

**FAIR EMPLOYMENT AND HOUSING COUNCIL
FAIR HOUSING REGULATIONS**

FINAL STATEMENT OF REASONS

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

UPDATED INFORMATIVE DIGEST [Government Code Section 11346.9(b)].

This rulemaking action implements, interprets and makes specific certain portions of the housing provisions of the Fair Employment and Housing Act (FEHA) as set forth in Government Code section 12900 et seq. As it relates to housing, the FEHA prohibits harassment and discrimination because of the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information, or any basis prohibited by section 51 of the Civil Code.

These are the first regulations promulgated under the housing provisions of FEHA. The Council has determined that the proposed amendments are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Council has concluded that these are the only such regulations that concern the Fair Employment and Housing Act.

The Council heard public comment on the originally proposed text at a public hearing in Oakland on April 4, 2018. The Council initiated three 15-day comment periods and heard public comments at six subsequent meetings: June 21, 2018, in Oakland; August 17, 2018, in Sacramento; December 10, 2018, in Oakland; January 28, 2019, in Sacramento; July 3, 2019, in Los Angeles; and July 31, 2019, in Oakland.

The following list summarizes the Council's amendments to the originally proposed text:

- addition of the definition of "Act" in section 12005(a), which is necessary for clarity since the term is used to refer to the FEHA throughout the regulations, and re-lettering of all subsequent definitions accordingly;
- modification of the definition of "adverse action" in section 12005(b)(1)(A) to replace "and" with "or" for clarity;
- deletion of definition of "arrest" in prior section 12005(d) because it was unnecessary in light of amendments to section 12264;
- modification of the defined term "assistance animals" in section 12005(d) which is necessary to clarify the distinction between service animals and support animals with appropriate cross-references and for internal consistency, and to add reference to

“cognitive or similar” regarding the type of support which an assistance animal might provide to a person with a disability for consistency with the definition of support animal in subsection (d)(2);

- modification of the defined term “business establishment” in section 12005(f) as necessary to add “entities engaged in” for clarity, and to delete an example in subsection (2) that was not specific enough to be clear;
- modification of the defined term “complainant” in section 12005(h) to expand beyond individuals who file complaints with the Department of Fair Employment and Housing to include those who bring civil claims under the Act, which is necessary to adhere to the required coverage under the Act;
- modifications of the defined term “criminal conviction,” and “directly related conviction” in sections 12005(i) and (k) respectively, by deleting certain text to make the definitions clearer and to not include a liability standard in the definition of “directly related conviction”;
- moved the defined term “criminal history information” from section 12005(k) to section 12264 for clarity and modified the definition to clarify that it includes records created for law enforcement purposes, compilations of such records, and other records that link individually identifiable information and an individual’s contacts with any law enforcement agency;
- modification of the defined term “financial assistance” in section 12005(n) to include certain securities or other debts and the pooling or packaging of certain loans or other debts or securities which is necessary to ensure that the regulations provide as much protection to protected classes as federal law (see 24 C.F.R. section 100.125);
- modification of the defined term “housing accommodation” in section 12005(o) which is necessary to clarify that it includes multi-family housing and community apartment projects;
- modification of the defined term “housing opportunity” in section 12005(p) to clarify that its relation to “development and land use” refers to public or private land use practices;
- modification of the defined term “owner” in section 12005(t) by substituting the word “means” for the word “includes” and by substituting the language “including the following if they hold such rights” for the phrase “This may include.” These changes are necessary to clarify that all persons or entities identified in each of the subsections come within the definition so long as they have a “legal or equitable right of ownership, possession or the right to rent or lease housing accommodations.” Also, deletion of “governance” as unnecessary in light of the revisions to the first part of the definition and deletion of language in subsection (5) that was duplicative of the revised language and therefore unnecessary;
- modification of the defined term “person” or “persons” in section 12005(u) by adding a phrase in subsection (5) referring to “HOAs”, by deleting the word “and” in subsection (6), and by adding the word “and” in subsection (7) for clarity purposes;
- modification of the defined term “practice” in section 12005(v) to add the word “practices” as necessary to clarify the scope of the definition;

- modification of the defined term “private land use practices” in section 12005(x) to delete certain words as unnecessary because they are already encompassed in the definition of “practice or practices”;
- modification of the defined term “protected bases” in section 12005(y) to clarify the phrase “arbitrary characteristics,” by including a reference to the Unruh Civil Rights Act, Civil Code section 51 et seq., which covers “arbitrary characteristics” and is incorporated by reference into FEHA in Government Code section 12921;
- modification of the defined term “public land use practices” in section 12005(z) by deleting certain words as unnecessary because they are already encompassed in the definition of “practice or practices,” by revising certain cross-references to reflect other modifications in the proposed regulations, by deleting words in subsection (1) as unnecessary, by adding the word “availability” in subsection (3) to clarify the scope of the regulation as including practices that affect the availability of housing opportunities, and by specifying that regulation of land use includes legislative, quasi-judicial, administrative, and other practices to clarify the scope of the term;
- modification of the defined term “respondent” in section 12005(dd) to include individuals beyond those against whom a complaint is filed with the Department of Fair Employment and Housing or in court to more fully cover those who respond to civil claims under the Act, which is necessary for complying with the required coverage under the Act;
- modification of the defined term “substantial interest” in section 12005(ee) by adding “entity or” in two places in front of “organization” to clarify the scope of the term;
- modifications to provisions in section 12010(a)(1)(B) and (C) regarding direct liability to clarify that whether an action is “prompt” must be determined on a case-by-case basis;
- modifications to provisions regarding vicarious liability in subsection 12010(b), including deleting language that was unclear, adding language to define the nature of vicarious liability and to clarify the scope of the regulation including the relationship between federal and state law standards for vicarious liability, adding language in section 12010(b)(1) to clarify the meaning of an agency relationship; substituting “may” for “shall” in section 12010(b)(2) to clarify the scope of liability, and revising the example in section 12010(b)(2) to clarify when vicarious liability may apply;
- modifications to provisions regarding Practices with a Discriminatory Effect by revising section 12060(a) to clarify the scope of the regulation, adding text in section 12060(b) to describe when a practice predictably results in a disparate impact; adding text in section 12060(b) to clarify when a single person may pursue a claim and deleting the previous text for clarity, and adding certain text in section 12060(b) to clarify that certain housing practices relating to segregation are practices that may give rise to discriminatory effect liability for consistency with Government Code section 12927(c)(1) and to ensure the regulations are at least as protective as federal law in 24 C.F.R. § 100.500(a);
- modifications to section 12061 by adding certain text in 12061(a) and (b) for clarity regarding the scope of the regulation, by substituting the word “elements” for “prongs” in section 12061(b) and rewording the provision regarding the respondent’s burden for clarity; by adding cross-references in section 12061(b) for clarity; by adding certain text

- in section 12061(d) to clarify that the relevance of any types of evidence depends upon the facts of the case and other clarifying text; and by deleting a reference to a Fair Employment and Housing Commission case from the note as unnecessary;
- modifications to section 12062 by adding text in section 12062(a) for clarity regarding the scope of the regulation and deleting prior text, clarifying the meaning of “necessary to the operation of the business” in section 12062(a)(1) by substituting “necessary to achieve” for “intended,” adding “one or more” for clarity, adding “business” to clarify the types of interests that are the focus of this subdivision, deleting “necessary to the operation of the business” as unnecessary because of the other modifications; rephrasing the provisions regarding what constitute a legally sufficient justification for non-business establishments in 12062(b) for clarity; substituting a new sentence in section 12062(c) to clarify the distinction between evidence and hypothetical or speculative justifications; deleting as redundant certain text in section 12062(d) regarding the possibility of per se legitimate interests and adding certain text for clarity; and deleting reference to a Fair Employment and Housing Commission case from the note as unnecessary;
 - modifications to section 12063 by clarifying the title;
 - modifications to provisions regarding financial assistance practices in section 12100 by revising language in section 12100(a) to clarify the scope of the regulation; by adding “in a manner” to sections 12100(a)(1) and (3) for clarity; and by clarifying the applicability of intentional discrimination provisions in section 12100(b);
 - modifications to provisions regarding harassment in section 12120 by clarifying in section 12120(a) that harassment is a discriminatory practice, that harassment under this provision can take two forms (quid pro quo harassment and hostile environment harassment), and that the same conduct may constitute one or more forms of harassment; adding certain text to section 12120(a)(1) to clarify that an action can constitute quid pro quo harassment if avoidance of an adverse action is the condition upon which submission to the request or demand is made; revising section 12120(b) to comply with case law and clarify that the affirmative defense under Title VII to an employer’s vicarious liability for harassment in an employment setting is not available in fair housing law; revising the definition of physical harassment in section 12120(c)(2) to provide clarity by adding or revising numerous examples; revising section 12120(c)(8) by deleting existing text that was not clear and adding certain text to clarify the relationship of different types of harassment to other prohibited conduct under the regulations and by adding an example on that point;
 - modifications to provisions regarding retaliation in section 12130 by adding language in section 12130(a) to clarify the scope of the regulation, revising the defined term “protected activity” in section 12130(c) by adding certain text to clarify when involvement with certain organizations may constitute a protected activity, adding certain text to clarify that a request for a reasonable accommodation is protected activity even if the request is denied, and by revising the text regarding burden-shifting in section 12130(d) for clarity and to include false reasons;

- modifications to provisions regarding practices related to residential real estate-related transactions, by revising the title of the Article for clarity, by adding certain text in section 12155(a) to clarify the scope of the regulation and deleting prior text, by deleting “or” and adding “in a manner that” in section 12155(a)(3) for clarity, and by revising section 12155(b) to clarify the relationship between residential real estate-related transactions and potential liability for intentional discrimination;
- modifications to section 12161, including the following: deleting certain text in section 12161(a) to clarify the prohibition on discrimination; in sections 12161(a)(1) and (a)(2), specifying the scope of the regulation is related to discrimination based upon membership in a protected class, clarifying and distinguishing the two distinct liability standards and their respective defenses, and adding certain cross references for clarity; renumbering the subsections starting with subsection 12161(a)(3) to (b) and related changes thereafter; adding certain text in subsection 12161(b) to specify the scope of the regulation, clarifying that subsection (b) applies to both intentional practices and practices with a discriminatory effect, and clarifying the relationship of subsection (a) to subsection (b); adding language in subsection 12161(b)(3) to clarify that the failure to enforce generally imposed requirements is a practice that may give rise to liability; in sections 12161(b)(7) and(8), adding certain text to clarify the scope of covered land use permitting processes and approvals and their relationship to requests for reasonable accommodations; in section 12161(b)(9), adding language clarifying that refusing or failing to allow a reasonable modification is a practice that may give rise to liability; in section 12161(b)(11), adding additional covered documents to provide greater clarity and direction, adding additional relevant translation and interpretation statutes that may also apply, and clarifying that the section does not reduce existing obligations to provide certain communication services to people with disabilities; and adding subsection 12161(b)(12), which is necessary to clarify that certain land use practices relating to segregation are covered, to ensure consistency with Government Code section 12927(c)(1) and subsection 12060(b), and to ensure that the regulations are at least as protective as federal law which recognizes segregative practices separately (*See* 24 C.F.R. § 100.500(a));
- modifications to section 12162 regarding Specific Land Use Practices by clarifying the scope of conduct covered by using the defined term “housing opportunities” and by deleting redundant text; in subsection 12162(a), specifying the meaning of broad definitions of nuisance activities and clarifying practices that may give rise to liability by giving examples; in subsection 12162(b), moving what had originally been subdivision 12162(e) to (b) and adding “in connection with housing opportunities” to clarify the scope of the regulation; deleting prior subsection 12162(c) as duplicative of newly revised subsection 12162(a); and adding new subsection 12162(d) which is necessary to incorporate language mandated by Government Code 12995(b);
- modifications to section 12176, including the following: in subsection 12176(a), deleting certain language that was not necessary for clarity; in subsection 12176(b)(1)(B), deleting the word “effectively” as unnecessary; in subsection 12176(c)(7), adding reasonable accommodations in financial policies as a covered type of accommodation

request along with examples to reflect applicable case law; and renumbering the following subsection;

- modifications to section 12177 regarding the interactive process, including the following: in subsection 12177(a), adding guidance to clarify when the interactive process is required, to identify the purpose of the interactive process, to clarify that the FEHA does not predetermine the outcome of any interactive process, and to identify other requirements of the interactive process such as timeliness and good faith; in subsection 12177(b), clarifying text regarding when a person considering a request for accommodation must seek clarification or additional information; in subsection 12177(c), defining equally effective accommodations, deleting the unnecessary word “requester’s,” and adding specific subsections to a cross reference for greater clarity; in subsection 12177(d), adding text to explain that whether or not a request for reasonable accommodation is prompt is determined on a case-by-case basis; in subsection 12177(e), clarifying that the scope of the regulation includes situations in which there is no response to a request in a reasonable time; in subsection 12177(f), deleting the unnecessary word “legally” for clarity, clarifying that what constitutes a reasonable attempt, a reasonable opportunity and an unreasonable failure to provide relevant information, when there is a failure to reach an agreement on an accommodation request, all must be decided on a case-by-case basis, and by adding some factors to assist in that determination; and in subsection 12177(g), clarifying that subsequent requests for accommodations must be considered regardless of the reason for the denial of a previous request or requests for accommodation;
- modifications to section 12178 regarding how to establish that a requested accommodation is necessary, including the following: in subsection 12178(b), adding text to define “apparent” and “known” and adding an example for clarity and deleting the word “readily” as unnecessary; in subsection 12178(f), adding text for clarity to explain self-certification methods; dividing former subsection 12178(f) into new subsections (f) and (g) for clarity; and renumbering the subsequent subsection;
- modifications to section 12179 regarding denials of reasonable accommodations, including the following: in subsection 12179(a)(5)(B), clarifying the requirements for determining whether a direct threat exists and explaining the relationship between credibility and the age of evidence; in subsection 12179(a)(5)(B)(ii), substituting “likelihood” for “probability” regarding the direct threat exception for clarity and by adding a cross-reference to the definition of support animal; in section 12179(a)(6), adding certain other clarifying language regarding when a request for a support animal can be denied; in subsection 12179(b), adding a cross reference and changing the word “should” to “must” for clarity; in subsection 12179 (b)(2), adding certain text to clarify whose financial resources are to be considered when determining whether an accommodation poses an undue financial or administrative burden; and in section 12179(c), adding a cross reference and other clarifying language;
- modifications to section 12185 regarding assistance animals, including the following: in subsection 12185(a), clarifying the purpose of the regulation and that it applies to both service animals and support animals, adding cross references for clarity, and deleting

other text as unnecessary; renaming subsections 12185(b), (c) and (d) for clarity and ease of reference; adding cross references to relevant definitions in subsections 12185(b), (c) and (d) for clarity; adding certain text to subsection 12185(c)(2) to clarify the scope of the subsection; adding text and a cross reference to subsection 12185(d) for clarity; adding text to subsection 12185(d)(1) to specify other statutory bases for potential duties regarding assistance animals; adding certain text to subsection 12185(d)(9) to clarify the role of further accommodations in considering whether an animal is a direct threat; adding necessary cross references for clarity in subsection 12185(d)(9); substituting “support animal” for prior references to “assistance animal” in subsections 12185(d)(9)(A)(i)-(ii) for clarity and accuracy; clarifying the relationship between the age of evidence regarding an animal’s conduct and the credibility or reliability of such evidence in subsection 12185(d)(9)(B); adding cross references in subsections 12185(d)(9)(B)-(D) for clarity; and substituting “likelihood” for “probability” for clarity regarding the direct threat exception in subsection 12185(d)(9)(C)(ii);

