance on this subject contemplates that jurisdictions may charge at least a "minimal" processing fee. [67] The regulations should be revised to reflect the appropriate case-by-case considerations for any municipal fee in this area.

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[63] The applicable HUD/DOJ guidance provides an excellent example of just such appropriate input: "Not all community opposition to requests by group homes is necessarily discriminatory. For example, when a group home seeks a reasonable accommodation to operate in an area and the area has limited on-street parking to serve existing residents, it is not a violation of the Fair Housing Act for neighbors and local government officials to raise concerns that the group home may create more demand for on-street parking than would a typical family and to ask the provider to respond. A valid unaddressed concern about inadequate parking facilities could justify denying the requested accommodation, if a similar dwelling that is not a group home or similarly situated use would ordinarily be denied a permit because of such parking concerns." (*HUD/DOJ Joint Statement on State and Local Land Use Practices, supra,* at p. 14.)

[64] § 12161, subd. (b)(8). See also § 12180, subds. (a)(1), (b)(6).

[65] See, e.g., *United States v. California Mobile Home Park Management Co.* (9th Cir. 1994) 29 F.3d 1413, 1418. See also *Fair Hous. of the Dakotas, Inc. v. Goldmark Prop. Mgmt.* (D.N.D. 2011) 778 F.Supp.2d 1028 [applying case-by-case reasonable accommodation analysis to generally applicable application fee, at the apparent urging of the Department of Justice, which argued that "Waiver of Generally Applicable Fees *May Be Required* Under the FHA *If Necessary To Afford Persons with Disabilities an Equal Opportunity To Use and Enjoy a Dwelling*", https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/goldmark_amicus_11-2-10.pdf - p. 20].

[66] As above, the only authority cited for this provision is the *HUD/DOJ Statement on Reasonable Accommodations, supra*. (ISOR, p. 80.) However, that guidance was directed at "housing providers," not municipal land use regulators. (*Nikolich, supra,* 870 F.Supp.2d at p. 566.) The applicable guidance for Public Land Use Practices (*HUD/DOJ Joint Statement on State and Local Land Use Practices, supra)* notably contains no such suggestion.

[67] See http://www.hcd.ca.gov/community-development/building-blocks/program-requirements/address-remove-mitigate-constraints.shtml - recommending "a ministerial process, with minimal or no processing fee."

Finally, one of the proposed examples of a reasonable accommodation goes beyond FEHA's provisions and should be removed. Section 12180, subdivision (b)(6) (relating to an accommodation request involving a wheelchair ramp) concludes with the parenthetical note that "reasonable accommodations may also be available to Marita if the ramp did extend beyond her property line *into a public right of way*, but a further interactive process might be warranted on those specific facts." The ISOR does not cite – nor have we uncovered – any authority suggesting when, if ever, a municipality is obligated to allow encroachments on public right-of-way, or otherwise grant permanent interests in public property free of charge, as reasonable accommodation *for land use regulations*. Absent authority on the subject, this parenthetical suggestion is inappropriate and misleading, and should be removed. .

Other Breadth and Ambiguity Concerns

A number of other provisions in the proposed regulations utilize language that is overly broad, vague, and raise the specter of unintended consequences:

- The regulations propose to broaden the statutory definition of "owner" [68] to encompass "any person having any...*right of...governance*" – specifically including "political subdivision[s]."[69] This is unnecessary and confusing. Municipalities engaged in land use regulation exercise "governance," in a sense, over private property within their boundaries. However, their authority and responsibility is plainly different from that of the actual property owner – as that term is used both in common parlance and elsewhere throughout the regulations.[70] Public agencies are certainly responsible for any fair housing violations *they may themselves commit* in the course of land use regulation; however, they are not "owners" of private property, nor are they responsible for housing discrimination such owners may commit.[71] The responsibility of government entities' under FEHA can be clearly expressed without conceptually or linguistically conflating "governance" with "ownership."

- Section 12161, subdivision (b) correctly indicates that a land use practice that "reflects acquiescence to the bias, prejudices or stereotypes" of the public, etc. may be discriminatory. However, particular care is required in this area, because

[68] Gov. Code, § 12927, subd. (e).

[69] § 12005, subd. (u)(4).

[70] See, e.g., §§ 12179, subd. (b)(6), 12180, subds. (b)(1)-(7), etc.

[71] The ISOR, p. 12, suggests that "governmental entities that may also constitute owners *in some contexts*"; however, those "contexts" are adequately covered in § 12005, subd. (u)(5), without the unnecessary reference to "governance" or the at best duplicative provisions of subd. (u)(4).

municipal decision-makers often receive a plethora of public input - which they cannot control, and often will not condone. Uncontrollable statements by third-parties should not undermine decisions by elected officials, nor inevitably give rise to litigation. The applicable HUD/DOJ guidance consequently includes a cautionary note, which should be reflected in the regulations: "Of course, a city council or zoning board is not bound by everything that is said by every person who speaks at a public hearing. It is the record as a whole that will be determinative."[72]

- The attempt to define the circumstances under which a government entity may constitute a "business establishment"[73] impermissibly deviates from applicable law. As the ISOR correctly notes, FEHA utilizes the definition of this term as developed by the courts under the Unruh Act.[74] To begin with, the statement that "[g]overnment bodies engaged in enacting legislation to implement governmental functions *may not* constitute business establishments..." suggests uncertainty where there is none. The published California authorities, which represent binding precedent, unequivocally hold that "a city enacting legislation is *not* functioning as a 'business establishment'...".[75] Conversely, the statement that government entities "may be a business establishment if they operate a business such as a shop in a government building" suggests certainty that is unsupported by existing caselaw. While there have been occasional (and entirely dictum) suggestions that a public entity might be a business establishment if "it engages in behavior involving sufficient 'businesslike attributes'",[76] there are no published California decisions articulating what, if any, activities could qualify, and certainly nothing addressing the specific circumstances of "shop[s] in government buildings". The Council should not step so far ahead of the caselaw by articulating new rules of law and factual examples unsupported by existing authority.

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[72] *HUD/DOJ Joint Statement on State and Local Land Use Practices, supra,* at p. 5. See also *HUD/DOJ Updated Related Q&A re Group Homes, Local Land Use* (Aug.6, 2015 ["If the record shows that there were valid reasons for denying an application that were not related to the disability of the prospective residents, the courts will give little weight to isolated discriminatory statements"].

[73] § 12005, subd. (f)(2).

[74] ISOR, p. 5, citing Gov. Code, § 12955.8, subd. (b).

[75] *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 764. See also *Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 172-176; *Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 825; *Burnett v. San Francisco Police Department* (1995) 36 Cal.App.4th 1177.

[76] *Carter, supra,* 224 Cal.App.4th at p. 825.

- The provision addressing language-based discrimination[77] indicates that it does not "expand the obligation to provide translations of certain contracts and agreements as set forth in Civil Code section 1632 or section 1632.5", but leaves it unclear whether the Council intends to create new or expanded obligations to provide translation in other contexts. The regulations should be revised to disclaim such an intent, at least with regard to public land use practices undertaken by government agencies. The obligation to provide translations in this area is already well addressed by several existing laws. Some of these are quite prescriptive,[78] whereas others allow more flexibility[79] - but in each case they represent the Legislature's considered judgment regarding the appropriate obligations, which the Council must respect.[80] Further, recent efforts to expand translation requirements in the land use arena were initially scaled back by the Legislature, and then ultimately vetoed by the Governor.[81] The regulations should clearly avoid any attempt to create obligations that the legislative process has declined to impose.[82]

- Several sections provide a general explanation of how land use practices may violate the Act, and then state that "those practices include" a lengthy list of specific actions and occurrences.[83] As written, it is unclear whether these are intended as examples of practices that *do* meet the stated criteria (and are therefore automatically unlawful), or whether the listed actions *may* be unlawful *only if the stated criteria are proven* by the complainant. In their present context, these examples serve no apparent purpose other than creating the mistaken

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[77] § 12161, subd. (a)(11).

[78] See, e.g., Water Code section 116450 [pertaining to certain notices provided by water systems] and Title VI of the Civil Rights Act of 1964 as implemented by Executive Order 13166 [applicable to certain federally-funded projects].

[79] See, e.g., Government Code sections 7290 et seq. [the Dymally-Alatorre Bilingual Services Act].

[80] The ISOR does not cite – nor have we uncovered – any authority suggesting that FEHA imposes additional translation obligations upon land use regulators, and the Council cannot create such obligations absent statutory authority. (*Esberg v. Union Oil Co., supra,* 28 Cal.4th at pp. 272-273.)

[81] Assem. Bill No. 543 (2013-2014 Reg. Sess.), vetoed Sep. 24, 2014.

[82] Additionally, even if the Council had authority to impose such obligations upon local agencies, this would constitute a reimbursable state mandate – which is not reflected in the Council's rulemaking materials. (See Legis. Counsel's Dig., Assem. Bill No. 543 (2013-2014 Reg. Sess.), as introduced ["By requiring a lead agency to translate these writings, this bill would impose a state-mandated local program"]; *In re False Reports of Police Misconduct* (Jan. 8, 2018) Comm. on State Mandates Dec. No. 00-TC-26, pp. 8-9, available at https://csm.ca.gov/decisions/00tc26sod.pdf) [reimbursable mandate requiring distribution of translated materials].)

[83] See, e.g., §§ 12161, subd. (a), 12162.

impression that the listed conditions are inherently suspect and appropriate for litigation. The ISOR compounds this confusion by describing these practices in unqualified terms as "specific actions that have been identified in FEHA...and in case law, as discriminatory practices in land use and housing programs."[84] The regulatory text and ISOR are misleading and inaccurate, as the practices in question would not, in fact, violate the Act *unless accompanied by the same proof of discriminatory intent or effect necessary to challenge any land use practice*. The regulations should consequently make it clear that these examples are not necessarily or presumptively unlawful, and remain subject to the same analysis as other land use practices. Absent such clarification, this will cause significant misapprehension and confusion for housing advocates, local governments, and the general public.

- In particular, Section 12162, subdivision (a) appears to strongly suggest that "crime-free housing" ordinances are *per se* unlawful or subject to heightened scrutiny.[85] To begin with, this is beyond the Council's authority, and beyond the Legislature's wishes. The legislative history underlying Government Code section 53165 clearly acknowledges that "these ordinances can serve very legitimate needs...",[86] and the Legislature provided parameters for such ordinances, but did not undertake to prohibit them. Similarly, the applicable HUD guidance avoids any suggestion that such ordinances inherently violate the FHA, instead clearly specifying that they are subject to the same legal analysis as any other land use practice.[87] Moreover, this subdivision is poorly drafted, and will invite litigation over such vague terms as "broad definitions of nuisance activities." California's

[84] ISOR, p. 54.

[85] The ISOR quite candidly acknowledges that this regulation is intended to "delineate with more specificity certain land use practices *that are unlawful*," but later appears to contradict this statement and include the appropriate caveat that such ordinances "may violate" FEHA if they are enacted or enforced with discriminatory effect or intent. (ISOR, p. 62.) The only thing this makes clear is the regulations' lack of clarity.

[86] Sen. Comm. on Judiciary, Analysis of Assem. Bill No. 319 (2013-2014 Reg. Sess.) as amended Jan. 9, 2014 [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140AB319#]. See also Assem. Comm. on Pub. Safety, Analysis of Assem. Bill No. 319 (2013-2014 Reg. Sess.) as amended Jan. 9, 2014 [https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140AB319#] [expressing apparent approval of Oakland's nuisance ordinance, which "is intended only to evict perpetrators, not victims of violent crimes from their homes"].

[87] Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances Against Victims of Domestic Violence, Other Crime Victims, and Others Who Require Police or Emergency Services (Sept. 13, 2016), available at: https://portal.hud.gov/hudportal/documents/huddoc?id=FinalNuisanceOrdGdnce.pdf – - e.g., p. 7 ["In the first step of the analysis, a plaintiff...has the burden to prove that a local government's enforcement of its nuisance or crime free housing ordinance has a discriminatory effect..."]

statutory public nuisance provision is itself "broad defined,"[88] and FEHA certainly does not preclude government agencies from requiring that property owners take those actions necessary to avoid it.[89] The legitimate concerns regarding "crime-free" ordinances raised in Section 53165 and the HUD guidance are adequately covered in other subdivisions of Section 12162, making subdivision (a) unnecessary and confusing.

- The proposed definition of "financial services" in Section 12005, subdivision (o) appears to create new and unwarranted legal liability for local governments. For instance, local sheriffs' foreclosure activities are arguably considered "financial services" but are required by the courts and driven by private legal actions. The broad definition of financial services applicable to public land use practices appears to create an avenue to hold local governments liable for some actions over which they may have no control.

In conclusion, we thank the Council for the opportunity to comment on the proposed regulations. Although our concerns are serious, we have been very impressed with the diligent attention to detail of both Councilmembers and staff, and look forward to working with you to produce a final version of these regulations that will achieve our shared goal of eliminating land use discrimination in an effective and workable manner.

To that end, as noted above, we would request that the Council hold at least one hearing in the Sacramento region prior to finalization of the regulations, to ensure full participation by stakeholders who may not be able to attend the April 4th meeting in Los Angeles. Thank you in advance for your consideration.

Sincerely,

ARTHUR J. WYLENE
Governmental Affairs Counsel
RCRC

JASON RHINE
Legislative Representative
LCC

[88] See Civ. Code, § 3479; *Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040.

[89] See also Gov. Code, § 12995, subd. (b) [“Nothing contained in this part relating to discrimination in housing shall affect the nondiscriminatory enforcement of state and local public nuisance laws, provided that those laws do not otherwise conflict with the provisions of this part.”]

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Attachments: Requested Revisions to Proposed Fair Housing Regulations

Fair Employment & Housing Council
Fair Housing Regulations

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapter 7. Discrimination in Housing

TEXT
[All additions to the CA Code of Regulations]

Article 1. General Matters

§§ 12000-12004. [Reserved]

§ 12005. Definitions.

As used in this subchapter, the following definitions shall apply:

(a) "Adverse action" means action that makes housing opportunities unavailable for an aggrieved person. The adverse action need not be related directly to the dwelling or housing opportunity forming the basis for the lawsuit or administrative complaint; for example, filing false allegations about a tenant with a tenant's employer may constitute adverse action. Adverse action includes:

Comment [AJW1]: Change made to conform to statutory limitation in GC 12955(l). See also *El Pueblo v. Kings County Bd. of Supervisors* (Jul. 3, 2012, F062297 [nonpub. opn.] [2012 Cal. App. Unpub. LEXIS 4984]; Gov. Code, § 12995.

Deleted: harms or has a negative effect on

(1) In dwellings that are rented, leased, or otherwise made available for occupancy whether or not for a fee, adverse actions include:

(A) Failing or refusing to rent or lease real property, failing or refusing to continue to rent or lease real property, failing or refusing to add a household member to an existing lease, reducing any tenant subsidy, increasing the rent, reducing services, changing the terms, conditions, or privileges, threatening to or actually filing false reports with tenant reporting agencies, unlawfully locking an individual out of, or otherwise restricting, access to all or part of the premises, harassment, termination, or threatened termination of tenancy, serving a notice to quit, filing an eviction action, evicting a tenant, refusing to provide a reasonable accommodation or reasonable modification, or engaging in any other discriminatory housing practice; and

(B) Taking any action prohibited by California Civil Code sections 1940.2 (a), 1940.3(b), 1940.35, or 1942.5(c) or (e), or Code of Civil Procedure 1161.4(a);

(2) Taking any action prohibited by Article 24 regarding the consideration of criminal history information;

(3) Refusing to sell a dwelling or residential real estate or otherwise failing or refusing to enter into a residential real estate related transaction;

(4) Refusing to provide financial assistance related to a dwelling or residential real estate; or

(5) Taking other action that has an adverse effect on an aggrieved person.

(b) “Aggrieved person” includes any person who:

(1) Believes they have been injured by a discriminatory housing practice; or

(2) Believes that they will be injured by a discriminatory housing practice that is about to occur.

(c) “Arrest” means a record from any jurisdiction that does not result in a conviction and includes information indicating that an individual has been questioned, apprehended, taken into custody or detained, or held for investigation by a law enforcement, police, military, or prosecutorial agency, and/or charged with or indicted for any felony, misdemeanor or other criminal offense.

(d) “Assistance animal” means an animal that is necessary as a reasonable accommodation for an individual with a disability. See also, section 12185. Assistance animals include service animals and support animals. An assistance animal is not a pet. It is an animal that works, provides assistance, or performs tasks for the benefit of an individual with a disability, or provides emotional support that alleviates one or more identified symptoms or effects of an individual’s disability.

(1) “Service animals” are animals that are trained to perform specific tasks to assist individuals with disabilities, including individuals with mental health disabilities. Service animals do not need to be professionally trained or certified, but may be trained by the individual with a disability or another individual. Specific examples include, but are not limited to:

(A) “Guide dog,” as defined at Civil Code section 54.1, or other animal trained to guide a blind individual or individual with low vision.

(B) “Signal dog,” as defined at Civil Code section 54.1, or other animal trained to alert a deaf or hard-of-hearing individual to sounds.

(C) “Service dog,” as defined at Civil Code section 54.1, or other animal individually trained to the requirements of an individual with a disability.

(D) “Miniature horses” meeting the requirements of 28 CFR 35.136(i) and 28 CFR 36.302(c)(9).

(E) “Service animals in training,” including guide, signal, and service dogs being trained by individuals with disabilities, persons assisting individuals with disabilities, or authorized trainers under Civil Code sections 54.1(c) and 54.2(b).

(2) “Support animals” are animals that provide emotional, cognitive, or other similar support to an individual with a disability. A support animal does not need to be trained or certified. Support animals are also known as comfort animals or emotional support animals.

(e) “Building” means a structure, facility, or portion thereof that contains or serves one or more dwelling units.

(f) “Business establishment” shall have the same meaning as in Section 51 of the Civil Code. Business establishments include persons engaged in the operation of a business covered by Section 51 of the Civil Code, insofar as the business is related to dwellings, housing opportunities, financial assistance, or residential real estate-related activities. For example:

(1) The rental, sale, management or operation of residential real estate, including common interest developments and mobilehome parks, constitute business establishments;

(2) Government bodies engaged in enacting zoning and planning legislation or other legislation to implement governmental functions do not constitute business establishments; and

(3) Both nonprofit and for-profit organizations can constitute business establishments depending on the facts, but truly private social clubs not engaged in business activity are not business establishments.

(g) “Common use areas” means rooms, spaces, or elements inside or outside of a building that are made available for the use of residents of a building or the guests thereof. Examples of common use areas include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, elevators, parking areas, garages, pools, clubhouses, dining areas, physical fitness areas or gyms, play areas, recreational areas, and passageways among and between buildings.

(h) “Complainant” means a person who files a complaint with the department alleging that the person has been aggrieved by a practice made unlawful by any law the department enforces.

(i) “Criminal conviction” means a record from any jurisdiction that includes information indicating that an individual has been convicted of a felony or misdemeanor, other than criminal determinations explicitly excluded by section 12269.

(j) “Criminal history information” means any federal, state or local public record, investigative consumer reports, and other compilations, reports, or other formats based on information in public records which include individual identifiers and describe an individual’s arrests and subsequent dispositions. For purposes of this article, persons must not

Comment [AJW2]: “Business…related to…land use” is unclear – and unnecessary given the broad coverage of the other terms in this sentence. This phrase could also be misinterpreted contrary to caselaw, which makes clear that the government is NOT a business establishment when enacting land use requirements. (*Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 825; *Qualified Patients Ass’n v. City of Anaheim* (2010) 187 Cal.App.4th 734, 763–765.

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seek, consider or use information on criminal convictions except in compliance with section 12269.

(k) "Department" means the Department of Fair Employment and Housing.

(l) "Directly related conviction" means the criminal conviction has a direct and specific negative bearing on the identified interest or purpose supporting the practice. In determining whether a criminal conviction is directly related, a practice should consider the nature and severity of the crime and the amount of time that has passed since the criminal conduct occurred as provided in criminal history information, and additional relevant information as provided in criminal history information.

(m) "Discriminatory housing practice" means an act that is unlawful under federal or state fair housing law, including housing-related violations of the Fair Employment and Housing Act, the federal Fair Housing Act, the Unruh Civil Rights Act, the Ralph Civil Rights Act, the Disabled Persons Act, and the Americans with Disabilities Act.

(n) "Dwelling unit" means a single unit of a housing accommodation for a family or one or more individuals.

(o) "Financial assistance" includes the making or purchasing of loans, grants or the provision of other financial assistance relating to the purchase, organization, development, construction, improvement, repair, maintenance, rental, leasing, occupancy, or insurance of dwellings or which are secured by residential real estate, including:

(1) Mortgages, reverse mortgages, home equity loans, and other loans secured by residential real estate;

(2) Insurance and underwriting related to residential real estate, including construction insurance, property insurance, liability insurance, homeowner's insurance, and renter's insurance; and

(3) Loan modifications, foreclosures, and the implementation of the foreclosure process by the lender or other holder of a security interest in residential real estate.

(p) "Housing accommodation" or "dwelling" includes:

(1) One or more dwelling units;

(2) Any building, structure, or portion thereof that is used or occupied as, or designed, arranged, or intended to be used or occupied as, a home, residence, or sleeping place by one individual who maintains a household or by two or more individuals who maintain a common household, and includes all public and common use areas associated with it, if any, including single family homes; apartments; community associations, condominiums, townhomes, planned developments, and other common interest developments as defined in the Davis-Stirling Common Interest Development Act (known colloquially as homeowner associations (HOAs)); housing cooperatives, including those defined under Civil Code 4100(d); single room occupancy hotel rooms; bunkhouses; dormitories, sober living

Comment [AJW3]: Overbroad language removed for consistency with applicable FEHA caselaw. See *Fair Hous. Council v. Roommate.com, LLC* (9th Cir. 2012) 666 F.3d 1216; *Angstman v. Carlsbad Seapoint Resort II, L.P.* (S.D.Cal. 2011) 2011 U.S. Dist. LEXIS 54788. The full proper scope of FEHA coverage is adequately captured by the remaining terms.

Deleted: rooms used for sleeping purposes;

Deleted: and rooms in which people sleep within other types of dwellings in which sleeping accommodations are provided but toileting or cooking facilities are shared by occupants of more than one room or portion of the dwelling

homes; transitional housing; supportive housing; licensed and unlicensed group living arrangements; residential motels or hotels; boardinghouses; emergency shelters; homeless shelters; shelters for individuals surviving domestic violence; cabins and other structures housing farmworkers; hospices; manufactured homes; mobilehomes and mobilehome sites or spaces; modular homes, factory built houses, multi-family manufactured homes, floating homes and floating home marinas, berths, and spaces; communities and live aboard marinas; and recreational vehicles used as a home or residence.

(3) Any vacant land that is offered for sale or lease for the construction of any housing accommodation, dwelling, or portion thereof as defined in subdivision (2); or

(4) All dwellings as defined in and covered by the federal Fair Housing Act (42 U.S.C. § 3602(b)).

(q) "Housing opportunity" includes the opportunity to obtain or use a dwelling, a residential real estate-related transaction, financial assistance in relation to dwellings or residential real estate, or those other housing related services and facilities, including infrastructure or governmental services, necessary to make a dwelling available.

(r) "Includes" or "including" has the same meaning as "includes, but not limited to" or "including, but is not limited to."

(s) "Legitimate" means that a justification is genuine and not false or pretexual.

(t) "Nondiscriminatory" means that the justification for a challenged practice does not itself discriminate based on a protected basis.

(u) "Owner" includes any person having any legal or equitable right of ownership, possession or the right to rent or lease housing accommodations. This may include:

(1) A lessee, sublessee, assignee, managing agent, real estate broker or salesperson;

(2) A trustee, trustee in bankruptcy proceedings, receiver, or fiduciary;

(3) Any person that is defined as a "housing provider" in a statute, regulation or government program or that is commonly referred to as a "housing provider" in the housing industry;

(4) The state and any of its political subdivisions and any agency thereof; agencies, districts, and entities organized under state or federal law; and cities, counties, and cities and counties (whether charter or not), and all political subdivisions and agencies thereof, having any legal or equitable right of ownership or possession or the right to rent or lease housing accommodations; and

(5) Governing bodies of common interest developments.