- modifications to section 12264 regarding criminal history by adding an amended definition of “criminal history information” that was previously found in section 12005(k) for clarity along with a reference note to support the definition;
- modifications to section 12265 by deleting former subsection 12265(b) as unnecessary provision and renumbering subsections for clarity;
- modifications to section 12266 regarding establishing a legally sufficient justification relating to criminal history information, including the following: rephrasing the text in section 12266(a) for clarity and substituting the word “elements” for “prongs” for clarity; adding a more specific cross reference in section 12266(b); revising section 12266(b)(1) to clarify the meaning of “necessary to the operation of the business” by substituting “necessary to achieve” for “intended”; adding the word “business” to clarify the relevant type of interest; adding the words “one or more” for clarity and deleting the words “necessary to the operation of the business” as unnecessary because of the other revisions; clarifying section 12266(b)(2) by adding cross references, providing a liability standard for determining whether a conviction is “directly-related,” revising the example for clarity, and deleting certain other text as unnecessary because of the other revisions; in section 12266(c)(1), adding the words “one or more” for clarity; in section 12266(c)(2), adding a cross reference, providing a liability standard for determining whether a conviction is “directly-related” for clarity, and deleting the example for clarity; in section 12266(d)(2), clarifying meaning of “factual accuracy of criminal history information”; in section 12266(e)(1), clarifying the application of the subdivision to minors and young adults and specifying “criminal” convictions;
- modifications to section 12267 regarding intentional discrimination and the use of criminal history information, including the following: in subsection 12667(a)(1), clarifying the example of pretextual use of criminal history information and adding consideration of mitigating circumstances as a required factor in the determination; adding section 12667(a)(2) to clarify the application of the regulation to situations in which an action is based upon a change in policy made in order to comply with law or

regulation; and deleting prior subsection (b) as unnecessary because of the other revisions;

- modifications to section 12269 regarding specific practices related to criminal history information, including the following: in subsection 12269(a)(1), identifying additional types of information concerning interactions with law enforcement that are necessarily included in the prohibition on seeking, considering, using, or basing an adverse action on criminal history; in subsection 12269(a)(3), adding additional types of information that are prohibited from consideration for clarity and deleting one instance of the word “sealed” which was inadvertently repeated; and in subsection 12269(c), for clarity, specifying certain relevant federal and California statutes and the specific requirement under the federal Fair Credit Reporting Act and deleting prior statutory references;
- more than a dozen non-substantive grammatical and technical revisions (e.g. renumbering subdivisions and using uniform spacing and citation conventions and updating cross-references due to renumbering); and
- deletions of “reserved” sections since such references are unnecessary.

DETERMINATION OF LOCAL MANDATE [Government Code Section 11346.9(a)(2)].

The proposed regulations do not impose any mandate on local agencies or school districts.

ALTERNATIVES CONSIDERED [Government Code Section 11346.9(a)(4)].

The Council considered various alternatives to these regulations based upon comments it received after noticing the rulemaking action; no specific alternatives were considered prior to issuance of the original notice. The Council has herein listed all alternatives it has considered applicable to specified subdivisions of these regulations. Having considered all alternatives, unless otherwise adopted and noted in the Council’s response, the Council has determined that no reasonable alternative it considered, or was otherwise brought to its attention, would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the Fair Employment and Housing Act.

ECONOMIC IMPACT ANALYSIS/ASSESSMENT [Government Code Section 11346.9(a)(5)].

The Council anticipates that the adoption of these regulations will not impact the creation or elimination of jobs or housing, the creation of new businesses or housing or the elimination of existing businesses or housing, or the expansion of businesses or housing currently doing business within the State. To the contrary, adoption of the proposed amendments to existing regulations is anticipated to benefit California businesses, workers, housing providers, owners, tenants, and the State's judiciary by clarifying and streamlining the operation of the law, making it easier for employees, employers, housing providers, owners, and tenants to understand their rights and obligations and reducing litigation costs.

NONDUPLICATION STATEMENT [1 CCR 12].

For the reasons stated below, the proposed regulations partially duplicate or overlap a state or federal statute or regulation which is cited as “authority” or “reference” for the proposed regulations and the duplication or overlap is necessary to satisfy the “clarity” standard of Government Code section 11349.1(a)(3).

COMMENTS RECEIVED DURING THE 45-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

General

Comment: Many provisions are 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.

Council response: The Council has provided detailed definitions, regulations, and cross references in this final statement of reasons to provide more clarity and respond to specific comments.

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

Council response: All proposed regulations are within the Council’s regulatory authority under Government Code Section 12935(a) and are appropriate interpretations of the applicable statutory provisions. Specific concerns about the Council’s authority or the scope of FEHA are addressed where they are raised in the context of a specific proposed regulation.

Comment: 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.

Council response: These proposed regulations comply with Government Code section 12955.6, Construction with other laws, which provides: “Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 et seq.) [collectively “FHA”] or state law relating to fair employment and housing as it existed prior to the effective date of this section. Any state law that purports to require or permit any action that would be an unlawful practice under this part shall to that extent be invalid. *This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.*” Nothing in Section 12955.6 prohibits deviation from the FHA so long as the differences afford greater rights and remedies. In drafting these regulations,

the Council has reviewed applicable law under the federal Fair Housing Act, carefully considered the relationship of the proposed regulations to the federal Fair Housing Act and ensured that these regulations provide equal or greater rights than the federal Fair Housing Act in a manner consistent with the statutory language.

Comment: 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 Act]" does not extend to creating additional bases for liability beyond those provided by the FEHA statute. (Gov. Code section 12935(a); *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.) Where the Act itself does not prohibit particular conduct, the Council may not do so of its own authority. (*Ibid.*) For this reason, in the many areas where the proposed regulations deviate from the guidance and case law applying the federal Fair Housing Act, it is not sufficient merely to note that the Act can provide broader protections than the Federal Fair Housing Act— 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.

Council response: As noted by the commenter, the Council has the power to interpret, implement, and apply the statutory provisions of the Act. The proposed regulations do not exceed the Council's authority, and are consistent with the terms and intent of the Act. *Esberg* is inapplicable because the proposed regulations are not inconsistent with the provisions of the Act. Specific concerns about the Council's authority or the scope of the Act are addressed where they are raised in the context of a specific proposed regulation.

These proposed regulations comply with Government Code section 12955.6, Construction with other laws, which provides: "Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 et seq.) [collectively "FHA"] or state law relating to fair employment and housing as it existed prior to the effective date of this section. Any state law that purports to require or permit any action that would be an unlawful practice under this part shall to that extent be invalid. *This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.*" Nothing in Section 12955.6 prohibits deviation from the FHA so long as the differences afford greater rights and remedies. In drafting these regulations, the Council has reviewed applicable law under the federal Fair Housing Act, carefully considered the relationship of the proposed regulations to the federal Fair Housing Act, and ensured that these regulations provide equal or greater rights than the federal Fair Housing Act in a manner consistent with the statutory language.

Comment: The proposed regulations do not currently address reasonable modifications, which are also required under the Act and federal law. However, we respectfully urge the Council to complete the current rulemaking process and finalize the current set of proposed regulations before drafting fair housing regulations that address topics such as reasonable modifications. We look forward to the Council addressing requirements related to reasonable modifications in the next rulemaking process.

Council response: The Council may consider including reasonable modifications for people with disabilities in future rulemaking actions.

Article 1. General Matters

Section 12005. Definitions.

Comment: There is no definition of "disability" in the regulations. Where is "disability" defined?

Council response: "Disability" is defined in the FEHA, including at Government Code sections 12926(j) (mental disability), 12926(m) (physical disability), 12926.1(b) (legislative findings and declarations) and 12955.3 (disability). Accordingly, the Council did not find adding a definition of "disability" necessary in connection with this rulemaking action.

Section 12005(a) (ultimately renumbered as Section 12005(b)):

Comment: We propose adding a reference to Civil Code section 1632 to make this definition more complete and to specifically address national origin discrimination. We therefore propose adding a new section 12005(a)(5):

(5) Failure to comply with Civil Code section 1632;

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

Council response: The Council disagrees that the proposed additions are necessary to make the definition complete because under appropriate circumstances section 12005(b)(5) could encompass violations of Civil Code section 1632.

Comment: We propose deleting the reference in section 12005(a) to action that "harms or has a negative effect on" an aggrieved person and recommend the following revision in order to better confirm with the statutory limitation in Gov. Code section 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 section 12995.)

(a) "Adverse action" means action that ~~harms or has a negative effect on~~ 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:

Council response: The Council declines to make this revision. The Act's definition of "discrimination" at Government Code section 12927(c) and the Act's definition of "unlawful practices" at Government Code section 12955 incorporate a much broader understanding of discrimination than merely "making housing opportunities unavailable." Adverse actions also encompass actions that constitute harassment or retaliation. This provision is a definition of adverse actions. Whether or not a particular adverse action violates the Act depends upon the application of the Act to the specific action. Finally, by declaring it the public policy of the state to protect the right to be free from discrimination on enumerated bases and declaring the rights protect by the Act to be "civil rights," the legislature has made it clear that the Act's provision must be broadly interpreted. See Government Code sections 12920 and 12921. Government Code section 12993(a) provides for the construction of the Act, both as to housing and employment: "(a) The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof." Courts have consistently held that the Act must be liberally construed. See, e.g. *Auburn Woods / Homeowners Assn. v. Fair Employment and Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 (stating the federal Fair Housing Act provides a minimum level of protection that the Act may exceed); *Brown v. Smith* (1997) 55 Cal.App.4th 767, 780-781 (same); *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157-1158; *Bagatti v. Dept. of Rehabilitation* (2002) 97 Cal.App.4th 344, 367-368; *State Personnel Board v. Fair Employment and Housing Com.* (1985) 39 Cal.3d 422. As one court stated, the legislature intended the Act "to amplify" the rights of victims of discrimination, *Rojo v. Kliger* (1990) 52 Cal.3d 65, 75.

Section 12005(d):

Comment: There is too much confusion over the additional term "assistance animal." We already have the terms "service animal" and "support animal" and there does not appear to be enough distinction in the terms to add the third term, especially to those in a condominium community who are charged with enforcing rules which restrict the number, size, and breed of animals on the premises. By using the word "assistance" animal – which seems to encompass both service and support/companion animals – it seems to be diluting the needs of a higher priority disabled person who needs a service animal for a specific purpose, while elevating the need of a resident who requests a variance from the pet rules to allow a support animal, due to a vaguely defined stress-related claim. For a homeowner's association committee of the board of directors trying to address the needs of its disabled members, and expedite requests for reasonable accommodation for service animals, it makes compliance more complicated than it already is. Once the requesters of accommodation start to use the word "assistance" to describe the animal, it is less definitive in determining if the accommodation is reasonable or not.

Council response: The Council disagrees with the comment. Both "service animal" and "support animal" are defined specifically in the regulations. And "assistance animal" is clearly defined as a term that encompasses both "service animal" and "support animal." The term "assistance

animal” is then used in the regulations when a regulation is intended to cover both "service animals" and "support animals." The Council also notes that number, size, and breed restrictions do not apply to assistance animals. See section 12185(d)(5). And neither the Act nor the proposed regulations provide for any “priority” among people who need assistance animals.

Comment: This subsection states that an assistance animal is “an animal that is necessary as a reasonable accommodation for an individual with a disability.” Service animals, including guide dogs, signal dogs, and service dogs are included in the definition of assistance animals. This definition is misleading in light of the Council’s position that allowing service animals in housing accommodations is not a reasonable accommodation issue, but rather that there is an absolute right under the Unruh Act for such animals to be brought into housing accommodations. Therefore, it would be misleading to define assistance animals by referencing reasonable accommodations. We recommend the definition be revised as follows:

(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.”~~

Council response: The Council agrees with the comment and has revised the regulation to clarify that the term “assistance animal” includes service animals and support animals, as described in subsections 12005(e)(1) and (2) [ultimately renumbered as subsections 12005(d)(1) and (2)].

Section 12005(f):

Comment: FEHA utilizes the definition of “business establishment” as developed by the courts under the Unruh Act. 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’. . .” (*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.) 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 case law. 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.” Further, case law makes clear that the government is *not* a business

establishment when enacting land use requirements. (*Carter v. City of Los Angeles, supra*, at p. 825; *Qualified Patients Assn. v. City of Anaheim, supra*, at p. 763–765.)