(v) "Person" or "persons" include:

Comment [AJW4]: Overbroad and overlapping language has been revised for consistency with statute, and to avoid confusion. In particular, "development" and "land use" are not *themselves* a "housing opportunity," but are instead *actions* that may *affect* housing opportunities - and are thus treated elsewhere in the regulations (e.g., § 12005(aa)). Including these actions within the definition of the noun "housing opportunity," while also treating them as actions affecting that noun, is circular and confusing.

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Deleted: development or land use in relation to dwellings or residential real estate,

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Deleted: The state and any of its political subdivisions and any agency thereof;

Deleted: Agencies, districts and entities organized under state or federal law, and cities, counties, and cities and counties (whether charter or not), and all political subdivisions and agencies thereof

(1) An individual or individuals;

(2) All individuals and entities that are included in the definition of "owner";

(3) All individuals and entities that are described in 42 U.S.C. § 3602(d) and 24 C.F.R. 100.20, including one or more individuals, corporations, partnerships, limited liability companies, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy proceedings, receivers, and fiduciaries;

(4) All institutional third parties, including the Federal Home Loan Mortgage Corporation, Fannie Mae, and any other entities that comprise the secondary loan market;

(5) Community associations, condominiums, planned developments, and other common interest developments, including those defined in the Davis-Stirling Common Interest Development Act (Civil Code section 4000 et seq.);

(6) The state and any of its political subdivisions and any agency thereof; agencies, districts, and entities organized under state or federal law; and cities, counties, and cities and counties (whether charter or not), and all political subdivisions and agencies thereof; and

(7) Any entity that has the power to make housing unavailable or infeasible through its practices, including government entities and agencies, insurance companies, real estate brokers and agents, and entities that provide funding for housing

(w) "Practice" includes the following, whether written or unwritten; an action, a failure to act as set forth in section 12010, a rule, law, ordinance, regulation, decision, standard, policy, procedure, and common interest development governing documents pursuant to Civil Code sections 4205, 4340- 4370. Practice also includes "practices" as used in 24 C.F.R. Part 100. "Practice" may encompass singular or multiple occurrences, as set forth in subdivisions (y) and (aa).

(x) "Premises" means the interior or exterior spaces, parts, components, or elements of a building, including individual dwelling units and the public and common use areas of a building.

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<#>"Person" shall be interpreted broadly.¶

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(y) “Private land use practices” include all non-governmental practices (a single action, multiple actions, and failure or failures to act) in connection with development and land use that are related to or have an effect on existing or proposed dwellings or housing opportunities including:

(1) Rehabilitation, transfer, conversion, demolition and development;

(2) Regulations and rules governing use of property and the conduct or characteristics of its occupants;

(3) Provision, denial of, or failure to provide infrastructure, services or facilities and land use that affect the feasibility, use or enjoyment of housing opportunities and existing and proposed dwellings;

(4) Covenants, deed restrictions, and other conditions or constraints on transfer or use of property, whether or not recorded with a county; and

(5) Other actions that make housing unavailable.

(z) “Protected bases” or “protected classes” include race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, age, medical condition, genetic information, citizenship, primary language, immigration status, arbitrary characteristics, and all other classes of individuals protected from discrimination under federal or state fair housing laws, individuals perceived to be a member of any of the preceding classes, or any individual or person associated with any of the preceding classes.

(aa) “Public land use practices” include all practices by governmental entities, as those entities are defined in sections 12005(u)(4) and 12005(v)(6), authorizing, permitting or otherwise allowing development of private or public property for dwellings or those housing related services and facilities necessary to make dwellings available, or that make housing opportunities unavailable. “Public land use practices” may consist of a legislative or quasi-judicial act, and may include failures to act as set forth in section 12010. The following are “Public land use practices” for purposes of this section:

(1) Adoption, modification, implementation or rescission of ordinances, resolutions, actions, policies, permits, or decisions, including authorizations, denials, and approvals of zoning, land use permits, variances, and allocations, or provision or denial of those facilities or services necessary to make dwellings available;

(2) Other actions authorized under the California Planning and Zoning Law (Title 7 (commencing with section 65000)), California Redevelopment Law (Health & Safety Code section 33320 et seq.), “Redevelopment Dissolution Law” (Division 24, Parts 1.8, 1.85 and 1.87), the Ellis Act (Government Code section 7060), the Mobilehome Parks Act (Health and Safety Code section 18200 et seq.), the Special Occupancy Parks Act (Health & Safety Code section 18860 et seq.), the California Relocation Assistance Act (Government Code section 7260 et seq.), the Surplus Lands Act (Government Code

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section 54220 et seq.), State Housing Law (Health and Safety Code section 17910 et seq., Government Code section 65580 et seq.) and other federal and state laws regulating the development, transfer, disposition, demolition, and regulation of residential real estate or existing or proposed dwellings, and the provision of public facilities and services and other practices that affect infrastructure, municipal services and community amenities in connection with housing opportunities;

(3) Provision of municipal infrastructure or services, such as water, sewer, and emergency services, and other services, that are necessary to make housing opportunities available;

(4) Permitting of facilities or services that are necessary to make housing opportunities available;

(5) Adoption, modification or implementation of programs that provide housing opportunities, which include activities where a governmental entity, in whole or in part, owns, finances, develops, constructs, alters, operates, or demolishes a dwelling, or where such activities are done in connection with a program administered by, or on behalf of, a governmental entity, directly or through contractual, licensing, or other arrangements; and

(6) Other practices that make housing opportunities unavailable,

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<#>All practices that could affect the feasibility, use, or enjoyment of housing opportunities;¶

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(bb) "Public use areas" means interior or exterior rooms or spaces of a building that are made available to the general public. Public use areas may be provided at a building that is privately or publicly owned.

(cc) "Residential real estate" means all real property, whether improved or unimproved, that includes or is planned to include dwellings, or is zoned or otherwise designated or available for the construction or placement of dwellings.

(dd) "Residential real estate-related transaction" includes:

(1) Providing financial assistance;

(2) Buying, selling, brokering or appraising of residential real estate; or

(3) The use of territorial underwriting requirements, for the purpose of requiring a borrower in a specific geographic area to obtain earthquake insurance, required by an institutional third party on a loan secured by residential real property.

(ee) "Respondent" means a person alleged to have committed a practice made unlawful by a law the department enforces and against whom a complaint has been filed with the department or civil action has been filed.

(ff) "Substantial interest" means a core interest of the organization that has a direct relationship

to the function of that organization.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, 12955.8, 12956.1, and 12956.2, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§§ 12006-12009. [Reserved]

§ 12010. Liability for Discriminatory Housing Practices.

(a) Direct Liability.

(1) A person is directly liable for:

(A) The person's own conduct that results in a discriminatory housing practice.

(B) Failing to take prompt action to correct and end a discriminatory housing practice by that person's employee or agent, where the person knew or should have known of the discriminatory conduct, including because supervisors, managers, or principals of the person had or should have had such knowledge.

(C) Failing to take prompt action to correct and end a discriminatory housing practice by a third-party in relation to housing accommodations for which the person is an owner, where the owner knew or should have known of the discriminatory conduct and had the power to correct it. The power to take prompt action to correct and end a discriminatory housing practice by a third-party depends upon the extent of any legal responsibility or authority the owner may have with respect to the conduct of such third party. The power, responsibility, or authority can be derived from sources including contracts, leases, common interest development governing documents, or by federal, California, or local laws, regulations, or practices.

(2) For purposes of determining liability under this section, prompt action to correct and end the discriminatory housing practice may not include any action that penalizes or harms the aggrieved person, such as eviction of the aggrieved person. An aggrieved person has a right to raise the discriminatory housing practice as an affirmative defense to an unlawful detainer action.

(3) An employee or agent may be directly liable for a discriminatory housing practice, regardless of whether the employee's or agent's employer or principal knew or should have known of the conduct or failed to take appropriate corrective action.

(b) Vicarious Liability. To the extent permissible by applicable California laws concerning agency, and so long as it is not inconsistent with interpretations of agency under the Fair Housing Act, a person is vicariously liable for a discriminatory housing practice by the person's agent or employee, regardless of whether the person knew or should have known of the conduct that resulted in a discriminatory housing practice.

Comment [AJW5]: This change maintains consistency with the caselaw cited in the ISOR and HUD rule. (While the analogous HUD regulation, 42 CFR § 100.7, itself uses the term "person," those regulations also give "person" a specific and different definition than the proposed regs. here. (Compare 42 CFR § 100.20 with § 12005(v).)

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(1) Whether liability for a discriminatory housing practice is consistent with agency law is a question of fact. However, a discriminatory housing practice can be found to occur even if it violates an agent's or employee's official duties, does not benefit the agent or employer, is willful or malicious, or disregards the agent's or employer's express orders.

(2) An agent or employee shall be considered to be acting within the course and scope of the agency or employment relationship even if his or her discriminatory housing practice occurs incidental to the agent's or employee's job-related tasks. This includes being on the premises of a dwelling for work-related reasons such as conducting repairs.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12983, Government Code.

Articles 2-6. [Reserved]

§§ 12011-12059. [Reserved]

Article 7. Discriminatory Effect

§ 12060. Practices with a Discriminatory Effect.

(a) Liability may be established under the Act based on a practice's discriminatory effect, as defined in paragraph (b) of this section, even if the practice was not motivated by a discriminatory intent. The practice may still be lawful if supported by a legally sufficient justification, as defined in section 12062.

(b) A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of individuals, or creates, increases, reinforces, or perpetuates segregated housing patterns, based on membership in a protected class. A single person may pursue a claim based upon a practice that has disparate impact on a group of individuals, if that person has been injured by the practice.

Deleted: A discriminatory effect may exist even if only a single person suffers harm from the practice.¶

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code.

§ 12061. Burdens of Proof in Discriminatory Effect Cases.

(a) The complainant has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect. The existence of a disparity does not, without more, satisfy the complainant's burden of proof. The complainant's evidence must demonstrate a causal connection between the challenged practice and the disparate impact. If a statistical discrepancy is caused by factors other than the respondent's practice, the complainant cannot establish a prima facie case. Disparate-effect liability mandates the removal of artificial, arbitrary, and unnecessary barriers not the displacement of valid governmental policies.

Comment [AJW6]: All of this language is taken directly from *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.* (2015) 135 S. Ct. 2507

(b) If the complainant satisfies the burden of proof set forth in subdivision (a) of this section, the respondent has the burden of proving that the challenged practice meets the criteria set forth in

subdivisions (a)(1) and (a)(2) or subdivisions (b)(1) through (b)(3), as applicable, of section 12062.

(c) If the respondent satisfies the burden of proof set forth in subdivision (b) of this section, the complainant may still prevail upon proving that there is a feasible alternative practice as set forth in subdivision (a)(3) or (b)(4), as applicable, of section 12062.

(d) The opposing party may rebut whether the party with the burden of proof in subdivision (a), (b), or (c) has met its burden.

(e)(1) The complainant must produce statistical evidence sufficient to demonstrate the existence of a discriminatory effect. Local statistics shall be given greater weight than state or national statistics.

(2) Where such statistical evidence has been produced, other types of evidence that may be relevant in further supporting or in rebutting the existence of a discriminatory effect include:

(1) Other national, state, and local statistics;

(2) Applicant files or data;

(3) Tenant/resident files or data;

(4) Conviction statistics;

(5) Demographic or census data;

(6) Local agency data or records;

(7) Police records and court records, including eviction data;

(8) Survey data; and

(9) Other relevant data.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 42 U.S.C. section 3615; 24 C.F.R. section 100.500 et seq.*; DFEH v. Merribrook Apts.* (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99.

§ 12062. Legally Sufficient Justification.

(a) A business establishment with a practice that has a discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of the Act if a legally sufficient justification exists. A legally sufficient justification exists where:

(1) The practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory

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Comment [AJW7]: This language is based upon 24 CFR § 100.500(b)(i).

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interests of the business;

(2) The practice effectively carries out the identified business interest; and

(3) There is no feasible alternative practice that would equally or better accomplish the identified business interest with a less discriminatory effect.

(b) In cases that do not involve a business establishment, the person whose practice has a discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of the Act if a legally sufficient justification exists. A legally sufficient justification exists where:

(1) The practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory purposes of the non-business establishment;

(2) The practice effectively carries out the identified purpose;

(3) The identified purpose is sufficiently compelling to override the discriminatory effect; and

(4) There is no feasible alternative practice that would equally or better accomplish the identified purpose with a less discriminatory effect.

(c) A legally sufficient justification must be supported by evidence and may not be hypothetical or speculative.

(d) The determination of whether an interest or purpose is substantial, legitimate, and nondiscriminatory requires a case-specific, fact-based inquiry. There are no interests that are per se substantial, legitimate, and nondiscriminatory.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; *DFEH v. Merribrook Apts.* (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99.

§ 12063. Relationship of Legally Sufficient Justification to Intentional Violations.

A demonstration that a practice is supported by a legally sufficient justification, as defined in section 12062, may not be used as a defense against a claim of intentional discrimination under section 12955.8(a) of the Act.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code.

Articles 8-10. [Reserved]

§§ 12064-12099. [Reserved]

Article 11. Financial Assistance Practices

Comment [AJW8]: The proposed regulatory language departs from FEHA's text by focusing on the business establishment's "intent." This alternative language is based on 24 CFR § 100.500(b)(i), and is consistent with both the statutory text and legal effect of Bus. & Prof. Code, § 12955.8, subd. (b).

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§ 12100. Financial Assistance Practices with Discriminatory Effect.

(a) Practices prohibited under this section in connection with loans and financial assistance include the following, unless there is a legally sufficient justification for the practice:

(1) Making available, making unavailable, or discouraging the provision of financial assistance that results in a discriminatory effect based on membership in a protected class;

(2) Establishing the terms or conditions of financial assistance in a manner that results in a discriminatory effect based on membership in a protected class;

(3) Failing or refusing to provide information regarding the availability of financial assistance, or failing or refusing to provide information regarding application requirements, procedures or standards for the review and approval of financial assistance, or providing information which is inaccurate or different from that provided others, that results in a discriminatory effect based on membership in a protected class;

(4) Imposing different terms or conditions on the availability of financial assistance in a manner that results in a discriminatory effect based on membership in a protected class;

(5) Determining the type of financial assistance to be provided or fixing the amount, interest rate, cost, duration, or other terms or conditions for financial assistance in a manner that result in a discriminatory effect based on membership in a protected class;

(6) Servicing of financial assistance, or providing such servicing with different terms or conditions, in a manner that results in a discriminatory effect based on membership in a protected class;

(7) Subjecting a person to harassment in a manner that has the effect of imposing different terms or conditions for the availability of financial assistance that results in a discriminatory effect based on membership in a protected class; and

(8) Conditioning the availability of financial assistance, or the terms or conditions thereof, on a person's response to harassment in a manner that results in a discriminatory effect based on membership in a protected class.

(b) Practices in this section may also be a discriminatory practice if they violate section 12955.8(a) of the Act and any implementing regulations by intentionally discriminating on the basis of membership in a protected class.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code.

§§ 12101-12119. [Reserved]

Article 12. Harassment and Retaliation

§ 12120. Harassment.

(a) General. Quid pro quo and hostile environment harassment because of membership in a protected class constitute discriminatory housing practices.

(1) Quid pro quo harassment. Quid pro quo harassment refers to an unwelcome request or demand to engage in conduct where submission to the request or demand, either explicitly or implicitly, is made a condition related to any of the following: the sale, rental, or availability of a dwelling; the terms, conditions, or privileges of the sale or rental, or the provision of services or facilities in connection therewith; or the availability, terms, conditions, or privileges of a housing opportunity. An unwelcome request or demand may constitute quid pro quo harassment even if an individual acquiesces in the unwelcome request or demand.

(2) Hostile environment harassment. Hostile environment harassment refers to unwelcome conduct that is sufficiently severe or pervasive as to interfere with any of the following: the availability, sale, rental, or use or enjoyment of a dwelling; the terms, conditions, or privileges of the sale or rental; the provision or enjoyment of services or facilities in connection therewith; the availability, terms, conditions, or privileges of a housing opportunity; or constitute any kind of adverse action. Hostile environment harassment does not require a change in the terms, conditions, or privileges of the dwelling, housing opportunity, or housing-related services or facilities.

(A) Whether hostile environment harassment existed or exists depends upon the totality of the circumstances.

(i) Factors to be considered in determining whether hostile environment harassment existed or exist include, but are not limited to, the nature of the conduct, the context in which the incident(s) occurred, the severity, scope, frequency, duration, and location of the conduct, and the relationships of the persons involved.

(ii) Neither psychological nor physical harm must be demonstrated to prove that a hostile environment existed or exists. Evidence of psychological or physical harm may, however, be relevant in determining whether a hostile environment exists or existed, as well as the amount of damages to which an aggrieved person may be entitled.

(iii) Whether unwelcome conduct is sufficiently severe or pervasive as to create a hostile environment is viewed from the perspective of a reasonable person in the aggrieved person's position.

(b) Title VII Affirmative Defenses Not Available. The affirmative defense to an employer's vicarious liability for hostile environment harassment by a supervisor under Title VII of the Civil Rights Act of 1964 is not available in housing cases.

(c) Type of Conduct. Quid pro quo and hostile environment harassment in housing can be written, verbal, or other conduct and do not require physical contact. Quid pro quo and hostile

environment harassment in housing include:

(1) Verbal harassment, including epithets, derogatory comments, or slurs;

(2) Physical harassment directed at an individual, including assault, impeding or blocking movement, or any physical interference with normal movement;

(3) Visual forms of harassment, including derogatory posters, cartoons, drawings, writings, or other documents. Nothing herein shall be construed to contravene the protections provided by Civil Code sections 1940.4 and 4710;

(4) Unwelcome sexual conduct, or other unwelcome conduct, linked to an individual's sex, gender, gender identity, gender expression, or sexual orientation;

(5) Any coercion, intimidation, threats, or interference with a person's exercise or enjoyment of a housing opportunity;

(6) Taking any adverse action against a person in a manner that constitutes quid pro quo or hostile environment harassment, such as representing to an applicant that a dwelling or housing opportunity is unavailable because of the applicant's response to a request for a sexual favor or other harassment;

(7) Revealing private information to a third party about a person, without their consent, in a manner that constitutes quid pro quo or hostile environment harassment, unless such disclosure is required by federal or state law or permitted by an exception set forth in section 12176(b);

(8) Subjecting a person to a discriminatory housing practice may constitute quid pro quo or hostile environment harassment.

(d) Number of Incidents. A single incident of harassment because an individual is a member of a protected class may constitute a discriminatory housing practice, where the incident is sufficiently severe to constitute hostile environment harassment, or evidences quid pro quo harassment.

(e) Persons Protected. The prohibition on harassment extends to conduct that is based on an individual's membership in a protected class, being perceived as a member of a protected class, or on account of having aided or encouraged any person in the exercise of the rights protected by the Act.

(f) Nothing herein is designed to contravene a person's right to petition the government or exercise their rights under the First Amendment to the United States Constitution.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12948, 12955, and 12955.7, Government Code.

§§ 12121-12129. [Reserved]

§ 12130. Retaliation.

(a) It shall be unlawful for any person to take adverse action against an aggrieved person when a purpose for the adverse action is retaliation for engaging in protected activity.

(b) Persons Protected. For purposes of a retaliation claim, an aggrieved person includes any person who has alleged that they have been subject to adverse action due to engagement in a protected activity. For purposes of a retaliation claim, the person does not need to have a claim under any other provision of the Act.

(c) "Protected activity" includes making a complaint, testifying, assisting or participating in any manner in a proceeding under the Fair Housing Act, Fair Employment and Housing Act, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, the Unruh Act, or any other federal, state or local law protecting fair housing rights or prohibiting discrimination in housing; opposition to housing practices believed to be discriminatory or made unlawful by a fair housing law; informing law enforcement or other government agencies of practices believed to be discriminatory or made unlawful by a fair housing law; assertion of rights protected by fair housing laws (including in response to perceived harassment); aiding or encouraging a person to exercise their fair housing rights; meeting or assembling with other persons in order to address potential or actual violations of fair housing rights (including, for example, by joining or organizing a tenant union); making a request for a reasonable accommodation or reasonable modification for an individual with a disability; or any other action related to access to statutory or constitutional remedial processes or remedies for violations of fair housing laws or laws prohibiting discrimination in housing.

(d) Burden-shifting rule. To establish a prima facie case of retaliation, a complainant must show that (1) the complainant was engaged in a protected activity; (2) the respondent subjected the complainant to an adverse action; and (3) a causal link exists between the protected activity and the adverse action. If the complainant can establish a prima facie case, the respondent must then offer a legitimate non-retaliatory reason for the adverse action, whereupon the burden shifts back to the complainant to demonstrate that the proffered reason is pretextual.

(e) "Purpose" means that retaliation formed some part of the basis for the respondent's action even if it was not the sole motivating factor. The purpose must be more than a remote or trivial factor. Purpose may be established by evidence which indicates that the timing of the adverse action in relation to the respondent's notification of the protected activity is such that retaliatory motivation can be inferred, may be established by the non-existence of another plausible purpose for the respondent's adverse action, or by other direct or circumstantial evidence. For purposes of section 12955(f) of the Act, "dominant purpose" shall have the same meaning as purpose under this subsection.

(f) An aggrieved person under this Act may raise retaliation as an affirmative defense in an unlawful detainer action. Nothing in this subsection is intended to cause or permit the delay of an unlawful detainer action due to asserting retaliation as an affirmative defense. Raising retaliation

as a good faith affirmative defense does not in and of itself constitute a delay of an unlawful detainer action.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12948, 12955, and 12955.7, Government Code.

Article 13. [Reserved]

§§ 12131-12154. [Reserved]

Article 14. Residential Real Estate-Related Practices

§ 12155. Residential Real Estate-Related Practices with Discriminatory Effect.

(a) Practices prohibited under this section in connection with a residential real estate-related transaction include the following, unless there is a legally sufficient justification for the practice:

(1) Making available, or making unavailable, a residential real estate-related transaction in a manner that results in a discriminatory effect based on membership in a protected class;

(2) Establishing the terms or conditions of a residential real estate-related transaction in a manner that results in a discriminatory effect based on membership in a protected class;

(3) Failing or refusing to provide information regarding a residential real estate-related transaction or failing or refusing to provide information regarding application requirements, procedures, or standards for the review and approval of the residential real estate-related transaction, or providing information which is inaccurate or different from that provided others, that results in a discriminatory effect based on membership in a protected class;

(4) Imposing different terms or conditions on the availability of a residential real estate-related transaction in a manner that results in a discriminatory effect based on membership in a protected class;

(5) Determining the price or other terms or conditions in connection with a residential real estate-related transaction in a manner that results in a discriminatory effect based on membership in a protected class;

(6) Subjecting a person to harassment that affects a residential real estate-related transaction, in a manner that results in a discriminatory effect based on membership in a protected class; and

(7) Conditioning the availability of a residential real estate-related transaction, or the terms or conditions thereof, on a person's response to harassment in a manner that results in a discriminatory effect based on membership in a protected class.

(b) Practices in this section may also be a discriminatory practice if they violate section 12955.8(a) of the Act and any implementing regulations by intentionally discriminating on the basis of membership in a protected class.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code.

Article 15. Discrimination in Land Use Practices

§§ 12156-12160. [Reserved]

§ 12161. Discrimination in Land Use Practices and Housing Programs Prohibited.