(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, ~~land use~~, or residential real estate-related activities. ~~The term business establishment shall be broadly interpreted.~~ For example:

...

(2) Government bodies engaged in enacting zoning and planning legislation or other legislation to implement governmental functions ~~may do~~ not constitute business establishments, ~~but they may be a business establishment if they operate a business such as a shop in a government building; and~~

Council response: The Council partly agrees and partly disagrees with the comment. The Council has revised subsection (2) by deleting the example of “a shops in a government building” because that example does not provide substantial additional clarity. The Council declines to adopt the proposed revision that a local government enacting legislation can *never* be acting as a business establishment. Neither decision cited in the comment extends that far, and the Council declines to predict how courts will interpret this provision of the Unruh Act in the future. *Qualified Patients* involved medical marijuana, not zoning and planning, and only addressed “the city’s legislative action *here*” *Id.* at 764. (Emphasis added.); *Carter* addressed provision of sidewalks and curb cuts, and the court discussed conflicting cases on the issue of whether the City was covered by Unruh and declined to determine the issue definitively. *Id.* at 825.

Section 12005(g):

Comment: The definition of common areas found in this subsection is broad enough that it could be interpreted to include the inside of individual dwellings. This does not appear to be the intention. We recommend inserting the word “shared” into the definition to clarify that common areas do not include individual dwelling units.

(g) “Common use areas” means rooms, spaces, or elements inside or outside of a building that are made available for the shared 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.

Council response: The Council disagrees with the comment. The proposed revision is unnecessary and would not add useful clarity to this provision. The term “common areas” is adequately described, and adding the term “shared” may create confusion.

Section 12005(h):

Comment: Because these regulations will not only be used to evaluate complaints that are submitted to the Department, but also civil actions filed alleging violations of FEHA, we ask the Council to clarify that the burden of proof standard in 12061 not only applies to a “complainant,” as currently defined in proposed section 12005(h), but also to plaintiffs who assert one or more FEHA claims using a discriminatory effects theory in a lawsuit. This is consistent with the approach in HUD’s Discriminatory Effects Rule, as well as with the Council’s Initial Statement of Reasons. (See HUD, “Implementation of the Fair Housing Act’s Discriminatory Effects Standard,” 78 Fed. Reg. 11,460 (Feb. 15, 2013), 24 C.F.R. § 100.500(c) (using the terms “charging party” and “plaintiff”).) The simplest way to accomplish this end is to amend the definition of “complainant” in proposed section 12005(h) as follows:

(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; *a person who files a civil action alleging that the person has been aggrieved by a practice made unlawful by any law the department enforces; or a person who has filed both a complaint with the department and a civil action alleging that the person has been aggrieved by a practice made unlawful by any law the department enforces.*

Council response: The Council agrees with this comment and has amended the language of section 12005(h), expanding the definition of “complainant” to include a person who files a civil claim or counterclaim or who raises an affirmative defense in the course of litigation alleging that the person has been aggrieved by a practice made unlawful by any law the department enforces.

Section 12005(i):

Comment: This definition excludes certain criminal history information from the definition of criminal conviction because that information is not allowed to be considered by a housing provider. While we understand that the regulations place restrictions on what criminal history information may be considered by a housing provider, it is confusing to say that certain convictions are not criminal convictions simply because they cannot be considered. We recommend the definition be revised as follows:

(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.~~

Council response: The Council agrees this revision adds clarity and has amended the provision accordingly.

Section 12005(l) (ultimately renumbered as Section 12005(k):

Comment: The term “directly related convictions” is used in the second prong of a legally sufficient justification as defined in subsections (b)(2) (business entities) and (c)(2) (non-business entities) of Section 12266. These two subsections require that the practice effectively carry out the identified business interest/legitimate purpose, and as part of that requirement, the housing provider is limited to considering only directly-related convictions. Yet, it is not clear how the “directly-related conviction” requirement differs from other requirements in the legally sufficient justification test. For example, both subsections (b)(2) and (c)(2) of section 12266 (the same sections that reference directly related convictions) require that the practice demonstrate that “taking adverse action on the basis of the criminal conviction is necessary to prevent a demonstrable risk to accomplishing the identified interest.” It is unclear how this requirement is different from the requirement for “directly related convictions” to have “a direct and specific negative bearing on the identified interest or purpose supporting the practice.” Both of these standards appear to require the same thing: that the convictions considered be related to the interest that the practice is alleged to serve. Presumably there is some difference between these two requirements though, because otherwise there would be no reason to have two different standards.

Similarly, the definition of “directly related convictions” requires consideration of “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.” It’s unclear how these factors (nature and severity of the crime, as well as time elapsed) differ from the factors that are considered “mitigating information” in section 12266(e). Confusing things further, the definition of “directly-related convictions” also requires consideration of “additional relevant information as provided in criminal history information.” It’s not clear what this means, or how it differs from the “other relevant facts or circumstances surrounding the criminal conduct and/or conduct after the conviction” that is considered to be “mitigating information.” Whether mitigating information is considered is listed as one of the factors to be considered in determining whether a less discriminatory alternative exists (the third prong of a legally sufficient justification). This overlap of requirements creates a great amount of confusion, which makes it impossible for a housing provider to develop a coherent policy that complies with the regulations.

Council response: The Council agrees with part of this comment and disagrees with other parts of the comment. The Council has amended this section, as well as sections 12266(b)(2) and (c)(2), in order to clarify the standard for consideration of directly-related convictions. The definition of “directly-related convictions” has been amended to “a criminal conviction that has a direct and specific negative bearing on the identified interest or purpose supporting the practice.” The reference to “consideration of additional relevant information as provided in criminal history information” has been deleted from the definition of “directly-related convictions.” The Council disagrees that the determination of “directly related convictions” as amended is insufficiently distinct from “mitigating information” in section 12266(e). A person choosing to use a criminal history information practice in housing decisions must only use and consider “directly related convictions,” and in order to meet the “no feasible alternative practice” element might be required to consider “mitigating information” which is defined in

section 12266(e) as “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.”

Section 12005(o) (ultimately renumbered as Section 12005(n):

Comment: “Financial assistance” should be defined to include the purchasing and pooling of securities to reflect current market practices, and to parallel the protections laid out in federal law. Federal regulations interpreting the Fair Housing Act, 24 C.F.R. section 100.125, incorporate discriminatory practices related to securities and the pooling of securities. The Council should ensure that these regulations are at least as protective and comprehensive as federal regulations by incorporating these concepts. (Gov’t Code §12955.6; *Auburn Woods I Homeowners Ass’n v. Fair Employment and Housing Com’n* (2004) 121 Cal.App.4th 1578, 1591 (FEHA may not be construed to provide lesser protections than the federal Fair Housing Act, and may be construed to provide greater protections).) In addition, discriminatory advertising and marketing is prohibited by federal and state law and should be incorporated into the definition of “financial practices.” (Gov’t Code 12955(c); 42 U.S.C. 3604(c).) We therefore suggest the following changes to the definition:

(o) “Financial assistance” includes the making or purchasing of loans, grants, *securities or other debts, and pooling or packaging of loans or other debts or securities*, or the provision of other financial assistance, *including advertising and marketing of such 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:...

Council response: The Council agrees that “financial assistance” should be defined to include the purchasing and pooling or packaging of loans and that the addition of these terms ensures the provisions are at least as protective as federal regulations that interpret the Fair Housing Act (24 C.F.R. section 100.125). Accordingly, the Council added them to the definition. The Council disagrees that proposed text relating to advertising and marketing should be added because marketing and advertising are not addressed in these regulations. The Council disagrees that marketing and advertising are part of the definition of financial assistance.

Comment: This definition includes the phrase “which are secured by residential real estate” towards the end of the section. While this phrase makes sense in reference to loans, it does not make sense in reference to insurance or other types of financial assistance listed in the definition. We recommend moving the phrase so that it is paired with loans:

(o) “Financial assistance” includes the making or purchasing of loans which are secured by residential real estate, 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:

Council response: The Council partly agrees and partly disagrees with the comment. The Council amended the proposed provision to clarify that “secured by residential real estate” only qualifies certain kinds of financial assistance, specifically the pooling or packaging of loans or other debts or securities. Other forms of financial assistance relating to housing are not necessarily secured by residential real estate.

Section 12005(o)(3) (ultimately renumbered as Section 12005(n)(3)):

Comment: The proposed definition of "financial services" 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.

(o)(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.

Council response: The Council disagrees with the comment and declines to adopt the proposed language. The definition of “financial assistance” (not “financial services” [sic]) does not expand the current legal liability of local governments, and the commenter fails to provide any legal authority for the assertion.

Section 12005(p)(2) (ultimately renumbered as Section 12005(o)(2)):

Comment: We recommend the Council remove overbroad language in this provision to bring the section in closer consistency with applicable FEHA case law. (*See Fair Hous. Council v. Roommate.com, LLC* (9th Cir. 2012) 666 F.3d 1216; *Angstman v. Carlsbad Seapointe 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.

(p)(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); ~~rooms used for sleeping purposes; single room occupancy hotel rooms 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~~; bunkhouses; dormitories, sober living 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.

Council response: The Council disagrees with the comment. This section is a definition, not a liability rule so it does not conflict with the cases cited by the comment. Whether any particular housing accommodation is subject to *Roommate.com*'s holding is a fact-specific application of the Act.

Comment: This section refers to 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's associations (HOAs)); housing cooperatives, including those defined under Civil Code 4100(d). I would suggest the word "apartment" be changed to "community apartment project" which is one of the four types of common interest developments in California. I would also suggest the term "single family" is potentially discriminatory reference that has no basis in statutes and is simply a marketing term. We have endeavored over the years to remove references to "single family" from CC&Rs and rules specifically to avoid allegations of potentially discriminatory effect.

(p)(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, community apartment projects, 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); rooms used for sleeping purposes; single room occupancy hotel rooms 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; bunkhouses; dormitories, sober living 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.

Council response: The Council agrees with part of the comment and disagrees with part of the comment. The Council agrees that adding the phrase “community apartment projects” adds clarity and has amended the provision accordingly. While the Council agrees that in some situations, the term “single family” may implicate discrimination, it disagrees that the term is merely a marketing term since it is found in many localities’ zoning ordinances.

Section 12005(q) (ultimately renumbered as Section 12005(p)):

Comment: We recommend revising this provision to remove overbroad and overlapping language 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., section 12005(aa) [ultimately renumbered as section 12005(z)]). Including these actions within the definition of the noun "housing opportunity," while also treating them as actions affecting that noun, is circular and confusing.

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

Council response: The Council agrees that the proposed regulation was unclear as regards “development and land use” and has amended it to read: “‘Housing opportunity’ includes the opportunity to obtain, use or enjoy a dwelling, a residential real estate-related transaction, financial assistance in relation to dwellings or residential real estate, public or private land use practices in relation to dwellings or residential real estate, or other housing related privileges, services and facilities, including infrastructure or governmental services.” The Council disagrees with the other recommended revisions, *viz.* deleting “or enjoy” and adding the qualifier “necessary to make a dwelling available.” Such revisions would conflict with the Act’s broad remedial purposes and its much broader understanding of the definition of “housing opportunity.” The Act provides in Government Code section 12921(b) “The opportunity to seek, obtain, *and hold housing* without discrimination...is hereby recognized as and declared to be a civil right.” (Emphasis added.) And Government Code section 12927(c)(1) defines “discrimination” to include...“refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use *and enjoy* a dwelling.” (Emphasis added.)

Comment: We support the Council’s definition as written, because it correctly incorporates the concept that “housing opportunity” includes using and enjoying housing, not just initial access to housing. The Council’s approach is consistent with state and federal law. (*See e.g. Salisbury v. Hickman* (E.D. Cal. 2013) 974 F.Supp.2d 1282, 1290 (to show FHA violation, plaintiff must demonstrate unwelcome sexual harassment sufficiently severe or pervasive so as to interfere use and enjoyment of housing); *Auburn Woods I Homeowners Ass’n v. Fair Employment and Housing Com’n* (2004) 121 Cal.App.4th 1578, 1593 (Reasonable accommodation appropriate where necessary for plaintiff to enjoy home); *Patton v. Hanassab* (S.D. Cal., Aug. 29, 2016, No. 14CV1489 AJB (WVG)) 2016 WL 4507022, at *5 (“The FHA not only demands that tenants be able to secure an apartment on a nondiscriminatory basis, but also “guarantees their right to equal treatment once they have become residents of that housing”).)

Council response: The Council appreciates the feedback on its work on this provision and has not amended the definition to delete “or enjoy.”

Section 12005(u) (ultimately renumbered as Section 12005(t)):

Comment: Introducing the subsections of the definition with the phrase “[t]his may include” creates confusion, and we suggest omitting the word “may” to make this definition parallel with the others. Thus modified the definition would state:

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

Council response: The Council agrees with the comment. Accordingly, the Council has revised the proposed regulation to delete the word “may” and ultimately rephrased the definition as follows: “Owner” means any person having any legal or equitable right of ownership, possession or the right to rent or lease housing accommodations, including the following if they hold such rights...” The citation in the comment is prior to deletion of the word “governance,” as the text was ultimately modified, which along with the deletion of the word “may” clarifies that all persons or entities identified in each of the subsections to subsection (t) come within the definition so long as they have a “legal or equitable right of ownership, possession or the right to rent or lease housing accommodations.”

Comment: The regulations propose to broaden the statutory definition of “owner” to encompass “any person having any. . . right of. . . governance” – specifically including “political subdivision[s].” 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. The responsibility of government entities’ under FEHA can be clearly expressed without conceptually or linguistically conflating “governance” with “ownership.”

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

...