(a) Unless there is a legally sufficient justification for the practice, it shall be unlawful for any person to engage in any public or private land use practice that intentionally discriminates pursuant to Government Code section 12955.8(a) and any implementing regulations based on membership in a protected class, or that causes a discriminatory effect on members of a protected class pursuant to Article 7. For example, a practice that does any of the following may violate the Act, if it is motivated by a discriminatory intent or causes a discriminatory effect, and thereby makes housing opportunities unavailable:

(1) Denies, restricts, conditions, or makes housing opportunities unavailable or denies dwellings to individuals or intended occupants of dwellings;

(2) Imposes different requirements than generally imposed that deny, restrict, or render unavailable housing opportunities;

(3) Provides inadequate, inferior, limited, or no governmental infrastructure, facilities, or services essential for housing opportunities, such as water, sewer, or basic utilities, or otherwise makes unavailable such essential infrastructure, facilities or services;

(4) Denies, restricts, conditions, or renders unavailable the use of services or facilities essential for housing opportunities or existing or proposed dwellings;

(5) Uses, approves of, or implements restrictive covenants, including provisions in governing documents of common interest developments, that restrict sale or use of property on the basis of a protected class, or the intended occupancy of any dwelling by individuals in a protected class, regardless of whether accompanied by a statement that the restrictive covenant is repealed or void;

(6) In the adoption, operation or implementation of housing-related programs, denies, restricts, conditions, or renders unavailable housing opportunities or existing or proposed dwellings;

(7) Refuses or fails to make reasonable accommodations in public or private land use practices or services related to housing opportunities or existing or proposed dwellings, or using a process to respond to a request for a reasonable accommodation that takes into consideration different criteria than those required for consideration as a reasonable

Deleted: has

Deleted: , including a practice that does any of the following in connection with housing opportunities or existing or proposed dwellings

Deleted: adversely impacts, or renders infeasible the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to housing opportunities;¶

Deleted: ¶
M

Comment [AJW9]: Paragraphs (1) and (2) have been combined to remove redundancy, improve clarity, and eliminate potential conflict with governing statute.

Deleted: condition, adversely impact,

Deleted: infeasible

Deleted: opportunities

Deleted: or the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to housing opportunities or existing or proposed dwellings

Comment [AJW10]: Language taken from *Clifton Terrace Assoc., Ltd. v. United Technologies* (D.D.C. 1991) 929 F.2d 714, 719-720.

Deleted: garbage collection, code enforcement, or other municipal infrastructure or services

Deleted: in connection with the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use or in connection with housing opportunities or existing or proposed dwellings,

Deleted: adversely impacts,

Deleted: infeasible

Deleted: privileges,

Deleted: ,

Deleted: associated with

Deleted: , or otherwise makes unavailable such privileges, services or facilities

Deleted: adversely impacts,

Deleted: infeasible the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use, or in connection with

Deleted: the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use, or in connection with residential real estate

Deleted: including charging a fee for seeking or processing a reasonable accommodation,

Deleted: variance or conditional use permit

Deleted: rather than a reasonable accommodation process

Deleted: if the process

Deleted: or uses different processes

accommodation;

(8) Refuses or fails to make, or allows to be made, reasonable modifications in a dwelling when such modifications are required by law;

(9) Denies, restricts, conditions, or renders unavailable housing opportunities or existing or proposed dwellings on the basis of an individual's or individuals' ability to speak, read or understand the English language. However, nothing in this section shall be interpreted to expand the obligation to provide translations of documents, notices, or proceedings beyond that otherwise provided by law, including but not limited to Civil Code section 1632 or section 1632.5, Government Code section 7295, or Water Code section 116450.

(b) Where a public or private land use practice reflects acquiescence to the bias, prejudices or stereotypes of the public, members of the public, or organizational members, intentional discrimination may be shown even if officials or decision-makers themselves do not hold such bias, prejudice or stereotypes. Officials or decision-makers are not assumed to have acquiesced to everything that is said by every person who speaks out at a public hearing or similar proceeding. It is the record as a whole that will be determinative. If the record shows that there were valid reasons for the challenged practice that were not related to a protected class, then little weight will be given to discriminatory statements made by members of the public in the exercise of their right to petition the government under the United States and California Constitution. This is a case-specific analysis.

(c) Application or implementation of a facially neutral practice violates the law if done in a manner that intentionally discriminates on the basis of membership in a protected class, or in a manner that has a discriminatory effect based on membership in a protected class in violation of section 12060 unless there is a legally sufficient justification for the manner in which the practice is applied or implemented.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, 12955.8, 12956.1, and 12956.2, Government Code.

§ 12162. Specific Practices Related to Land Use Practices.

To the extent that public or private land use practices identified in this section require conduct that violates other provisions of the Act and this subchapter, or otherwise restrict or deny residence, or otherwise make housing opportunities unavailable or deny dwellings to individuals because of membership in a protected class or the intended occupancy of any dwelling by individuals in a protected class, or which have a discriminatory effect on the basis of membership in a protected class in the absence of a legally sufficient justification, they shall be unlawful. Examples of practices that may violate the Act include any of the following, if they are motivated by a discriminatory intent or cause a discriminatory effect, and thereby make housing opportunities unavailable:

Comment [AJW11]: The section pertaining to "toxic" land uses is wholly unauthorized by FEHA, and has been removed. See *El Pueblo v. Kings County Bd. of Supervisors* (Jul. 3, 2012, F062297 [nonpub. opn.] [2012 Cal. App. Unpub. LEXIS 4984].

Deleted: <#>Results in the location of toxic, polluting, and/or hazardous land uses in a manner that denies, restricts, conditions, adversely impacts, or renders infeasible the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use, or in connection with housing opportunities or existing or proposed dwellings; or¶

¶

Deleted: adversely impacts,

Deleted: infeasible the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use, or in connection with

Deleted: or otherwise makes housing opportunities unavailable

Deleted: certain contracts and agreements

Deleted: as

Deleted: set forth in

Deleted: .

Comment [AJW12]: Redundant and overbroad language removed for consistency with statute.

Deleted: land ownership, tenancy, or any other land use benefit or housing opportunities,

Deleted: Those practices include actions to enact, modify, enforce, or implement

Deleted: :¶

(a) Practices requiring persons to use specified criminal history records in connection with housing opportunities provided by their business establishment, prohibiting persons from renting or engaging in transactions covered by this Act on the basis of specified criminal convictions, or mandating initiation of eviction proceedings against tenants and occupants arrested, suspected or convicted of crimes;

(b) Practices requiring persons to take actions against individuals based upon their calls to emergency services or visits to the property by emergency services;

(c) Practices requiring persons to take actions against individuals based on information related to immigration status or legal residency or otherwise related to enforcement of laws related to immigration. Activities required by federal law or court order are exempt from this provision; and

(d) Practices that violate, or mandate that other persons violate, Article 24.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, 12955.8, 12956.1, and 12956.2, Government Code.

Articles 16-17. [Reserved]

§§ 12163-12175. [Reserved]

Article 18. Disability

§ 12176. Reasonable Accommodations.

(a) It is a discriminatory housing practice for any person to refuse to make reasonable accommodations in rules, policies, practices, or services when such accommodations may be necessary to afford an individual with a disability an equal opportunity to use and enjoy a dwelling unit and public and common use areas, or an equal opportunity to obtain, use, or enjoy a housing opportunity unless providing the requested accommodation would constitute an undue financial or administrative burden or a fundamental alteration of its program, or if allowing an accommodation would constitute a direct threat to the health and safety of others (i.e. a significant risk of bodily harm) or would cause substantial physical damage to the property of others, as defined in Section 12179(a)(5) or 12185(d)(9).

(1) Subsection (b) of this section describes confidentiality requirements regarding reasonable accommodations;

(2) Subsection (c) of this section defines requirements relating to requests for reasonable accommodations;

(3) Section 12177 of this article describes the interactive process that is required when the duty to consider a reasonable accommodations request has been triggered;

Deleted: <#>Practices requiring persons to take actions against individuals based upon broad definitions of nuisance activities (such as considering a certain number of phone calls to emergency services as a nuisance) or unlawful conduct, or mandating initiation of eviction procedures against tenants or occupants;¶
¶

Comment [AJW13]: This revision is necessary to clarify and maintain the regulations' focus on *housing discrimination*. As written, the regulations could have been interpreted to affect business regulations unrelated to housing. For example, a state or local law prohibiting sex offenders from being employed at daycare centers requires those who operate such centers to "use specified criminal history records in their business establishment." However, such business and occupational regulations raise numerous legal and policy issues outside the scope of these regulations (and outside of the land use discrimination provisions of FEHA).

(4) Section 12178 of this article defines requirements relating to the determination of whether a requested accommodation is necessary;

(5) Section 12179 of this article defines the bases upon which a requested accommodation can be lawfully denied;

(6) Section 12180 of this article states other requirements or limitations in the provision of reasonable accommodations and provides examples of reasonable accommodations.

(b) Confidentiality Regarding Reasonable Accommodations

(1) All information concerning an individual's disability, request for an accommodation, or medical verification or information must be kept confidential and must not be shared with other persons who are not directly involved in the interactive process or decision making about the requested accommodation unless disclosure is:

(A) Required to make or assess the decision to grant or deny the request for accommodation;

(B) Required to effectively administer or implement the requested accommodation;

(C) Authorized by the individual with the disability in writing; or

(D) Reasonably determined by the person making the disclosure to be required by law, including without limitation the California Public Records Act.

Deleted: R

(E)Reasonably determined by a government entity to be necessary to process the request in accordance with the government entity's established procedures.

(c) Requests for Reasonable Accommodations.

(1) The individual with a disability seeking a reasonable accommodation must make a request for such accommodation.

(2) The request for a reasonable accommodation may be made by the individual with a disability, a family member, or someone authorized by the individual with a disability to act on their behalf ("representative").

(3) (A) Except as provided in paragraph (B), a request for a reasonable accommodation need not be made in a particular manner or at a particular time. An individual makes a reasonable accommodation request at the time they request orally or in writing, or through a representative, an exception, change, or adjustment to a practice because of a disability, regardless of whether the phrase "reasonable accommodation" is used as part of the request. A request for a reasonable accommodation may be made at any time, including during litigation, at or after trial.

(B) Where a local land use or zoning code contains specific procedures for seeking a departure from the general rule, these procedures should ordinarily be followed. If no procedure is specified, or if the procedure is unreasonably burdensome or intrusive or involves significant delays, a request for a reasonable accommodation may, nevertheless, be made in accordance with paragraph (A).

(4) The duty to provide reasonable accommodations is an ongoing one. Some individuals with disabilities require only one reasonable accommodation, while others may need more than one. Still others may need one reasonable accommodation for a period of time, and then at a later date, require another type of reasonable accommodation. Each request must be considered separately under the standards in this article.

(5) Adopting a formal procedure may aid individuals with disabilities in making requests for reasonable accommodations and may make it easier to assess those requests and keep records of the considerations given the requests. An individual requesting an accommodation may be asked to use a form or follow a particular procedure. However, except as set forth in paragraph (3)(B), a person may not refuse a request or refuse to engage in the interactive process because the individual with a disability or their representative did not use the preferred forms or procedures. The forms and procedures used may not seek information that is not necessary to evaluate if a reasonable accommodation may be needed to afford an individual with a disability equal opportunity to use and enjoy a dwelling or housing opportunity, such as the information prohibited in section 12178.

(6) A person responsible for responding to accommodation requests must treat a request by an individual with a disability for assistance in completing forms or in following procedures, or a request for alternative methods of communication during the reasonable accommodation process, as a request for reasonable accommodations that must be responded to in the same manner as any other request. In many circumstances, such requests, or the person considering the request, may also be covered by the American with Disabilities Act and the provisions in the ADA and its accompanying regulations requiring the provision of auxiliary aids and services and alternative methods of communication.

(7) Reasonable Accommodation Requests in Unlawful Detainer Actions.

(A) An individual with a disability may raise failure to provide a reasonable accommodation as an affirmative defense to an unlawful detainer action.

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Comment [AJW14]: This language is taken directly from the Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *State and Local Land Use Laws and Practices and the Application of the Fair Housing Act* (Nov. 10, 2016), at p. 16.