~~(4) The state and any of its political subdivisions and any agency thereof;~~
~~(5)(4) Agencies,~~ 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

Council response: The Council ultimately agrees with this comment and has deleted the word “governance” in the definition. The word “governance” is unnecessary in the definition because the other parts of the definition (“legal or equitable right of ownership, possession or the right to rent or lease housing accommodations”) are sufficient. It is not necessary to include the word “governance,” as the text was ultimately modified to clarify that all persons or entities identified in each of the subsections to subsection 12005(t) come within the definition so long as they have a “legal or equitable right of ownership, possession or the right to rent or lease housing accommodations.”

Section 12005(v)(8) (ultimately renumbered as Section 12005(u)(8)):

Comment: We recommend amending this provision to remove the requirement that the term “person” must be interpreted broadly.

~~(v)(8) “Person” shall be interpreted broadly.~~

Council response: The Council disagrees with this comment. The definition is consistent with the Act’s broad definitions of “person,” including in Government Code sections 12925(d) and 12927(f). And this provision is necessary to implement the Act’s broad applicability to potential defendants and practices in Government Code section 12955 (unlawful practices). Finally, by declaring it the public policy of the state to protect the right to be free from discrimination on enumerated bases, and declaring the rights protect by the Act to be “civil rights,” the legislature has made it clear that the Act’s provision must be broadly interpreted. See Government Code sections 12920 and 12921. Government Code section 12993(a) provides for the construction of the Act, both as to housing and employment: “(a) The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof.” Courts have consistently held that the Act must be liberally construed. See, e.g. *Auburn Woods I Homeowners Assn. v. Fair Employment and Housing Com.* (2004) 121 Cal.App.4th 1578, (stating the federal Fair Housing Act provides a minimum level of protection that the Act may exceed); *Brown v. Smith* (1997)55 Cal.App.4th 767, 780–781 (same); *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157-1158; *Bagatti v. Dept. of Rehabilitation* (2002) 97 Cal.App.4th 344, 367-368; *State Personnel Board v. Fair Employment and Housing Com.* (1985) 39 Cal.3d 422. As one court

stated, the legislature intended the Act “to amplify” the rights of victims of discrimination, *Rojo v. Kliger* (1990) 52 Cal.3d 65, 75.

Section 12005(w) (ultimately renumbered as Section 12005(v)):

Comment: We recommend amending this provision to specifically limit the term to single instances. Further, a failure to act should be specifically limited to the context of section 12010.

(w) “Practice” includes the following, whether written or unwritten ~~or singular or multiple~~: 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).

Council response: The Council disagrees with the comment that the term be limited to single instances. The Act regularly uses both the singular and plural of “practice.” The Council disagrees that a failure to act should be specifically limited to the context of section 12010 (Liability for Discriminatory Housing Practices). The commenter fails to provide any legal authority for the claim. Government Code section 12955.8 provides that proof of both an intentional violation and a violation causing a discriminatory effect include “an act or failure to act.”

Section 12005(y) and 12005(aa) (ultimately renumbered as Section 12005(x) and (z)):

Comment: The definition of “Public land use practices” (section 12005(aa) [ultimately renumbered as Section 12005(z)]) accurately describes the broad range of activities that implicate fair housing issues, and we commend the Council’s thorough definition. The definition appropriately incorporates entities’ failure to act, in recognition of the duty to affirmatively further fair housing. (The duty to affirmatively further fair housing appears in the federal Fair Housing Act, 42 U.S.C. 3608(e)(5), and pending legislation, AB 686, would insert a parallel provision into state law. Regardless of whether pending legislation is adopted, federal law sets the floor for fair housing rights and obligations, so it is appropriate for these regulations to incorporate this affirmative duty. Gov’t Code § 12955.6.) In order to clarify that this definition incorporates the previously defined term “Practices,” we recommend that the Council modify the provision as follows:

“Public land use practices’ include all practices (a single action, multiple actions, and failure or failures to act as defined in Section 12005(w) [ultimately renumbered as section 12005(v)])...

We recommend that the Council make the same modification with respect to the definition of “Private land use practices” (section 12005(y) [ultimately renumbered as section 12005(x)]).

Council response: The Council disagrees with the comment. Since “practice” and “practices” are specifically defined in section 12005(v) to include singular or multiple acts and failure to act,

there is no need to specifically cross-reference that definition when the same word is used in sections 12005(x) and (z).

Comment: The purpose of the parenthetical in sections 12005(y) and (aa) [ultimately renumbered as sections 12005(x) and (z)], viz. (a single action, multiple actions, and failure or failures to act), appears to be to define the word “practices.” Because the Council has already set forth a very thorough definition of “practice” in subsection (w) [ultimately renumbered as subsection (v)], we recommend removing the parenthetical altogether or simply referring to subsection (w) [ultimately renumbered as subsection (v)].

Council response: The Council agrees with the comment and has deleted the parenthetical in sections 12005(y) and (aa) [ultimately renumbered as sections 12005(x) and (z)] accordingly, so that the phrase only appears in the definition of “practice” or “practices” in section 12005(v).

Section 12005(aa) (ultimately renumbered as Section 12005(z)):

Comment: This subsection emphasizes that public land use practices include "a single action" and "single or multiple" planning actions. The 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 Cmty. Project, Inc.* 135 S.Ct. 2507 articulated the appropriate focus for such claims – i.e., upon government policies, not one-time decisions. Two federal Courts of Appeals decisions, *City of Joliet, Illinois v. New West, L.P.* (7th Cir. 2016) 825 F.3d 827, 830 and *Ellis v. City of Minneapolis* (8th Cir. 2017) 860 F.3d 1106, 1113-1114., addressed this issue and held that "[d]isparate-impact analysis looks at the effects of policies, not one-off decisions, which are analyzed for disparate treatment." The question here is not whether FEHA can or should reach farther, to “one-off” non-policymaking actions – but whether it does. In sum, "not all one-time decisions are equal," and this should be reflected in the regulations:

(aa) “Public land use practices” include all practices ~~(a single action, multiple actions, and failure or failures to act)~~ by governmental entities, as those entities are defined in sections 12005(u)(4), ~~12005(u)(5)~~, and 12005(v)(6), ~~in connection with~~ authorizing, permitting, or otherwise allowing development and land use that are related to or have an effect on existing or proposed of private or public property for dwellings or housing opportunities including 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 ~~single or multiple~~ 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;

...

~~(3) All practices that could affect the feasibility, use, or enjoyment of housing opportunities;~~

~~(4) Allocation, provision, denial of or failure to provide~~ (3) Provision of municipal infrastructure or services, such as water, sewer, and emergency services, and other services, ~~in connection with~~ that are necessary to make housing opportunities available;

~~(5)~~(4) Permitting of facilities or services that affect housing opportunities;

~~(6)~~(5) Adoption, modification or implementation of ~~housing-related~~ 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

~~(7)~~(6) Other practices ~~related to regulation of land use~~ that make housing opportunities unavailable.

Council response: The Council disagrees with these comments and suggestions. The Council has amended section 12005(w) [ultimately renumbered as section 12005(v)] to include “whether . . . singular or multiple.” The proposed language by the commenter contradicts its own suggestion by using the singular: “‘Public land use practices’ may consist of *a legislative or quasi-judicial act* . . .” (Emphasis added.) It is clear that under a multitude of circumstances a single action by a government regarding land use, such as a single zoning decision, could constitute the basis for a discriminatory effect claim. Moreover, Government Code section 12955.8(b) of the Act specifically states: “Proof of a violation causing a discriminatory effect is shown if *an act* or failure to act...” (Emphasis added.) Since the text of the Act specifically refers to “an act” as constituting the basis for a violation, to the degree that federal cases hold otherwise, this proposed regulation complies with Government Code section 12955.6, Construction with other laws, which provides: “Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 et seq.)...This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.”

As regards the commenter’s suggestion to revise the regulation to limit liability to making housing opportunities unavailable, the Council disagrees. Such revisions would conflict with the Act’s broad remedial purposes and its much broader understanding of definition of housing opportunity. The Act provides in Government Code section 12921(b) “The opportunity to seek, *obtain, and hold housing without* discrimination...is hereby recognized as and declared to be a civil right.” (Emphasis added.) And Government Code section 12927(c)(1) defines “discrimination” to include...”refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to *use and enjoy* a dwelling.” (Emphasis added.) In addition, section 12955(l) of the Act specifically provides: “It shall be unlawful... To discriminate through public or

private land use practices, decisions, and authorizations because of race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, familial status, marital status, disability, genetic information, national origin, source of income, or ancestry. Discrimination includes, but is not limited to, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law (Title 7 (commencing with Section 65000)), that make housing opportunities unavailable.” The first sentence of this provision prohibits discrimination and the second sentence provides nonexclusive examples.

Finally, by declaring it the public policy of the state to protect the right to be free from discrimination on enumerated bases, and declaring the rights protect by the Act to be “civil rights,” the legislature has made it clear that the Act’s provision must be broadly interpreted. See Government Code sections 12920 and 12921. Government Code section 12993(a) provides for the construction of the Act, both as to housing and employment: “(a) The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof.” Courts have consistently held that the Act must be liberally construed. See, e.g. *Auburn Woods I Homeowners Assn. v. Fair Employment and Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 (stating the federal Fair Housing Act provides a minimum level of protection that the Act may exceed); *Brown v. Smith* (1997) 55 Cal.App.4th 767, 780–781 (same); *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157-1158; *Bagatti v. Dept. of Rehabilitation* (2002) 97 Cal.App.4th 344, 367-368; *State Personnel Board v. Fair Employment and Housing Com.* (1985) 39 Cal.3d 422. As one court stated, the legislature intended the Act “to amplify” the rights of victims of discrimination, *Rojo v. Kliger* (1990) 52 Cal.3d 65, 75.

Section 12005(dd) (ultimately renumbered as Section 12005(cc)):

Comment: The definition of residential real estate transactions should be revised to include the marketing of real estate, to be consistent with federal and state law. (Gov’t Code 12955(c); 42 U.S.C. 3604(c) (prohibiting discriminatory advertising).) Marketing can be used in a discriminatory manner or as part of a discriminatory practice to steer members of protected classes away from desirable housing. This definition is also somewhat confusing because subsection (3) is much more specific than other subsections. We suggest broadening subsection (3) to broadly incorporate underwriting requirements as follows:

(dd) “Residential real estate-related transaction” includes:

- (1) Providing financial assistance
- (2) Buying, selling, brokering, or appraising of residential real estate,
- (3) Making, producing, printing, distributing or publishing, or causing to be made, printed, produced, published or distributed any notice, statement, advertisement, or other marketing of residential real estate; or
- ~~(3)~~(4) The use of territorial underwriting requirements for the purpose of requiring a borrower in a specific geographic area to obtain—earthquake a specific type of insurance, including earthquake and flood insurance, required by an institutional third party on a loan secured by residential real property.

Council response: The Council disagrees that the proposed text relating to advertising and marketing should be added because the addition would go beyond the definition of “real estate-related transactions” in Government Code section 12927(h). The Council recognizes that the Act specifically prohibits discriminatory advertising and marketing as an unlawful practice in section 12955(c). This current set of regulations does not address discriminatory advertising and marketing. As regards flood insurance, this definition is inclusive and therefore does not exclude flood insurance even if it is not specifically identified in the regulation.

Section 12010. Liability for Discriminatory Housing Practices.

Comment: Directors of community associations are volunteers; non-paid members who are elected by their fellow homeowners to serve on the board of their community association. Most have no formal training or education in how to operate an association. The standards of care for these volunteers should not be the same as the paid owners of other types of housing providers. The majority of associations meet once a month for two to four hours and have little day to day control over the activities of independent contractors, vendors or other persons working at the association, or over the residents. To make such volunteer directors liable whether they knew or should have known of the conduct that resulted in a discriminatory housing practice is inequitable and unjust. Despite the language in this section that provides there will vicarious liability to the extent permissible by applicable California laws concerning agency, and under interpretations of the Fair Housing Act, imposing personal liability on volunteer directors for acts beyond their knowledge or control, appears inconsistent with case law and the Business Judgment Rule limitations on director personal liability. Perhaps the Council could create an additional exception for acts of those persons who act in a manner which is consistent with the Business Judgment Rule. (Corporations Code section 7231 et. seq.)

Council response: The Council disagrees with the comment. Directors of community associations, even though they are volunteers, act through agents and employees and are responsible for ensuring that those who act on their behalf follow the law. Section 12010(a)(1)(B) ultimately provides: “Failing to take prompt action as determined on a case-by-case basis 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” *See, e.g. U.S. v. Balistrieri*, 981 F.2d 916, 930 (7th Cir. 1992). Furthermore, under Section 12010(a)(1)(C), as ultimately phrased, directors of community associations are also responsible for discriminatory housing practices of other third parties if they knew or should have known of the conduct, and had the power to take prompt action to correct and end the discriminatory practices. Section 12010(a)(1)(C)(1) further provides: “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 person 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.” *See, e.g. Fahnbulleh v. GFZ*

Realty, LLC, 795 F. Supp. 2d 360, 364 (D. Md. 2011); *Reeves v. Carrollsbury Condominium Unit Owners Ass'n*, 1997 WL 1877201, *7–8 (D.D.C. 1997). The extent to which Corporations Code 7231 applies is a fact specific inquiry which is consistent with this section as drafted. This section limits a person’s liability to what it has the power to do as defined in the section. In addition, common interest development associations have the authority under their governing documents to adopt policies ensuring compliance with applicable law, including imposing penalties for noncompliance with their policies. The Council does not have the authority to expand the powers of associations or to exempt them from the Act.

Section 12010(a)(1)(C):

Comment: We recommend this change to maintain consistency with the case law cited in the Initial Statement of Reasons and HUD rule. (While the analogous HUD regulation, 42 CFR section 100.7, itself uses the term “person,” those regulations also give “person” a specific and different definition than the proposed regulations here. (Compare 42 CFR section 100.20 with section 12005(v) [ultimately renumbered as section 12005(u)].)

(a)(1)(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.

Council response: The Council disagrees. Individuals other than owners may be liable for discriminatory housing practices under 12010(a)(1)(C), under a variety of circumstances. For example, public entities, lenders, realtors and others may be liable for discriminatory practices engaged in by third parties under the terms set out in this subsection.

Section 12010(a)(2):

Comment: We are concerned about the statement in section 12010(a)(2) that a discriminatory housing practice may be raised as a defense to an unlawful detainer action. While we certainly recognize that discrimination is a valid defense to an unlawful detainer action, there must be a nexus between the alleged discriminatory practice and the basis for the unlawful detainer action. We request that this be made clear in the regulation. At a minimum, we request that this section include a statement equivalent to the statement included in the retaliation regulation – i.e., that while a discrimination defense may be raised in an unlawful detainer

action, such defense may not be used to hinder or delay an unlawful detainer action. We request the following language be added:

(a)(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~~ where it forms the basis of the unlawful detainer action.”

Council response: The Council disagrees. The language proposed by the commenter is unclear and there is no authority cited for the proposition that affirmative defenses in unlawful detainer actions based on discrimination are limited in some unspecified manner. No additional language is necessary because courts in unlawful detainer actions will evaluate the merits of the affirmative defense based on the specific allegations and facts in each case. Further, the specific language regarding delay referenced by the commenter, which derives from Government Code section 12955(f), only applies to claims of retaliation.

Section 12010(b):

Comment: Subsection (b), describing vicarious liability, begins with two clauses regarding California and federal agency law, which make this straightforward concept appear confusing. Since all of these fair housing regulations will be interpreted in the context of California state law and the federal Fair Housing Act, it is unnecessary to specify that vicarious liability concepts should be interpreted in this context, and may introduce confusion as to how other regulations should be interpreted. We therefore suggest amending the regulation as follows:

(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~~ 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.

Council response: The Council disagrees that the language which the commenter proposes to strike is unnecessary, but realizes that it is not completely clear as drafted. The language referenced by the commenter is necessary to clarify the operation of traditional principles of vicarious liability in the Act context, and to clarify that in specific situations whichever law, California or federal, provides greater protection shall apply. Generally, California agency law will control determinations of agency and vicarious liability. However, where California vicarious liability principles are inconsistent with interpretations and applications of agency rules under the federal Fair Housing Act, the federal interpretations shall apply, so long as they provide greater protection to members of protected classes. This is because, while based in California law, the Act must provide at least the same level of protection to individuals covered by the Act as the equivalent provisions in the federal Fair Housing Act. Government Code

12955.6. However, the language as drafted was not clear on these points and the subsection has been revised in the ultimate text of the regulations to make these points clearer.

Section 12010(b)(2):

Comment: Subsection (b)(2) relates to the determination of whether an employee or agent is acting within the scope of his or her employment/agency for the purposes of determining whether an employer is vicariously liable. The subsection states that an agent or employee *shall* be considered to be acting within the scope of his/her employment/agency even if the discriminatory conduct occurs incidental to the agent or employee’s job-related tasks. The subsection states that this includes being on the premises for work-related reasons such as conducting repairs. We believe this constitutes an unwarranted expansion of existing law. We understand the California Supreme Court has extended liability in situations where “the risk was one ‘that may fairly be regarded as typical of or broadly incidental’ to the enterprise undertaken by the employer.” *See Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202 (cited in the Initial Statement of Reasons). However, “the question of scope of employment is ordinarily one of fact for the jury to determine.” *Id.* at 221. By stating that an agent/employee *shall* be considered to be acting within the scope of his/her agency/employment if the discriminatory practice occurs incidental to the agent or employee’s job-related tasks, and naming a specific (and common) circumstance in which this rule would apply, the Council has made the scope of employment a question of law rather than fact. This is not supported by existing law and should be revised. We recommend the following:

(b)(2) An agent or employee ~~shall~~may 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.~~

Council response: The Council agrees with the content of this comment and has revised this provision accordingly. The Council changed the word “shall” to “may.” The Council also ultimately modified the last sentence to provide a clearer example: “For example, a person may be liable for harassment committed by their employee on the premises of a dwelling for work related reasons such as conducting repairs, even though harassment is not part of the employee’s job duties.”

Article 7. Discriminatory Effect

Section 12060. Practices with a Discriminatory Effect

Section 12060(b):

Comment: This provision appears to conflate disparate treatment with discriminatory effects, contrary to FEHA. The federal courts, applying the same case law routinely relied upon by

California courts interpreting FEHA, have cautioned against just such conflation. According to *McCaskill v. Gallaudet Univ.* (D.D.C. 2014) 36 F.Supp. 3d 145, 157, 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." 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.* (2007) 151 Cal.App.4th 1386, 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.

(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 discriminatory effect may exist even if only a single person suffers harm from the practice.~~ 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.

Council response: The Council agrees that this language clarifies the provision, and has amended the subsection with the language suggested by the commenter.

Section 12061: Burdens of Proof in Discriminatory Effect Cases.

Comment: While the proposed regulations, in this section and section 12060, elaborate most elements of the prima facie case in considerable detail, they omit any such detail regarding one of the critical "safeguards" emphasized heavily by federal authorities applying the FHA – namely the element of causation. As the U.S. Supreme Court recently explained in *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, "[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 . . ." At least one California court has recently applied these causation safeguards to a housing discrimination claim. 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. 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.

Council response: The Council disagrees with the comment because the proposed regulation clearly and explicitly includes the causation requirement. Section 12955.8(b) of the Act which

sets forth the liability rule for discriminatory effect provides: "Proof of a violation causing a discriminatory effect is shown..." Accordingly, section 12060(b) of the proposed regulation provides: "A practice has a discriminatory effect where it actually or predictably results in a disparate impact..." and the specific language regarding the complainant's burden of proof in section 12061(a) provides: "The complainant has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect."

Comment: Federal FHA case law has unequivocally "recognized the *necessity* of statistical evidence in disparate impact cases." (*Budnick v. Town of Carefree* (9th Cir. 2008) 518 F.3d 1109, 1118.) California decisions applying FEHA likewise hold that "[s]tatistical proof is indispensable in a disparate impact case." Contrary to some suggestions, "anecdotal evidence" is absolutely *not* sufficient to establish a prima facie case of discriminatory effects. Further, in the context of general housing discrimination claims, preference must be given to local, rather than state or national statistics. 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 language we propose in section 12061(a) is taken directly from *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.* (2015) 135 S. Ct. 2507.

(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.

(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 ~~all of the prongs of a legally sufficient justification, as set forth in section 12062.~~ 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.

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

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

- (1) ~~Other national~~ 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

Council response: This comment's suggested textual revision regarding the proof of causality is addressed above in the response to the comment immediately above. This comment's suggested textual revision regarding the allocation of the burden of proof is addressed in the comment immediately below. As regards the concern regarding statistics, other than cases that allege that a practice unlawfully creates, increases, reinforces, or perpetuates segregated housing patterns, the Council agrees that statistical evidence is generally required to prove a discriminatory effect and has ultimately amended section 12061(d) to clarify that requirement as follows: "Types of evidence that, depending upon the facts of the case, are relevant in providing statistics to establish or to rebut the existence of a discriminatory effect include..." The Council disagrees with the comment's suggestion to amend the regulation to give priority to local statistics over state or national statistics because it is up to the trier of fact to decide which statistics in a given case are most relevant and probative.

Comment: We are concerned about the divergence from the burdens of proof set forth in HUD's discriminatory effect regulation (24 CFR 100.500). HUD's regulation places the burden of proving that a less discriminatory alternative exists on the complainant/plaintiff. Similarly, the Council's employment regulations place this burden on the employee. There is no reason for this burden to be placed on the respondent/defendant in the housing context, and it puts the respondent/defendant in the position of having to prove a negative. Therefore, we request that the burden of proving the existence of a less discriminatory alternative be placed on the complainant/plaintiff.

Council response: The Council disagrees with the comment. The Act as revised by A.B. 2244 in 1993 did not specifically allocate this burden, providing in Government Code section 12955.8(b)(1): "Any 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." Pursuant to the Council's duty to clarify and implement the Act, the Council has concluded that it is necessary for the regulations to specifically allocate the burden of proof in these cases in order to clarify the rights and duties created by the Act and to avoid waste of judicial resources determining which party bears the burden in each case.

The legislative history of A.B. 2244 supports placing this burden on the defendant. The legislative history specifically and regularly repeats the following statement: "... [T]he cases generally have required a respondent/defendant to prove that no less discriminatory practice or policy exists." This language is included in the April 4, 1993 Assembly bill analysis, the July 13,

1993 Senate bill analysis, the August 8, 1993 Senate bill analysis, the August 24, 1993 Senate bill analysis and the September 9, 1993 Senate bill analysis. In contrast, nowhere in the legislative history is it suggested that the plaintiff should bear this burden. The bill analyses consistently cite the same six cases: *NAACP v. Town of Huntington* (2d Cir. 1988) 844 F.2d 926, *aff'd per curiam*, 109 S.Ct. 276 (1988); *Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467; *Betsey v. Turtle Creek Associates* (4th Cir. 1984) 736 F.2d 983; *United States v. City of Black Jack* (8th Cir. 1974) 508 F.2d 1179; *Resident Advisory Board v. Rizzo* (3rd Cir. 1977) 564 F.2d 126; and *In the Matter of the Accusation of the Dept. of Fair Employment & Housing v. Merribrook Apartments* (Nov. 9, 1988) FEHC Dec. No. 88-19. All of the cases cited support a disparate impact cause of action. Three of these cases never reached the issue of the allocation of the burden of the less discriminatory alternative element: *Keith v. Volpe*, *Betsey v. Turtle Creek Associates*, and *DFEH v. Merribrook Apartments*. The other three cases cited did reach the issue, and all of them placed the burden for this element on the defendant. *Black Jack* placed the burden on defendant as part of a “compelling governmental interest” burden holding that the governmental defendant must demonstrate that its conduct was “necessary to promote a compelling governmental interest” which includes examining three factors: “first, whether the ordinance in fact furthers the governmental interest asserted; second, whether the public interest served by the ordinance is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it; and third, whether less drastic means are available whereby the stated governmental interest may be attained.” 508 F.2d at 1186–1187. *Rizzo* states “the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact,” 564 F.2d at 148-49. *NAACP* agrees with *Rizzo*, placing this burden on defendant, 844 F.2d at 936 and 939.

To the extent that the proposed regulation differs from the federal FHA and its implementing regulations, this proposed regulation complies with Government Code section 12955.6, Construction with other laws, which provides: “Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 et seq.)...This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.”

The Council disagrees with the comment’s concern about a respondent/defendant having “to prove a negative.” Defendants have easier access to the relevant information about what alternative practices would meet their nondiscriminatory interest or purpose. They know how the relevant systems work and what the likely results of alternative practices would be. Therefore, it is not likely that his allocation of the burden of proof will be overly burdensome or unfair to Defendants. Moreover, placing the burden of proof on the defendant will encourage persons subject to the Act to avoid discrimination by routinely screening their policies for discriminatory impact and upon finding it, developing alternative policies and practices that advance legitimate business goals with less (or no) discrimination.

In regards to a difference in the allocation of burden of proof for this element between employment case and housing cases, two of the cases cited by the legislative history explain that plaintiffs in employment cases are better positioned to identify less discriminatory alternatives than plaintiffs in housing cases because “the job-related qualities which might

legitimately bar a Title VII protected employee from employment will much more susceptible to definition and quantification than any attempted justification of discriminatory housing practices under Title VIII.” *Rizzo*, 564 F.2d at 148; *Huntington*, 844 F.2d at 936–37 (stating “in Title VIII cases there is no single objective like job performance to which the legitimacy of the facially neutral rule may be related” and that a defendant’s justifications are “normally based on a variety of circumstances” in zoning cases under the federal Fair Housing Act). HUD’s allocation of this burden on plaintiffs was based not on a legal requirement but on policy grounds, and California’s legislature disagreed with that policy analysis.

Section 12062: Legally Sufficient Justification.

Comment: This section is a dramatic departure from 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.” (HUD Final Rule on Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed.Reg. 11473-11474 (Feb. 15, 2013).) HUD noted that every federal court but one to consider the question had similarly declined to place this ultimate burden on the respondent. (*Id.* at p. 11462, fn. 34.)

The Council has asserted this change is necessary because “Government Code section 12955.8(b)(1) sets out a different allocation of the burden of proof on less restrictive alternatives than 24 CFR 100.500(c)(3).” This is not accurate. Government Code section 12955.8(b)(1) 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.

Council response: The Council disagrees with the comment. The comment’s concerns regarding the difference between the proposed allocation of the burden of proof and HUD’s Final Rule and the issue of requiring the defendant to “prove a negative” are addressed in the response to the comment immediately above. The comment accurately states that the Act as revised by A.B. 2244 in 1993 did not specifically allocate this burden, providing in Government Code section 12955.8(b)(1): “Any 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.” Pursuant to the Council’s duty to clarify and implement the Act, the Council has concluded that it is necessary for the regulations to specifically allocate the burden of proof in these cases in order to clarify the rights and duties created by the Act and to avoid waste of judicial resources determining which party bears the burden in each case. The legislative history of A.B. 2244 supports placing this burden on the defendant. The legislative history specifically and regularly repeats the following statement: “... [T]he cases generally have required a respondent/defendant to prove that no less discriminatory practice or policy exists.” This language is included in the April 4, 1993 Assembly bill analysis, the July 13, 1993 Senate bill analysis, the August 8, 1993 Senate bill analysis, the August 24, 1993 Senate bill analysis and the September 9, 1993 Senate bill

analysis. In contrast, nowhere in the legislative history is it suggested that the plaintiff should bear this burden.