(B) A request for a reasonable accommodation in unlawful detainer actions can be made at any time during the eviction process, including at or after trial, and in certain circumstances after eviction. A reasonable accommodation request that is made during a pending unlawful detainer action is subject to the same regulations that govern reasonable accommodation requests at any other time. For example:

(i) Rowan is an individual with a disability who receives Social Security Disability on the sixth day of each month. He is served a three-day notice to pay rent or quit on the second day of the month, but is unable to pay until after the notice expires. As a result, the owner files an unlawful detainer action. At trial, Rowan requests an accommodation to pay his rent on the sixth instead of the first, including allowing a late payment for the month at issue in the trial. The owner must consider the request under these regulations, including considering whether it constitutes an undue financial or administrative burden as defined in section 12179, and engaging in the interactive process under section 12177 as needed.

(ii) Chelsea is an individual with a physical disability. The owner filed a successful unlawful detainer action unrelated to her disability. Chelsea partially moved out the day after the trial, but was unable, without help, to move some larger items (e.g. her couch, bed and dresser) to her new apartment. Because of the disability, she could not lift or carry anything heavy. She requested some additional time as a reasonable accommodation to arrange for help to move her furniture. The owner must consider the request under these regulations, including considering whether it constitutes an undue financial or administrative burden as defined in section 12179 (for example if the owner has the capacity to leave the items in the unit for a period of time or if the unit is not re-rented), and engaging in the interactive process under section 12177 as needed.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, 12927, 12955, and 12955.3, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 12177. The Interactive Process.

(a) If a request for a reasonable accommodation is not promptly granted, the person considering the request for accommodation must engage in a timely (pursuant to subsection (d)), good faith, interactive process with the individual with a disability, or the individual's representative, in order to identify, evaluate, or implement an effective, reasonable accommodation for an individual with a disability.

(b) If the person considering the request for accommodation believes the information received is insufficient to establish either that a disability exists or the nature of the disability-related need for the accommodation, or if the nexus between the disability and the requested accommodation is not clear to the person considering the request for accommodation, the person considering the request for accommodation must seek clarification or additional information pursuant to section 12178 from the individual with a disability or the individual's representative. The person considering the request must not deny it for lack of information without first requesting the clarification or additional information and providing a reasonable opportunity for the individual

requesting the accommodation to provide it.

(c) If the person considering the request believes that the initially requested accommodation cannot be granted for a reason permitted under section 12179, the person considering the request must try to identify if there is another accommodation that is equally effective and must discuss with the individual with the disability or the individual's representative whether other alternative accommodations would be equally effective in meeting the needs of the individual with a disability. If an alternative accommodation would effectively meet the requester's disability-related needs of the individual and could not be lawfully denied for a reason permitted under Section 12179(a)(3)-(6), the person considering the request must grant it. The individual requesting the accommodation is not obligated to accept an alternative accommodation if the alternative accommodation will not meet the needs of the individual with the disability and the initially requested accommodation could not be lawfully denied for a reason permitted under section 12179. In many cases, the individual with the disability has the most accurate knowledge about the functional limitations posed by their disability, and therefore should be given significant weight.

(d) Requests for reasonable accommodations must be promptly considered. The time necessary to respond to a request depends on many factors, including:

(1) The nature of the accommodation under consideration;

(2) Whether it is necessary to obtain supporting information because the disability or the need for the accommodation is not obvious or known to the person considering the request;

(3) Whether the accommodation is needed on an urgent basis; and

(4) Whether it is necessary to engage in the interactive process to resolve the request.

(e) An undue delay by the person considering the request, for example, when there is a failure to act promptly on the need to acquire additional information pursuant to section 12178, may constitute a denial of a reasonable accommodation. Whether a request has been promptly considered is a case-by-case factual determination.

(f) A failure to reach an agreement on an accommodation request after a reasonable attempt to do so is in effect a decision not to grant the requested accommodation. If the individual requesting the accommodation or their representative has, after a reasonable opportunity, unreasonably failed to provide legally relevant information that was requested consistent with the regulations, the person considering the request may find this failure to be grounds for determining that the accommodation could not be granted. However, if after the denial of the initial request, the individual with a disability or their representative makes a later request for the same or similar accommodation, the latter request must be considered pursuant to these regulations independently of the initial request.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921,

12926, 12926.1, 12927, 12955, and 12955.3, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 12178. Establishing that a Requested Accommodation is Necessary.

(a) If an individual with a disability or their representative makes a request for an accommodation that provides reliable information about the disability and how the requested accommodation is necessary to afford the individual with a disability equal opportunity to use and enjoy a dwelling or housing opportunity, then the person considering the request may not request any additional information about the individual's disability or the disability-related need for the accommodation.

(b) If the disability of the individual requesting an accommodation is apparent or known by the person considering the request, and it is also readily apparent or known how the requested accommodation is necessary to afford the individual with a disability equal opportunity to use and enjoy a dwelling or housing opportunity, then the person considering the request may not request any additional information about the requestor's disability or the disability-related need for the accommodation.

(c) If the disability of the individual requesting an accommodation is apparent or known by the person considering the request, but the need for the requested accommodation is not readily apparent or known, then in order to evaluate the disability-related need for the accommodation, the person considering the request may request only information that:

(1) Describes the needed accommodation; and

(2) Shows the relationship between the individual's disability and how the requested accommodation is necessary to afford the individual with a disability equal opportunity to use and enjoy a dwelling or housing opportunity.

(d) If the disability of the individual requesting an accommodation is not readily apparent to the person considering the request, the person may request only information that:

(1) Is necessary to establish that the individual has a disability;

(2) Describes the needed accommodation; and

(3) Shows the relationship between the individual's disability and how the requested accommodation is necessary to afford the individual with a disability equal opportunity to use and enjoy a dwelling or housing opportunity.

(e) A person considering a request for an accommodation may not seek information about:

(1) The individual with a disability's particular diagnosis or medical condition, the severity of the disability, medical records, medical history, other disability or medical issues unrelated to the request, or other disability or health related information beyond the information identified in subdivision (d) above.

(2) Information unrelated to the inquiry in subdivision (d) above.

(f) Depending on the individual's circumstances, information establishing that the individual has a disability can usually be provided directly by the individual with a disability through a variety of means, such as a credible statement or documentation of receipt of disability benefits. A credible statement is one that a reasonable person would believe is true based on the available information. Information confirming that the individual has a disability, or confirming that there is a disability-related need for the accommodation, may also be provided by any reliable third party who is in a position to know about the individual's disability or the disability-related need for the requested accommodation, including:

(1) A medical professional;

(2) A health care provider, including the office of a medical practice or a nursing registry;

(3) A peer support group. Peer support groups are mutual support groups developed as alternatives to traditional medical or psychological treatments. They provide services such as education, peer mentoring, peer coaching, and peer recovery resource connections for groups of people with disabilities or people suffering from a wide range of trauma or illness;

(4) A non-medical service agency or person, including In-Home Supportive Services or Supported Living Services providers; or

(5) Any other reliable third party who is in a position to know about the individual's disability or disability-related need for the accommodation. This could include a relative caring for a child with a disability, a relative caring for an elderly family member with dementia, or others in a caregiving relationship with a person with a disability.

(g) The determination of whether a third party is reliable must be determined on a case-by-case basis. A determination of reliability may take into account:

(1) Information establishing how the third party is familiar with the individual's disability or the disability-related need for the accommodation;

(2) Information that specifies the functional limitations that underlie the request for an accommodation, but this information need not include specific medical information or terminology; or

(3) Information providing a means to contact the third party to verify that the person identified did in fact provide the documentation and to answer any questions permitted by law.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, 12927, 12955, and 12955.3, Government Code.

§ 12179. Denial of Reasonable Accommodation.

(a) A requested accommodation may be denied if:

(1) The individual on whose behalf the accommodation was requested is not an individual with a disability;

(2) There is no disability-related need for the requested accommodation (in other words, there is no nexus between the disability and the requested accommodation);

(3) The requested accommodation would constitute a fundamental alteration of the services or operations of the person who is asked to provide the accommodation;

(4) The requested accommodation would impose an undue financial or administrative burden on the person who is asked to provide the accommodation; or

(5) The requested accommodation would constitute a direct threat to the health or safety of others (i.e. a significant risk of bodily harm) or would cause substantial physical damage to the property of others, and such risks cannot be sufficiently mitigated or eliminated by another reasonable accommodation, pursuant to the following:

(A) A determination that an accommodation poses a direct threat to the health or safety of others or would cause substantial physical damage to the property of others must be based on an individualized assessment that relies on objective evidence, not on mere speculation or stereotype about the requested accommodation or a particular disability or individuals with disabilities in general;

(B) The assessment of whether the specific accommodation in question poses a direct threat to the health or safety of others or would cause substantial physical damage to the property of others must consider, based on objective evidence that is sufficiently recent as to be credible, and not from unsubstantiated inferences:

(i) The nature, duration, and severity of the risk of a direct threat to the health and safety of others or of substantial physical damage to the property of others;

(ii) The probability that a direct threat to the health or safety of others or substantial physical damage to the property of others will actually occur; and

(iii) Whether there are any additional or alternative reasonable accommodations that will eliminate the direct threat to the health or safety of others or substantial physical damage to the property of others; or

(6) A support animal requested as a reasonable accommodation would constitute a direct threat to the health or safety of others or would cause substantial physical damage to the property of others under Section 12185(d)(9).

(b) The determination of whether an accommodation poses an undue financial or administrative

burden must be made on a case-by-case basis and should consider various factors including:

(1) The cost of the requested accommodation;

(2) The financial resources of the person who has been asked to grant the accommodation;

(3) The benefits that a proposed alternative accommodation would provide to the individual with a disability;

(4) The availability of alternative accommodations that would effectively meet the disability-related needs of the individual with a disability;

(5) Where the entity being asked to make the accommodation is part of a larger entity, the structure and overall resources of the larger organization, as well as the financial and administrative relationship of the entity to the larger organization. In general, a larger entity with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller entity with fewer resources; and

(6) Whether the need for the accommodation arises from the owner's failure to maintain or repair the property as required by law or contract, or to otherwise comply with related legal obligations.

(c) A fundamental alteration is a modification that changes the essential nature of the services or operations of the person being asked to provide the accommodation. For example, if a landlord does not normally provide shopping for residents, a request to shop for an individual with a disability could constitute a fundamental alteration.

(d) A person cannot deny a request for a reasonable accommodation based on the person's or another individual's fears or prejudices about the individual's disability, nor can a denial be based on the fact that provision of a reasonable accommodation might be considered unfair by other individuals or might possibly become an undue burden if extended to multiple other individuals who might request accommodations.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, 12927, 12955, and 12955.3, Government Code, *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§ 12180. Other Requirements or Limitations in the Provision of Reasonable Accommodations; and Examples.

(a) Other requirements or limitations in the provision of reasonable accommodations include:

(1) (A) Except as provided in paragraph (B), it is unlawful to charge a fee or require an additional deposit or financial contribution as a condition of receiving, processing, or granting a reasonable accommodation.

Deleted: I

(B) A government agency may charge a reasonable non-discriminatory fee to process a request for reasonable accommodation in accordance with the government entity's established procedures, provided that the government entity must waive the fee if waiver is necessary to provide reasonable accommodation.

Comment [AJW15]: See *United States v. California Mobile Home Park Management Co.* (9th Cir. 1994) 29 F.3d 1413, 1418.

(2) The fact that an accommodation may impose some cost on the person providing the accommodation is not grounds for denial of a request, so long as the cost does not constitute an undue financial or administrative burden, under section 12179.

(3) It is unlawful for a person to request or require that an individual with a disability or representative waive the right to request a future accommodation.