The bill analyses consistently cite the same six cases: *NAACP v. Town of Huntington* (2d Cir. 1988) 844 F.2d 926, *aff'd per curiam*, 109 S.Ct. 276 (1988); *Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467; *Betsey v. Turtle Creek Associates* (4th Cir. 1984) 736 F.2d 983; *United States v. City of Black Jack* (8th Cir. 1974) 508 F.2d 1179; *Resident Advisory Board v. Rizzo* (3rd Cir. 1977) 564 F.2d 126; and *In the Matter of the Accusation of the Dept. of Fair Employment & Housing v. Merribrook Apartments* (Nov. 9, 1988) FEHC Dec. No. 88-19. All of the cases cited support a disparate impact cause of action. Three of these cases never reached the issue of the allocation of the burden of the less discriminatory alternative element: *Keith v. Volpe*, *Betsey v. Turtle Creek Associates*, and *DFEH v. Merribrook Apartments*. The other three cases cited did reach the issue, and all of them placed the burden for this element on the defendant. *Black Jack* placed the burden on defendant as part of a “compelling governmental interest” burden holding that the governmental defendant must demonstrate that its conduct was “necessary to promote a compelling governmental interest” which includes examining three factors: “first, whether the ordinance in fact furthers the governmental interest asserted; second, whether the public interest served by the ordinance is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it; and third, whether less drastic means are available whereby the stated governmental interest may be attained.” 508 F.2d at 1186–1187. *Rizzo* states “the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact,” 564 F.2d at 148-49. *NAACP* agrees with *Rizzo*, placing this burden on defendant, 844 F.2d at 936 and 939.

Comment: Authorities on this issue support placing the burden of proof on the plaintiff or complainant. Both the FEHC decision in *Dept. Fair Empl. & Hous. v. Merribrook Apartments* (1988) No. 88-19, FEHC Precedential Decisions 1988–1989 CEB 7, p. 1. and the legislative history behind Government Code section 12955.8 reiterate that the “adverse impact analysis in federal housing discrimination law [is] a sound and persuasive guide for interpretation of California law.” 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 [a] no less discriminatory practice or policy exists.” This was, at best, a misreading of the federal case law, as demonstrated by HUD’s thorough analysis, discussed above. More importantly, on a *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.

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 is a reasonable provision that will not hamper the prosecution of meritorious discriminatory effects cases.

(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 ~~the~~

~~business establishment can establish that a legally sufficient justification exists. A legally sufficient justification exists where:~~

~~(1) The practice is intended to serve a necessary to achieve one or more substantial, legitimate, nondiscriminatory interests that is necessary to the operation of the business;~~

...

(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 ~~the person can establish that:~~

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

Council response: The Council disagrees with the comment. The comment's textual suggestions regarding deleting the "intent" language are addressed below in response to comment on Section 12062(a)(1). The Council disagrees with the comment's interpretation of the legislative history of A.B. 2244. Since at the time A.B. 2244 was being considered there was no controlling authority in California on the allocation of the burden of proof issue, the legislature was privileged to rely on case law that it found most persuasive. The legislative history of A.B. 2244 supports placing this burden on the defendant. The legislative history specifically and regularly repeats the following statement: "... [T]he cases generally have required a respondent/defendant to prove that no less discriminatory practice or policy exists." This language is included in the April 4, 1993 Assembly bill analysis, the July 13, 1993 Senate bill analysis, the August 8, 1993 Senate bill analysis, the August 24, 1993 Senate bill analysis and the September 9, 1993 Senate bill analysis. In contrast, nowhere in the legislative history is it suggested that the plaintiff should bear this burden.

The bill analyses consistently cite the same six cases: *NAACP v. Town of Huntington* (2d Cir. 1988) 844 F.2d 926, *aff'd per curiam*, 109 S.Ct. 276 (1988); *Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467; *Betsey v. Turtle Creek Assocs.* (4th Cir. 1984) 736 F.2d 983; *United States v. City of Black Jack* (8th Cir. 1974) 508 F.2d 1179; *Resident Advisory Board v. Rizzo* (3rd Cir. 1977) 564 F.2d 126; and *In the Matter of the Accusation of the Dept. of Fair Employment & Housing v. Merribrook Apartments* (Nov. 9, 1988) FEHC Dec. No. 88-19. All of the cases cited support a disparate impact cause of action. Three of these cases never reached the issue of the allocation of the burden of the less discriminatory alternative element: *Keith v. Volpe*, *Betsey v. Turtle Creek Associates*, and *DFEH v. Merribrook Apartments*. The other three cases cited did reach the issue, and all of them placed the burden for this element on the defendant. *Black Jack* placed the burden on defendant as part of a "compelling governmental interest" burden holding that the governmental defendant must demonstrate that its conduct was "necessary to promote a compelling governmental interest" which includes examining three factors: "first, whether the ordinance in fact furthers the governmental interest asserted; second, whether the public interest served by the ordinance is constitutionally permissible and is substantial enough to outweigh the private detriment caused by it; and third, whether less drastic means are available whereby the stated governmental interest may be attained." 508 F.2d at 1186-

1187. *Rizzo* states “the defendant must show that no alternative course of action could be adopted that would enable that interest to be served with less discriminatory impact,” 564 F.2d at 148-49. *NAACP* agrees with *Rizzo*, placing this burden on defendant, 844 F.2d at 936 and 939.

On the issue of conformity, to the degree that the HUD Final Rule sets forth the current federal law on this issue, it does not bind California if the Act provides for a different position and the resulting regulation complies with Government Code section 12955.6. Furthermore, the federal statute does not assign a burden of proof. Government Code section 12955.6 provides: “Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 et seq.)...This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws.”

Finally, defendants have easier access to the relevant information about what alternative practices would meet their nondiscriminatory interest or purpose. They know how the relevant systems work and what the likely results of alternative practices would be. Therefore, it is not likely that his allocation of the burden of proof will be overly burdensome or unfair to Defendants or result in “delay, paralysis, and perpetuation of the status quo.” Moreover, placing the burden of proof on the defendant will encourage persons subject to the Act to avoid discrimination by routinely screening their policies for discriminatory impact and upon finding it, developing alternative policies and practices that advance legitimate business goals with less (or no) discrimination.

Comment: Under both federal and state law, there is a burden of proof standard for discriminatory effect cases. Under each standard, a business may rebut any finding of discriminatory effect. Specifically regarding state law, Government Code section 12955.8 states, “A business establishment whose action or inaction has an unintended discriminatory effect shall not be considered to have committed an unlawful housing practice in violation of this part if the business establishment can establish that the action or inaction is necessary to the operation of the business and effectively carries out the significant business need it is alleged to serve.”

Under federal law, an aggrieved person can rebut in turn by showing that there are feasible alternatives to the business practice that have a less-discriminatory effect. Under state law, Government Code section 12955.8 states that the availability of feasible, less-discriminatory alternatives to the business practice are a factor that shall be considered in determining a violation, but does not allocate a burden of proof for that factor.

The Council concedes in its Initial Statement of Reasons that the relevant Government Code section does not allocate whose responsibility it is to establish that prong of the test. The Council in the Statement of Reasons states that a DFEH decision from prior to the enactment of Government Code section 12955.8 and a legislative analysis for the law that mentions certain earlier cases that placed that burden on businesses, among other factors, warrant placing the burden for feasible less discriminatory alternatives on the business.

However, despite the awareness of these earlier cases and decisions, the legislature still saw fit to enact Government Code section 12955.8, where in section 12955.8(b)(l) it states that

a determination of a violation shall look at the existence of feasible alternatives. It is evident from the legislative history cited that the legislature was aware of their ability to clearly set the burden of proof for this prong on businesses, but elected not to do so. The Council should not usurp the legislature on this issue and should either follow the language of the Government Code and leave the determination of how that information is to be determined to the finder of fact, or follow the FHA, which places the burden on the plaintiff.

A relatively recent HUD statement in 24 CFR Part 100 of the Federal Register, from February, 2013, discusses discriminatory effect burdens, and advocates in favor of the FHA approach. The statement discusses the burden-shifting approach, which includes the requirement that the plaintiff in discriminatory effect cases to prove there is a feasible alternative with a less discriminatory effect after a business establishes a business necessity. The statement notes this is "the fairest and most reasonable approach to resolving the claims . . . [T]his framework makes the most sense because it does not require either party to prove a negative." (Federal Register I Vol. 78, No. 32). We would suggest that section 12062(a) as follows be amended to be similar to section 24 CFR 100.500:

(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 the business establishment can establish that:

- (1) The practice is intended to serve a substantial, legitimate, nondiscriminatory interest that is necessary to the operation 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) If the business satisfies the burden of proof set forth in paragraph (a) of this section, the aggrieved person may still prevail upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another feasible alternative practice that has a less-discriminatory effect.

Alternatively if the Council does not wish to follow federal regulations the Council could elect to reiterate Government Code section 12955.8, which leaves it to the fact finder to decide how to consider such information.

Council response: The Council disagrees with the comment. The comment accurately states that the Act as revised by A.B. 2244 in 1993 did not specifically allocate this burden. The Act as revised by A.B. 2244 in 1993 did not specifically allocate this burden, providing in Government Code section 12955.8(b)(1): "Any 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." The Council declines to follow the suggestion of leaving it to the factfinder to decide how to allocate the burden of proof. Pursuant to the Council's duty to clarify and implement the Act, the Council concluded that it is necessary for the regulations to specifically allocate the burden of proof in these cases in order to clarify the rights and duties created by the Act and to avoid waste of judicial resources determining which party bears the burden in each case.

The Council disagrees with the comment's interpretation of legislative history of A.B. 2244. That legislative history supports placing this burden on the defendant as is explained in the response to the comment immediately above.

The comment's concerns regarding how the proposed regulation differs from HUD's Final Rule and its concern about the issue of a defendant having to "prove a negative" are addressed in the comments above.

Section 12062(a)(1):

Comment: The inclusion of the word "intended" in proposed section 12062(a)(1) imposes a lesser rebuttal burden on business establishments than under the statutory language of section 12955.8 and federal law. Under the draft regulation, a business establishment can satisfy the first element of the legally sufficient justification program by simply establishing an intent for the practice, instead of showing that the practice actually serves a "substantial, legitimate, nondiscriminatory interest that is necessary to the operation of the business." We therefore recommend making the following change:

(a)(1) The practice ~~is intended to serve~~ serves a substantial, legitimate, nondiscriminatory interest that is necessary to the operation of the business.

Inclusion of the phrase "intended" departs from the statutory text because it introduces the concept of intent into the legally sufficient justification portion of the analysis, even though intent that a practice serve a substantial, legitimate nondiscriminatory interest is not the standard under FEHA or under the regulations implementing the Fair Housing Act.

Council response: The Council agrees with the comment that the appropriate standard is not "intent," and has amended the section to reflect that practices undertaken because they are necessary to achieve one or more substantial, legitimate, nondiscriminatory business interests (or purposes), regardless of intent, may constitute a legally-sufficient justification. The subsection has been substantially rewritten and now reads: "The practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory business interests." The Council did not employ the comment's suggested language because the change would have conflated the element in section 12062(a)(1) with the element in section 12062(a)(2).

Comment: We have previously expressed concern about subsection (a)(1)'s requirement that the practice in question be "necessary to the operation of the business." While we understand that this dichotomy appears in statute, we are not aware of any authority which holds that business establishments are held to a higher standard than non-businesses. To resolve this issue, we request that the Council provide a definition for what makes an interest "necessary to the operation of the business," and that the definition make clear that a practice which serves a substantial, legitimate, and nondiscriminatory interest is sufficient. This will make the standards applicable to business entities and non-business entities the same while staying consistent with the statute.

Council response: The Council disagrees with the comment. Government Code section 12955.8(b) specifically includes the requirement that the practice be “necessary to the operation of the business.” The same section specifies distinct burdens on “business establishments” and “establishments that do not involve a business.” The Council has no authority to depart from such a clearly stated distinction. Accordingly, the Council has provided two distinct rules for “business establishments” and “establishments that do not involve a business.” On the issue of necessity, the two standards (viz. subsections 12062(a)(1) and 12062(b)(1)) are parallel. Moreover, there is no basis for the comment’s assumption that the proposed regulation holds business establishments “to a higher standard than non-businesses” since under subsection 12062(b)(3) non-businesses have an additional element (“the identified purpose is sufficiently compelling to override the discriminatory effect”) that business establishments are not required to prove. The Council has found that the examples provided in subsection 12266(b)(1) (“such as the safety of its residents, employees, or property”) are sufficiently illustrative to provide useful guidance regarding the meaning of an interest “necessary to the operation of the business.”

Section 12062(c):

Comment: This subsection requires that a legally sufficient justification be supported by “evidence” and may not be hypothetical or speculative. It is not entirely clear what the purpose of this subsection is. Presumably the intent is to prevent housing providers from providing pretextual reasons to support discriminatory practices. However, if that is the case, that is already prohibited by section 12063. We request that the Council define the types of evidence that are acceptable to support a legally sufficient justification. What, if anything, is a housing provider required to show beyond a rational relationship between the practice and the interest it is alleged to serve? Must a housing provider experiment with obviously bad policies simply to have “evidence” of the need for a practice?

Council response: The Council disagrees with this comment. However, the Council has revised the text of this proposed regulation to provide: “A respondent’s justification for a practice with a discriminatory effect will not be legally sufficient if it is not supported by evidence, meaning that the justification is hypothetical or speculative.” This provision as revised makes clear that a purported justification must be grounded in fact and supported by admissible evidence.

Article 11. Financial Assistance Practices

Section 12100. Financial Assistance Practices with Discriminatory Effect.

Section 12100 & Section 12155 Residential Real Estate-Related Practices with Discriminatory Effect:

Comment: We suggest combining the “Financial Assistance Practices with Discriminatory Effect” and “Residential Real Estate-Related Practices with Discriminatory Effect” sections into one section, as these two areas overlap and the subsections are nearly identical. The titles are misleading, because both subsections also apply to intentional discrimination. (The definition of “Residential real estate transactions” also includes “providing financial assistance” (section 12005(dd)) [ultimately renumbered as section 12005(cc)].) This combined section could be titled “Discrimination in Financial Assistance and Residential Real Estate Practices.”