(b) Examples of Reasonable Accommodation:

(1) Progress Gardens is a 300 unit apartment complex with 450 parking spaces which are available to tenants and guests of Progress Gardens on a first-come, first-served basis. John applies for housing in Progress Gardens. John has a mobility disability and is unable to walk more than a short distance and therefore requests that a parking space near his unit be reserved for him so he will not have to walk very far to get to his apartment. Without a reserved space, John might be unable to live in Progress Gardens at all or, when he has to park in a space far from his unit, might have great difficulty getting from his car to his apartment unit. The accommodation therefore is necessary to afford John an equal opportunity to use and enjoy a dwelling. The owner must consider the request under these regulations, including considering whether it constitutes an undue financial or administrative burden as defined in section 12179, and engaging in the interactive process under section 12177 as needed. Because the cost of reserving a space is likely minimal in light of the overall budget of a 300 unit apartment complex, the accommodation does not constitute an undue burden as defined in section 12179(b). Since providing parking spaces is part of the essential operations of the apartment complex, the accommodation is not a fundamental alteration, as defined in section 12179(c). Therefore, in the absence of additional relevant facts, the requested accommodation should be granted.

(2) Miguel is an individual with cognitive impairments that limit his ability to manage his financial affairs. Miguel uses a third party representative payee. He requests that he be able to pay rent through the payee rather than pay directly from his checking account, and that any nonpayment notices be sent to his representative payee as well as himself. This accommodation is necessary because without it Miguel might not be able to pay rent in a regular and timely manner which is necessary for him to fulfill his obligation as a tenant. The owner must consider the request under these regulations, including considering whether it constitutes an undue financial or administrative burden as defined in section 12179, and engaging in the interactive process under section 12177 as needed. Because the cost is likely minimal in light of the overall budget of most apartment complexes, the accommodation does not constitute an undue burden as defined in section 12179(b). Since processing rent payments is part of the essential operations of the apartment

complex, the accommodation is not a fundamental alteration, as defined in section 12179(c). Therefore, in the absence of additional relevant facts, the requested accommodation should be granted.

(3) Abigail, an individual with a disability, receives only SSI (Supplemental Security Income), a government benefit based on her inability to work because of her disability. She requests that she be permitted to add a co-signer on her rental lease in order to meet the minimum income qualifications. If the combined income of Abigail and the co-signer constitutes sufficient income to meet the reasonable minimum income qualifications in light of Abigail's and the co-signer's other financial obligations, and if Abigail would not otherwise be able to rent this apartment, this accommodation may be necessary. The owner must consider the request under these regulations, including considering whether it constitutes an undue financial or administrative burden as defined in section 12179, and engaging in the interactive process under section 12177 as needed. Because the cost is likely minimal in light of the overall budget of most apartment complexes, the accommodation does not constitute an undue burden as defined in section 12179(b). Since making changes to application and screening criteria is part of the essential operations of the apartment complex, the accommodation is not a fundamental alteration, as defined in section 12177(c). Therefore, in the absence of additional relevant facts, the requested accommodation should be granted.

(4) Tuan has quadriplegia and uses a power wheelchair, which can make it difficult for him to travel. He must make arrangements with a paratransit agency and it cannot always accommodate his requests without significant advance notice. He requests a reasonable accommodation for additional time to come into the mortgage lender's office to sign a loan modification application, even though the mortgage company's normal practice is to give little advance notice of the meeting. This accommodation may be necessary because without it Tuan may be unable to sign the loan modification application and so receive the loan. The mortgage company must consider the request under these regulations, including considering whether it constitutes an undue financial or administrative burden as defined in section 12179, and engaging in the interactive process under section 12177 as needed. Because the cost is likely minimal in light of the overall budget, the accommodation does not constitute an undue burden as defined in section 12179(b). Since processing loan modification applications is part of the essential operations of the mortgage company, the accommodation is not a fundamental alteration, as defined in section 12177(c). Therefore, in the absence of additional relevant facts, the requested accommodation should be granted.

(5) Michiko requests an exception to her property's no-pets policy as a reasonable accommodation so that her friend Yoshi, who has a non-apparent disability, is able to visit with his emotional support animal. Yoshi, as an individual with a disability, is entitled to reasonable accommodations. Michiko may request such an accommodation on behalf of Yoshi. As the disability is non-apparent, the owner may request information establishing the disability and the disability-related need for the animal. Discrimination is prohibited against individuals associated with an individual with a disability. Denying Michiko the right to have visitors of her choice, like other tenants, because her visitor has

a disability would constitute discrimination against Michiko because of her association with an individual with a disability. Because without this accommodation Michiko will not be able to receive Yoshi as a visitor at her apartment which is a standard benefit of being a leaseholder this accommodation may be necessary to provide Michiko an equal opportunity to use and enjoy a dwelling, and is therefore a necessary accommodation. The owner must consider the request under these regulations, including considering whether it constitutes an undue financial or administrative burden as defined in section 12179 and engaging in the interactive process under section 12177 as needed. Because the cost to process the request is likely minimal in light of the overall budget, the cost of providing an accommodation does not constitute an undue burden as defined in section 12179(b). Further, since determining the appropriateness of assistance animals is part of the essential operations of the apartment complex, the accommodation is not a fundamental alteration, as defined in section 12179(c). Therefore, in the absence of additional relevant facts or unless the animal poses a direct threat to the health or safety of others or would cause substantial physical damage to the property of others, or unless Yoshi fails to provide the necessary information, the accommodation should be granted. (Note if Yoshi has a service animal, rather than a support animal, the animal would be permitted pursuant to subsection 12185(b) without the need to request an accommodation.)

(6) Marita wants to install a ramp to enable her son, who uses a wheelchair, to enter and leave her house without assistance. Given the small lot, the ramp will extend slightly beyond the permitted set-back requirements on Marita's lot but will still be within Marita's property line and will not cross a public right of way. Marita requests a reasonable accommodation from the city to modify the city's policy or ordinance regarding set-back requirements on her property. Because without the ramp Marita's son would not be able to use the house like any other dweller (coming and going without assistance), this accommodation is necessary to afford him an equal opportunity to use and enjoy a dwelling. The city must consider the request under these regulations, including considering whether it constitutes an undue financial or administrative burden as defined in section 12179, and engaging in the interactive process under section 12177 as needed. Because the cost of processing and permitting her request is likely minimal in light of the city's overall budget, the accommodation does not constitute an undue burden as defined in section 12179(b). Since reviewing building alterations is part of the essential operations of the city, the accommodation is not a fundamental alteration, as defined in section 12179(c). Therefore, in the absence of additional relevant facts, the requested accommodation should be granted.

Deleted: The city must not charge Marita a fee for processing her request, whether or not it is granted, under section 12180(a)(1). (Note that reasonable accommodations may also be available to Marita if the ramp did extend beyond her property line into a public right of way, but a further interactive process might be warranted on those specific facts).

(7) Teresa lives in a second floor apartment in a medium-sized apartment building with a single elevator that was working when she moved in. Last month her leg was amputated and she now uses a wheelchair. The elevator in the building is broken. Teresa cannot leave her home without assistance on the stairs. She requests that the owner expedite repairs to the elevator and offer her the first available ground floor unit. Her request is necessary because there is a nexus between Teresa's disability and her request; without the requested accommodations she will not be able to access her unit using the common area. The owner must consider the request under these regulations, including considering

whether it constitutes an undue financial or administrative burden as defined in section 12179 and engaging in the interactive process under section 12177 as needed. Because the repair would be required by law as part of the owner's obligation to maintain the apartment, and if the costs of the requested accommodations are not burdensome in light of the overall budget of the building, the accommodations would not constitute an undue burden as defined in section 12179(b). Since making repairs is part of the essential operations of the apartment complex, the accommodation is not a fundamental alteration, as defined in section 12179(c). See, section 12179(b)(6). Therefore, in the absence of additional relevant facts, the requested accommodation should be granted. Depending on the time it takes to repair the elevator, or particular difficulties for Teresa, additional accommodation requests may be made that would need to be considered.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, 12927, 12955, and 12955.3, Government Code; *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

§§ 12181-12184. [Reserved]

§ 12185. Assistance Animals.

(a) Assistance animals include guide dogs, signal dogs, service dogs, service animals, and support animals as defined in section 12005(d).

(b) Persons, including tenants, occupants, invitees, owners, and others, are permitted to have service animals in all dwellings (including common use and public use areas), residential real estate, and other buildings involved in residential real estate transactions, subject to the restrictions set forth in subsection (d) below. The only permissible questions that can be asked of an individual to determine if the animal is a service animal are: 1) "Are you an individual with a disability?" and 2) "What is the disability-related task the animal has been trained to perform?" It is not permitted to ask the individual with a disability to demonstrate the task.

(c) Individuals with disabilities who have a support animal may request a reasonable accommodation related to the individual's need for the support animal in dwellings (including common use and public use areas) and residential real estate, and other buildings involved in residential real estate transactions.

(1) The standards, procedures, and defenses in sections 12176 through 12180 for evaluating a request for a reasonable accommodation apply to a request to have a support animal as a reasonable accommodation.

(2) A support animal certification from an online service that does not include an individualized assessment from a medical professional is presumptively considered not to be information from a reliable third party under section 12178(f). An individualized assessment means an assessment based on information that demonstrates that the individual has a disability, describes the needed accommodation (including the species of animal), and describes the relationship between the individual's disability and how the

requested accommodation is necessary to afford the individual with a disability equal opportunity to use and enjoy a dwelling or housing opportunity. A person provided with such a certification must provide an opportunity to the individual requesting the accommodation to provide additional information that meets the requirements of section 12178 before denying a request for reasonable accommodation.

(d) Provisions applicable to all assistance animals include:

(1) An individual with an assistance animal may also be covered by other legal obligations relating to assistance animals, such as the American with Disabilities Act, section 504 of the Rehabilitation Act, Civil Code section 51 et seq., and Government Code 11135, which include additional requirements or prohibitions relating to assistance animals, and may further restrict the nature and type of inquiry that may be made concerning assistance animals;

(2) An individual with an assistance animal shall not be required to pay any pet fee, additional rent, or other additional fee, including additional security deposit or liability insurance, in connection with the assistance animal;

(3) An individual with an assistance animal may be required to cover the costs of repairs for damage the animal causes to the premises, excluding ordinary wear and tear;

(4) An individual may have more than one assistance animal. Each animal must be individually determined to meet the requirements in this article. When an individual already has a support animal as a reasonable accommodation and requests an additional support animal as a reasonable accommodation, the person considering the subsequent request may consider whether the cumulative impact of multiple animals in the same dwelling unit constitutes an undue burden or fundamental alteration;

(5) No breed, size, and weight limitations may be applied to an assistance animal (other than specific restrictions relating to miniature horses as service animals under the Americans with Disabilities Act);

(6) Reasonable conditions may be imposed on the use of an assistance animal to ensure it is under the control of the individual with a disability or an individual who may be assisting the individual with a disability, such as restrictions on waste disposal and animal behavior that may constitute a nuisance, so long as the conditions do not interfere with the normal performance of the animal's duties. For example, a leash requirement may interfere with the ability of a guide dog, signal dog, or service dog to assist an individual, in which case the animal may be under voice control or otherwise responsive. Similarly, a "no noise" requirement may interfere with a dog's job of barking to alert a blind individual to a danger or someone at the door, but incessant barking all night long or when the individual is not at home may violate reasonable restrictions relating to nuisance. Any such conditions may not be more restrictive than those imposed upon other animals on the property;

(7) Animal vests, identification cards, or certificates are not in and of themselves

documentation of either disability or the need for a reasonable accommodation, other than as set forth in subsection (c)(2) above;

(8) If an individual with a disability is denied permission to have an assistance animal, the individual is still entitled to all the rights and privileges that otherwise would have been accorded the individual, so long as the individual no longer has the animal; and

(9) An assistance animal need not be allowed if the animal constitutes a direct threat to the health or safety of others (i.e. a significant risk of bodily harm) or would cause substantial physical damage to the property of others under the following provisions:

(A) In addition to the reasons set out in section 12179 for denial of a request for a reasonable accommodation for a support animal, an assistance animal may be denied if:

(i) The specific assistance animal in question poses a direct threat to the health or safety of others that cannot be sufficiently mitigated or eliminated by another reasonable accommodation; or

(ii) The specific assistance animal in question would cause substantial physical damage to the property of others that cannot be sufficiently mitigated or eliminated by another reasonable accommodation;

(B) A determination that an assistance animal poses a direct threat to the health or safety of others or would cause substantial physical damage to the property of others must be based on an individualized assessment that relies on objective evidence that is sufficiently recent as to be credible, about the specific animal's actual conduct, not on mere speculation or fear about the types of harm or damage an animal may cause or on evidence about harm or damage that other animals have caused.

(C) The assessment of whether the assistance animal poses a direct threat to the health or safety of others or would cause substantial physical damage to the property of others must consider:

(i) The nature, duration, and severity of the risk of a direct threat to the health or safety of others or of substantial physical damage to the property of others;

(ii) The probability that a direct threat to the health or safety of others or substantial physical damage to the property of others will actually occur; and

(iii) Whether there are any reasonable accommodations that will eliminate the direct threat to the health or safety of others or substantial physical damage to the property of others. The reasonable accommodation provisions in Section 12176 through Section 12180 must be used to determine whether there is another or additional reasonable accommodation that would sufficiently mitigate or eliminate the problems creating the direct threat.

(D) Relevant evidence in determining whether an assistance animal imposes a direct

threat includes whether there is evidence that the animal in question is currently engaging in dangerous conduct or has a recent history of overt dangerous acts, as described under Food & Agric. Code section 31601 et seq. A dog that has been finally determined by a court of law to a be "potentially dangerous dog" or "vicious dog" pursuant to Food & Agric. Code section 31601 et seq. shall presumptively be considered to pose a direct threat to the health or safety of others.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12926.1, 12927, 12955, and 12955.3, Government Code; Section 54.1 and 54.2, Civil Code, *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578.

Articles 19-23. [Reserved]

§§ 12186-12264. [Reserved]

Article 24. Consideration of Criminal History Information in Housing

§ 12265. Prohibited Uses of Criminal History Information.

(a) Any practice of a person that includes seeking information about, consideration of, or use of criminal history information is unlawful if:

(1) It has a discriminatory effect under Article 7, unless a legally sufficient justification applies under section 12266;

(2) It constitutes intentional discrimination under section 12267;

(3) It constitutes a discriminatory statement under section 12268; or

(4) It relates to practices specifically prohibited under section 12269.

(b) Subject to the requirements in this article, persons who choose to seek, consider or use criminal history information for decisions or actions covered by the Act may either:

(1) Establish a practice that uses a "bright line" policy (that is, categorical exclusions that do not consider individualized circumstances);

(2) Establish a practice that conducts an individualized assessment of an individual's circumstances; or

(3) Establish a practice that combines a "bright line" policy with an option (either discretionary or required) for an individualized assessment of an individual's circumstances.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code.

§ 12266. Establishing a Legally Sufficient Justification Relating to Criminal History Information.

(a) Persons with a practice of seeking, considering or using criminal history information that has a discriminatory effect on individuals in protected classes must establish that the practice complies with this article and meets all of the prongs of a legally sufficient justification, as set forth in this section and in subsections 12062 (c) and (d).

(b) Business establishment: A business establishment as defined in section 12005 whose practice has a discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of the Act if the business establishment can establish that:

(1) The practice is intended to serve a substantial, legitimate, nondiscriminatory interest, such as the safety of its residents, employees, or property, that is necessary to the operation of the business;

(2) The practice effectively carries out the identified business interest. This element requires that the practice seek, consider, and use only criminal history information regarding directly related convictions. Demonstrating that the practice effectively carries out the identified business interest requires showing that taking adverse action on the basis of the criminal conviction is necessary to prevent a demonstrable risk to accomplishing the identified interest. A demonstrable risk is a risk that is more than speculative and is based on objective evidence. For example, a recent criminal conviction for residential arson could be directly related to the risk that a person may injure other residents or property, and therefore taking adverse action on such a conviction could be necessary to prevent a demonstrable risk of such an injury. In contrast, a ten-year-old conviction for a non-alcohol related traffic offense would not likely be directly related to fulfilling financial obligations, and therefore taking adverse action on such a conviction would not be necessary to prevent a demonstrable risk to that business interest; and

(3) There is no feasible alternative practice that would equally or better accomplish the identified business interest with a less discriminatory effect.

(c) Non-Business establishment: In cases that do not involve a business establishment, the person whose practice has a discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of the Act if the person can establish that:

(1) The practice is necessary to achieve a substantial, legitimate, nondiscriminatory purpose of the non-business establishment;

(2) The practice effectively carries out the identified purpose. This element requires that the practice seek, consider, and use only criminal history information regarding directly related convictions. Demonstrating that the practice effectively carries out the identified purpose requires showing that taking adverse action on the basis of the criminal conviction is necessary to prevent a demonstrable risk to accomplishing the identified interest. A

demonstrable risk is a risk that is more than speculative and is based on objective evidence. For example, a recent criminal conviction for residential arson could be directly related to the risk that a person may injure other residents or property, and therefore taking adverse action on such a conviction could be necessary to prevent a demonstrable risk of such an injury. In contrast, a ten-year-old conviction for a non-alcohol related traffic offense would not likely be directly related to fulfilling financial obligations, and therefore taking adverse action on such a conviction would not be necessary to prevent a demonstrable risk to that business interest;

(3) The identified purpose is sufficiently compelling to override the discriminatory effect; and

(4) There is no feasible alternative practice that would equally or better accomplish the identified purpose with a less discriminatory effect.

(d) The determination of whether there is a feasible alternative practice that would equally or better accomplish the identified purpose with a less discriminatory effect is a fact-specific and case-specific inquiry and will depend on the particulars of the criminal history information practice under challenge. In making that determination, the following factors must be taken into consideration:

(1) Whether the practice provides the individual: (A) an opportunity to present individualized, mitigating information either in writing or in person; and (B) written notice of the opportunity to present mitigating information;

(2) Whether the practice requires consideration of the factual accuracy of the criminal history information;

(3) Whether the practice requires consideration of mitigating information in determining whether to take an adverse action;

(4) Whether the practice delays seeking, considering, or using a third party report of criminal history information until after an individual's financial and other qualifications are verified;

(5) Whether the practice includes providing a copy or description of a person's policy on the use of criminal history information to an individual upon request; or

(6) Any other factor that the court considers relevant to the determination.

(e) Mitigating information means credible information about the individual that suggests that the individual is not likely to pose a demonstrable risk to the achievement of the identified interest.

Credible information is information that a reasonable person would believe is true based on the source and content of the information. Mitigating information includes:

(1) Whether the individual was a juvenile at the time of the conduct upon which the conviction is based;

(2) The amount of time that has passed since the date of conviction;

(3) Evidence that the individual has maintained a good tenant history before and/or after the conviction;

(4) Evidence of rehabilitation efforts, including a person's satisfactory compliance with all terms and conditions of parole and/or probation; successful completion of parole, probation, mandatory supervision, or Post Release Community Supervision; a Certificate of Rehabilitation under Penal Code section 4852.01; or other conduct demonstrating rehabilitation, such as maintenance of steady employment;

(5) Whether the conduct arose from the individual's status as a survivor of domestic violence, sexual assault, dating violence, stalking, or comparable offenses against the individual;

(6) Whether the conduct arose from the individual's disability, or any risks related to such conduct, which could be sufficiently mitigated or eliminated by a reasonable accommodation; or

(7) Other relevant facts or circumstances surrounding the criminal conduct and/or conduct after the conviction.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code.

§ 12267. Intentional Discrimination and the Use of Criminal History Information.

(a) Practices that seek, consider, or use criminal history information may be a discriminatory practice if they violate Government Code section 12955.8(a) and any implementing regulations by intentionally discriminating on the basis of membership in a protected class. This includes cases where selective use of the information is demonstrated to be a pretext for unequal treatment of individuals who are members of a protected class.

(1) For example, the fact that a respondent has acted upon criminal history information differently for a member of a protected class than the respondent has acted upon comparable information for another individual may demonstrate pretext.

(2) Pretext also may be shown where evidence establishes that the respondent did not actually know of the individual's criminal history information at the time of the alleged discrimination.

(b) If the different action is the result of an intervening change in policy pursuant to complying with newly adopted regulations, and the later enacted policy is applied uniformly, the different action shall not, in and of itself, be considered unlawful.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code.

§ 12268. Discriminatory Statements Regarding Criminal History Information.

(a) A person's notice, advertisement, application, or other written or oral statement regarding criminal history information that violates Government Code section 12955(c) or its implementing regulations or which conflicts with the provisions in this article and Article 7 shall be a violation of the Act.

(b) Advertising a lawful screening policy or providing individuals a copy of a lawful screening policy pursuant to section 12266(d)(5) is not unlawful. Offering an individual an opportunity to present individualized, mitigating information pursuant to section 12266(d) and (e) is not unlawful.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, and 12955.6, Government Code.

§ 12269. Specific Practices Related to Criminal History Information.

(a) It is unlawful for a person to:

(1) Seek, consider, use, or take an adverse action based on criminal history information about any arrest that has not resulted in a criminal conviction;

(2) Seek, consider, use, or take an adverse action based on information about any referral to or participation in a pre-trial or post-trial diversion program or a deferred entry of judgment program; provided that if this information was provided by an individual for purposes of offering mitigating information, a person may consider and use such information;

(3) Seek, consider, use, or take an adverse action based on information about any criminal conviction that have been sealed, dismissed, vacated, expunged, sealed, voided, invalidated, or otherwise rendered inoperative by judicial action or by statute (for example, under California Penal Code sections 1203.1 or 1203.4); provided that if this information was provided by an individual for purposes of offering mitigating information, a person may consider and use such information;

(4) Unless pursuant to an applicable court order, seek, consider, use or take an adverse action based on any adjudication in the juvenile justice system, or information regarding a matter considered in or processed through the juvenile justice system; provided that if

this information was provided by an individual for purposes of offering mitigating information, a person may consider and use such information; or

(5) Implement a "blanket ban" or categorical exclusion practice that takes adverse action against all individuals with a criminal record regardless of whether the criminal conviction is directly related to a demonstrable risk to the identified substantial, legitimate, nondiscriminatory interest or purpose. Examples of such prohibited practices include bans against all individuals with a criminal record, bans against all individuals with prior convictions, bans against all individuals with prior misdemeanors, and bans against all individuals with prior felonies.

(b) While laws regulating investigative consumer reports, such as California Civil Code section 1785.13(a)(6), allow the reporting of certain criminal history information up to seven years from the date of disposition, release or parole, a court may consider shorter look-back periods in its determination of whether there is a feasible alternative practice under subsection 12266. A look-back period limits the inquiry to criminal activity that occurred during a certain amount of time prior to the present. Look-back periods are intended to ensure that the criminal history information considered is relevant to the decision being made.

(c) Persons who obtain investigative consumer reports or criminal history information from third parties are also subject to the requirements of applicable federal and state law regarding such reports, including the Fair Credit Reporting Act (15 U.S.C. section 1681 et seq.); the California Consumer Credit Reporting Agencies Act (Civil Code section 1785.2 et seq.); and Civil Code section 1785.10 et seq. relating to consumer credit reporting agencies.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code.

§ 12270. Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History.

In some instances, persons may also be subject to federal or state laws or regulations that require or prohibit consideration of certain criminal history information.

(a) Compliance by a person with specific federal or state laws that apply to the particular transaction at issue and require consideration of criminal history information constitutes an affirmative defense to a discriminatory effect claim under the Act, e.g. Ineligibility of Dangerous Sex Offenders for Admission to Public Housing (42 U.S.C. section 13663(a)) and Ineligibility of Individuals Convicted for Manufacturing or Producing Methamphetamine on Premises of Federally Assisted Housing for Admission to Public Housing and Housing Choice Voucher Programs (24 CFR section 982.553).

(b) Failure of a person to comply with specific federal or state laws that prohibit consideration of specific criminal history information, or that require consideration of mitigating factors or evidence of rehabilitation, in regard to consideration of such history, and that apply to the transaction, may constitute a violation of the Act.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code.

§ 12271. Local Laws or Ordinances.

In some instances, a person may also be subject to local laws or ordinances that provide additional limitations on seeking, considering, or using criminal history information. Nothing in this article exempts persons from compliance with those local laws or ordinances; provided that such local laws or ordinances do not violate the Act or implementing regulations and those limitations are more protective of individuals in protected classes.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code.