We suggest two additional subsections to more closely align the regulations with parallel provisions of state and federal fair housing laws. As discussed above, federal and state law prohibit discriminatory advertising; we therefore suggest an additional provision prohibiting:

Making, producing, printing, distributing or publishing, or causing to be made, printed, produced, published or distributed any notice, statement, advertisement, or other marketing of financial assistance or residential real estate that results in a discriminatory effect based on membership in a protected class, or that indicates any preference, limitation, or discrimination based on membership in a protected class.

This language is supported by the Federal Fair Housing Act, 42 U.S.C.A. section 3604(c), and FEHA, Gov. Code section 12955(c), both of which explicitly prohibit discriminatory advertisements.

In addition, federal regulations prohibit discriminatory practices in credit determinations. We therefore suggest adding a subsection prohibiting:

Using different policies, practices or procedures in evaluating or in determining creditworthiness of any person in connection with the provision of financial assistance. This language is consistent with federal regulations, 24 C.F.R. section 100.130.

Council response: The Council disagrees with the suggestion to combine the sections. These sections address different sets of conduct, even if there is some overlap. Furthermore, maintaining them as separate sections allows for possible future rulemaking that is specific to the separate conduct addressed. The Council also disagrees with the suggestion to add additional language regarding marketing and advertising. Those topics are not the subject of this rulemaking action. The Council may consider these suggestions in future rulemaking actions. The Council also disagrees with the suggestion to explicitly address creditworthiness in this set of regulations because that is not the subject of this rulemaking action, although creditworthiness, depending on the facts, could fall within one of the enumerated subsections. The Council may consider these suggestions in future rulemaking actions.

Article 12. Harassment and Retaliation

Article 12:

Comment: We express our strong support for the draft regulations concerning harassment and retaliation as proposed by the Council. We appreciate the Council's thoughtful approach to the issues of harassment and retaliation, and its approach of using the federal FHA as a foundation, while also drafting additional provisions where appropriate to provide greater clarity.

Council response: The Council thanks these commenters for their input.

Section 12120. Harassment.

Section 12120(a):

Comment: Section 12120(a)(2) should be modified in acknowledgement of the fact that associations do not have any authority or ability to control harassment by one resident against another resident. Once an association is on notice of such conduct, it can hold hearings, and levy fines against the owner of the residence. But associations are limited with regard to taking actions against tenant/lessees of residences, and have direct recourse only against the owner of the residence. Additionally, I encourage the Council to give further authority to associations, along with this potential liability, to address such activity by empowering associations in the Regulations to have authority to evict or take other actions to address such discrimination and conduct.

Council response: The Council disagrees with the comment. With regard to liability of persons for third parties' conduct in cases of harassment by one owner or their tenants against another, section 12010(a)(1)(C) ultimately provides: "Failing to take prompt action, as determined on a case-by-case basis to correct and end a discriminatory housing practice by a third-party, where the person 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 person 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." This provision limits a person's liability to what it has the power to do as defined in the subsection, including the powers available to it to address harassment. We do note that common interest development associations have the authority under their governing documents to adopt policies ensuring compliance with applicable law, which likely includes provisions regarding harassment under FEHA and owner's obligations regarding tenants, and their authority includes imposing penalties for noncompliance with their policies. See, e.g., Civil Code section 5850(a), Schedule of Monetary Penalties: "If an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a

violation of the governing documents, including any monetary penalty relating to the activities of a guest or tenant of the member...” The Council does not have the authority to expand the powers of associations or to exempt them from FEHA.

Section 12120(c):

Comment: This section, with particular attention to subsection (c)(3), should be amended to clearly acknowledge that associations cannot control or limit non-commercial banners or flags, including those with hate speech and other forms of harassment.

Council response: The Council disagrees with the comment because the proposed regulations already address it. Proposed section 12120(c)(3) explicitly states that nothing in the proposed regulations shall be construed to contravene Civil Code section 4710, which limits the authority of common interest developments to restrict non-commercial signs, posters, flags or banners. The Council also notes that Civil Code section 4710(a) itself provides an exception allowing restrictions “required for the protection of public health or safety or if the posting or display would violate a local, state or federal law.”

With regard to liability of persons for third parties’ conduct, section 12010(a)(1)(C) provides that a person is directly liable for: “Failing to take prompt action to correct and end a discriminatory housing practice by a third-party, where the person 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 person 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.” This provision limits a person’s liability to what it has the power to do as defined in the subsection. In addition, section 12120(f) provides: “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.”

Section 12120(g) (as proposed by comment):

Comment: We recommend including language in this section that clarifies that conduct colloquially referred to as “harassment” that may not fall under quid pro quo or hostile housing environment theories may still violate one or more FEHA provisions. The Council rightly includes language to this effect in its Initial Statement of Reasons. Initial Statement of Reasons, at 37 (“Proposed section 12120 only addresses quid pro quo and hostile environment harassment, and does not address conduct generally referred to as harassment that may, for different reasons, violate Government Code sections 12927, 12955 or other provisions of FEHA, including Government Code sections 12948 and 12955.7.”). We therefore suggest that the Council add the following subsection:

(g) This subsection only addresses quid pro quo and hostile environment harassment, and does not address conduct generally referred to as harassment that may, for different reasons, violate other provisions of the Act.

Council response: The Council disagrees that the proposed subsection needs to be amended. To the extent that some conduct generally referred to as “harassment” also or alternatively violates Government Code sections 12926.05, 12927, 12948, 12955, or 12955.7 or other provisions of the Act, but does not fall under quid pro quo or hostile housing environment theories, a claim may be brought under the relevant provisions of the Act. Therefore, the proposed subsection does not need to be amended.

Section 12130. Retaliation.

Section 12130(a) and (e):

Comment: This subsection states that unlawful retaliation occurs when “a purpose” for the adverse action is retaliation for engaging in a protected activity. This standard is problematic and not a correct statement of California law. Government Code section 12955(f) is very clear that the standard for a retaliation claim under FEHA is that the owner’s “dominant purpose” is retaliation. We understand the Council is in the position of having to harmonize this “dominant purpose” standard with the requirement that FEHA be no less protective than the FHA. However, neither 42 U.S.C. section 3617 (FHA protection from retaliation) nor 24 C.F.R. section 100.400 (FHA implementing regulation for retaliation protection) use the “a purpose” language.

In the Initial Statement of Reasons, the Council cites to *Walker v. City of Lakewood* (9th Cir. 2001) F.3d 114 and related case law to support the contention that the “a purpose” standard is required by the FHA. However, neither *Walker* nor the other cases support this contention. Rather, *Walker* (and the other cases) all refer to the *McDonnell Douglas* burden shifting analysis, which requires that for a plaintiff to establish a prima facie case of retaliation, he/she must show that: (1) he/she engaged in a protected activity, (2) the defendant subjected him/her to an adverse action, and (3) there was a causal link between the protected activity and adverse action. It is this third prong, that “a causal link” exists, that appears to be the basis for the Council’s contention. But, the three-prong test is not the end of the story. As the *Walker* court acknowledged, if a plaintiff has presented a prima facie retaliation claim, then the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the decision. Once the defendant has done this, the burden again shifts to the plaintiff who “bears the ultimate burden of demonstrating that the reason was merely a pretext for a discriminatory motive.” Notably, the *McDonnell Douglas* analysis does not set forth the quantum of proof required for any of the various elements it states. Thus, a conclusion that the “a purpose” standard is mandated by *Walker* or its progeny is untenable. But *Walker* is informative on the matter.

The *McDonnell Douglas* framework set forth in *Walker* and its progeny make clear the causation standard must be something more than the “a purpose” standard because it allows the defendant to overcome a plaintiff’s prima facie case by putting forth a legitimate

nondiscriminatory reason for the adverse action. In other words, the defendant can prevail by showing that there was another reason (other than retaliation) for the adverse action. This factor does not require that the legitimate nondiscriminatory reason be the sole motivating factor. Once the defendant has done so, the plaintiff can prevail only by showing that the reason put forward by the defendant was pretextual – i.e., it was not the true reason for the adverse action. This framework makes clear that the essence of the inquiry in a retaliation claim is what the true motivation for the adverse action was. If the defendant can show that their true purpose – their most important or controlling reason – for the adverse action was legitimate and nondiscriminatory, then they prevail unless the plaintiff can prove pretext.

In addition, cases interpreting the FHA have held that retaliation claims brought pursuant to the FHA are analyzed under the same standards that are applied to retaliation claims brought under Title VII and other employment discrimination statutes. *Texas v. Crest Asset Mgmt., Inc.* (S.D. Tex. 2000) 85 F. Supp. 2d 722, 733. The U.S. Supreme Court has held that a plaintiff making a Title VII retaliation claim “must establish that his or her protected activity was a but-for cause of the alleged adverse action...” *Univ. of Texas Sw. Med. Ctr. v. Nassar* (2013) 133 S. Ct. 2517, 2534. This standard requires the plaintiff to show that the harm would not have occurred in the absence of — i.e., but for — the defendant's conduct. *Id.* at 2525. In holding that a “but for” standard is the appropriate standard for causation in Title VII cases, the Court conducted a lengthy analysis as to why the “motivating factor” test (akin to the “a purpose” standard in the proposed regulations) was inappropriate. The Court noted that applying the proper causation standard is of “central importance to the fair and responsible allocation of resources in the judicial and litigation systems.” *Id.* at 2531. The Court also raised a concern that applying the lower causation “motivating factor” standard in the absence of a specific statutory directive to the contrary could “contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat workplace harassment.” *Id.* at 2531-32. The reasoning of *Nassar* applies with equal force in the housing context.

Accordingly, we request sections (a) and (e) be revised to reflect this standard:

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

...

(e) “Dominant Purpose” means that but for the complainant’s engagement in a protected activity, the respondent would not have taken the adverse action~~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.~~

Council response: The Council disagrees with the comment. The comment misconstrues the Council's reference to *Walker* and its progeny. As regards subsection (e), the Initial Statement of Reasons cited to *Walker* and its progeny (*Idaho AIDS Foundation, Inc. v. Idaho Housing & Finance Assn.* (D. Idaho 2006) 422 F.Supp.2d 1193, 1204; *McColm v. San Francisco Housing Auth.* (N.D. Cal. Sept. 4, 2009) No. C 06-07378 CW, 2009 WL 2901596, at *7–8) for the proposition that the causation analysis in those cases did not require a “heightened standard” that the phrase “dominant purpose” suggests. The Council must abide by the requirement of Government Code section 12955.6 that “Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988” Therefore, the term “dominant purpose” used in Government Code section 12955, subd. (f) cannot be interpreted to afford the classes protected under the Act fewer rights or remedies than under the federal Fair Housing Act and its implementing regulations. Without clarification, the term “dominant purpose” might be interpreted to require a heightened level of proof by a complainant regarding the degree of causation between the protected activity and the adverse action. Since neither *Walker* nor its progeny require such a heightened standard, requiring a complainant under the Act to prove causation at a heightened standard would violate section 12955.6 because it would have the effect of providing fewer rights under the Act than are provided under the federal Fair Housing Act. The Council added a sentence to the ultimate text of section 12130(a) to further clarify the purpose of the retaliation provisions under the Act.

The federal cases cited by the comment are not binding and inapposite. *The Univ. of Texas Sw. Med. Ctr. v. Nassar* (2013) 133 S. Ct. 2517 is an employment case. And *Texas v. Crest Asset Mgmt., Inc.* (S.D. Tex. 2000) 85 F. Supp. 2d 722 is a district court case from the Fifth Circuit. Where there are specific housing cases in the Ninth Circuit and precedential cases decided by the Fair Employment and Housing Commission that are on point, there is no need to rely on employment law cases or housing cases from a different circuit. Finally, the comment ignores numerous FEHC precedential decisions on this issue which in effect interpret and apply the Act's “dominant purpose” language to be “a purpose.” The leading case, *DFEH v. Atlantic North Apartments, et al.* (1983) FEHC Precedential Dec. No. 83-12 (1983 WL 36461), explained “dominant purpose” as follows: “The requisite inference of causality may be established by evidence which indicates that the timing of the adverse action in relation to the owner's notification of the protected activity is such that we can infer retaliatory motivation...or may be established by the nonexistence of another plausible purpose for the owner's inimical actions.” (internal citations omitted) (*Id.* at 3). In other words, in explaining the meaning of “dominant purpose,” *DFEH v. Atlantic North Apartments* did not articulate a heightened standard of required proof, but instead offered examples of types of evidence that could prove causation under the standard. Later cases followed *Atlantic North Apartments'* use of the term. See, e.g. *DFEH v. McWay Family Trust* (1996) FEHC Precedential Dec. No. 96-07 (1996 WL 774922) (citing *DFEH v. Atlantic North Apartments* for meaning of “dominant purpose” and applying that case's definition); *DFEH v. O'Neill*, (2008) FEHC Precedential Dec. No. 08-08 (2008 WL 5869851) (citing *McWay*). In light of these cases, the Council's proposed definition clarifies the causation standard by non-exhaustively illustrating some types of evidence that could prove causation

under the proposed subdivision, including the timing of the adverse action and the non-existence of another plausible purpose.

Section 12130(c):

Comment: We recommend the following change to ensure that the term “protected activity” includes not only persons requesting a reasonable accommodation or reasonable modification on behalf of a person experiencing a disability, but also persons experiencing a disability requesting a reasonable accommodation or reasonable modification on their own behalf:

(c)...making a request for a reasonable accommodation or reasonable modification ~~for~~ by or on behalf of an individual with a disability...

Council response: The Council disagrees with the comment because the proposed regulation already clearly encompasses both persons requesting a reasonable accommodation or reasonable modification on behalf of a person experiencing a disability and persons experiencing a disability themselves.

Comment: With one limited exception (discussed below) we have no major objections to the list of activities provided in this subsection. However, the protected activities should be limited to those enumerated, rather than “including” those enumerated. The protection against retaliation should be limited to those matters within the scope of FEHA and the other fair housing laws for which the Department has enforcement authority.

We also request the parenthetical which reads “(including, for example, by joining or organizing a tenant union)” be deleted. The parenthetical is provided as an example of “meeting or assembling with other persons in order to address potential or actual violations of fair housing rights.” However, joining or organizing a tenant union is not necessarily related to an exercise of fair housing rights, and we are concerned this broad example could be used to make a FEHA violation out of alleged retaliation that is not at all related fair housing rights. Of course, we do not support retaliation against tenants who organize or join a tenant’s union or association. That being said, Civil Code Section 1942.5 already includes a protection from retaliation for such behavior. By including “joining or organizing a tenant union” as a per se exercise of fair housing rights, we believes the Council exceeds its regulatory authority. The example should be removed.

We recommend the following revisions:

(c) “Protected activity” ~~includes~~ means 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.

Council response: The Council disagrees with part of the comment. The Council disagrees that this definition should be exclusive. The definition of “protected activity” is intended to be illustrative. It would be impossible to list all possible protected activities. And, the open-ended nature of the definition is appropriate given the Act’s broad remedial purpose. Secondly, in response to the comments about the parenthetical regarding joining or organizing a tenant union, the Council has amended the subsection to read “meeting or assembling with other persons in order to address potential or actual violations of fair housing rights (including, for example, by joining, supporting, or organizing an organization that advances or protects fair housing rights) to clarify the relationship to fair housing rights.

Section 12130(d):

Comment: I would suggest clarifying language in this subsection to assist entities with disclosure duties to be able to make appropriate and necessary disclosures to the members, including the filing of DFEH complaints, with notice of final resolution by the DFEH. Associations have duties of disclosure to the membership regarding matters which may affect the association's financial condition. When a complaint is filed against an association for discrimination, there may or may not be insurance coverage provided to the association. The association is in a difficult position with regard to the duty to notify the membership of potential financial consequences, including potential special assessments, when it cannot be forthcoming about DFEH or HUD complaints because of privacy and retaliation concerns.

Council response: The Council is unclear why the comment is associated with section 12130(d), which concerns the burden of proof in retaliation claims. To the extent that it refers to the confidentiality provisions under section 12176(b) (Confidentiality Regarding Reasonable Accommodations), the Council understands the concern behind the comment, but disagrees that this concern requires any change to the proposed regulation. Furthermore, section 12176(b)(1)(D) allows disclosures if required by law. Alternatively, if a complaint is filed against an association for discrimination which may affect the association's financial condition, an association may fulfill its legal duties of disclosure to membership regarding potential financial exposure without disclosing the name of the complainant or other identifying information.

Article 15. Discrimination in Land Use Practices

Article 15:

Comment: 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. 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." (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).) Such a duty to affirmatively further fair housing is presently under consideration by the Legislature, but is not currently part of state law. (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.)

The authority cited by the Initial Statement of Reasons for this provision, Government Code section 12955.8, subdivision (a), 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" that is currently provided by FEHA. (HUD Final Rule on Affirmatively Furthering Fair Housing, 80 Fed. Red. 42274 (Jul. 16, 2015).)

Such an affirmative duty is not yet part of FEHA, and it is beyond the purview of the Council to add by regulation. (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 272.) 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.

Council response: The Council disagrees that a failure to act should be limited in some manner. The commenter fails to provide any legal authority for the claim. Government Code section 12955.8 provides that proof of an intentional violation and a violation causing a discriminatory effect both apply to "an act or failure to act" in connection with any practices covered by the Act, including violations of 12955(l) relating to land use. Whether a particular governmental failure to act rises to the level of a violation of the Act is a question of fact for determination by a court, based on the liability provisions set out in section 12010, this article, and other provisions of the Act and regulations. Furthermore, the proposed regulations are independent

of and distinct from any legislative action with regard to the duty to affirmatively further fair housing.

Comment: 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. For example, this is the crux of the regulations' proposal to make siting decisions for "hazardous land uses" actionable under FEHA. 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(l), "is limited to discrimination that makes housing *unavailable*. . . 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(l)." (*El Pueblo v. Kings County Bd. of Supervisors* (Jul. 3, 2012, F062297 [nonpub. opn.] [2012 Cal. App. Unpub. LEXIS 4984].) 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. (42 U.S.C. section 3604(a).) 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. 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 Initial Statement of Reasons 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. 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.

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 opportunities are covered *only if those effects are sufficiently severe to render the housing opportunities unavailable*. 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, section 65008(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. We suggest eliminating the potentially misleading terms and replace them with language consistent with the statutory text of both FEHA and FHA and the respective authorities thereunder. The Initial Statement of Reasons 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." 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.

Council response: With regards to the commenter's suggestion to revise the regulation to limit liability to making housing opportunities unavailable, the Council disagrees. Such revisions would conflict with the Act's broad remedial purposes and its much broader understanding of definition of housing opportunity. The relevant provision, Government Code section 12955, subsection (l), provides: It shall be unlawful... "To discriminate through public or private land use practices, decisions, and authorizations because of [list of protected bases]. Discrimination includes, but is not limited to, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law (Title 7 (commencing with Section 65000)), that make housing opportunities unavailable." The comment misinterprets the statutory provision because it ignores the word "includes" in that provision. The phrase "make housing opportunities unavailable" does not modify the entire provision of section 12955, subsection (l). Rather, the second sentence exemplifies some of the ways in which public or private land use practices, decisions, and authorizations can discriminate. Similarly, nothing in 12955(l) limits land use discrimination to actions under the Planning and Zoning Law, but rather the section includes actions under that law. For example, restrictive covenants are prohibited, but such covenants are not a component of planning and zoning law.

The Council agrees that "availability" and "enjoyment" of housing opportunities are separate criteria. Both are included in the Act's broad understanding of "discrimination" as provided in Government Code section 12927(c) and the Act's definition of "unlawful practices" at Government Code section 12955 and 12955(l). The commenter fails to cite any relevant and authoritative cases that preclude the application of the Act to appropriate limitations of enjoyment of housing opportunities.

Further, the Act provides in Government Code section 12921(b): "The opportunity to seek, obtain, *and hold housing* without discrimination ... is hereby recognized as and declared to be a civil right." (Emphasis added.) And Government Code section 12927(c)(1) defines "discrimination" to include..."refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use *and enjoy* a dwelling." (Emphasis added.)

Finally, by declaring it the public policy of the state to protect the right to be free from discrimination on enumerated bases, and declaring the rights protect by the Act to be “civil rights,” the legislature has made it clear that the Act’s provision must be broadly interpreted. See Government Code sections 12920 and 12921. Government Code section 12993(a) provides for the construction of the Act, both as to housing and employment: “(a) The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof.” Courts have consistently held that the Act must be liberally construed. See, e.g. *Auburn Woods I Homeowners Assn. v. Fair Employment and Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 (stating the federal Fair Housing Act provides a minimum level of protection that the Act may exceed); *Brown v. Smith* (1997) 55 Cal.App.4th 767, 780–781 (same); *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157-1158 ; *Bagatti v. Dept. of Rehabilitation* (2002) 97 Cal.App.4th 344, 367-368; *State Personnel Board v. Fair Employment and Housing Com.* (1985) 39 Cal.3d 422. As one court stated, the legislature intended the Act “to amplify” the rights of victims of discrimination, *Rojo v. Kliger* (1990) 52 Cal.3d 65, 75.

None of the cases cited in the comment require the council to reach a different conclusion. Government Code 12955(l) has explicit language prohibiting discrimination in land use decisions that is not found in the federal Fair Housing Act, so cases interpreting unrelated federal Fair Housing Act provisions are not controlling. Further, in *Inland Mediation Bd. v. City of Pomona*, the only case cited in the comment relating to the Act, the court found that plaintiffs had stated a cause of action against the City under the Act based on allegations that the City’s actions otherwise made housing unavailable.

The comment misconstrues the references in the ISOR to Government Code section 65008. The Council does not intend to imply that Section 65008 extends beyond its express terms. Rather, since Section 65008 and the Act could, in many situations, apply to the same set of facts, and are both aimed at preventing housing and land use discrimination against the same set of protected classes, the Council has endeavored to be generally consistent where such consistency is an appropriate interpretation of the Act. See Government Code section 12993, and 65008(a)(1)(A), which prohibits discrimination based, among other things, on “any characteristic of the individual or group of individuals listed in subdivision (a) or (d) of section 12955, as those bases are defined in sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955 and Section 12955.2. Neither 87 Ops.Cal.Atty.Gen. 148 (2004) nor *BCP/Fox Hollow LLC v. Alpha III, Inc.* (Oct. 13, 2006, D045138) [nonpub. opn.] [2006 Cal. App. Unpub. LEXIS 9115]) compel a contrary approach.

Comment: 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 Employment and Housing 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.

Council response: The Council disagrees with the comment. We appreciate that regulations have to be carefully tailored, balanced, and well-defined, and these proposed regulations meet those standards. Contrary to the inference in the comment, nothing in the proposed regulations conflicts with the State Planning and Zoning Act or CEQA. To the contrary, these regulations are drafted to be consistent, where applicable and appropriate, with such laws, such as Government Code section 65008. Nor does the comment cite to any specific conflict. Nor does anything in the proposed regulation support the proposed hypotheticals proffered in the comment.

Nothing in the proposed regulation suggests, much less provides, that "one person may pursue a disparate impact claim based only on anecdotal evidence, with no statistical support." Rather, section 12061(d) specifically refers to "types of evidence that may be relevant in providing statistics to establish or to rebut the existence of a discriminatory effect." The Council did accept an earlier suggestion by the commenter to revise the regulations regarding a single person pursuing a discriminatory effect claim section 12060(b) to provide: "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."

The Council has no reason to believe that public entities will stop complying with their affordable housing obligations and stop seeking economically and socially diverse communities simply because they are required to do so in a nondiscriminatory manner, and no legal authority is offered for that proposition. Rather, the proposed regulation will simply require that those functions be carried out in compliance with the Act.

Contrary to the implications in the comment, any allegations based on "enjoyment of housing" need to meet the standards for liability set out in section 12010, Article 7, this article, and other provisions of the Act and regulations. The Council agrees that "availability" and "enjoyment" of housing opportunities are separate criteria, and has found that both are included in the Act's broad understanding of "discrimination" as provided in Government Code section 12927(c) and the Act's definition of "unlawful practices" at Government Code section 12955 and 12955(l). The comment fails to cite any relevant and authoritative cases that

preclude the application of the Act to appropriate limitations of enjoyment of housing opportunities.

Further, the Act provides in Government Code section 12921(b): “The opportunity to seek, obtain, *and hold housing* without discrimination ... is hereby recognized as and declared to be a civil right.” (Emphasis added.) And Government Code section 12927(c)(1) defines “discrimination” to include...”refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and *enjoy* a dwelling.” (Emphasis added.)

Finally, by declaring it the public policy of the state to protect the right to be free from discrimination on enumerated bases, and declaring the rights protect by the Act to be “civil rights,” the legislature has made it clear that the Act’s provision must be broadly interpreted. See Government Code sections 12920 and 12921. Government Code section 12993(a) provides for the construction of the Act, both as to housing and employment: “(a) The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof.” Courts have consistently held that the Act must be liberally construed. See, e.g. *Auburn Woods I Homeowners Assn. v. Fair Employment and Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 (stating the federal Fair Housing Act provides a minimum level of protection that the Act may exceed); *Brown v. Smith* (1997) 55 Cal.App.4th 767, 780–781 (same); *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157-1158; *Bagatti v. Dept. of Rehabilitation* (2002) 97 Cal.App.4th 344, 367-368; *State Personnel Board v. Fair Employment and Housing Com.* (1985) 39 Cal.3d 422. As one court stated, the legislature intended the Act “to amplify” the rights of victims of discrimination, *Rojo v. Kliger* (1990) 52 Cal.3d 65, 75.

Contrary to the suggestion of the commenter, the term “failure to act” is appropriately used in the regulations. Government Code section 12955.8 provides that proof of an intentional violation and a violation causing a discriminatory effect both apply to “an act or *failure to act*” in connection with any practices covered by the Act, including violations of 12955(l) relating to land use. (Emphasis added.) Furthermore, under subsections 12161(a)(1) and (2), the reference in subsection (b)(3) to a “fail[ure] to enforce generally imposed requirements” is only a violation if it rises to the level of either intentional discrimination or discriminatory effect. Whether a particular governmental failure to act rises to that level is a question of fact for determination by a court, based on the liability provisions set out in section 12010, Article 7, this article, and other provisions of the Act and regulations. The Council has no reason to believe that public entities will simply refuse to carry out critical health and safety functions such as code enforcement simply because they are required to do so in a nondiscriminatory manner, and no legal authority is offered for that proposition. Rather, the proposed regulation will simply require that those functions be carried out in compliance with the Act. Any concerns that specific claims of violations of the Act are meant to harm protected classes can be addressed by the courts on a fact-specific, case by case basis.

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

Section 12161(a):

Comment: 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 disregards virtually unanimous authority – including cases from the Ninth Circuit – holding that a government entity may process requests for reasonable accommodation "through the entity's established procedures used to adjust the neutral policy in question." (See, e.g., *Enriching, Inc. v. City of Fountain Valley* (9th Cir. 2005) 151 Fed. Appx. 523; *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.) It also includes guidance from HUD and DOJ. (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; *HUD/DOJ Updated Related Q&A re Group Homes, Local Land Use* (Aug. 6, 2015).)

In 2001, the Attorney General articulated that 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. (*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.

Further, the blanket prohibition upon "charging a fee for seeking or processing a reasonable accommodation" 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, they are not inherently impermissible for municipalities processing requests through established non-discriminatory land use procedures. Indeed, the only authority cited for this provision is the *HUD/DOJ Statement on Reasonable Accommodations*. However, that guidance was directed at "housing providers," not municipal land use regulators. (*Nikolich v. Arlington Heights* (N.D.Ill. 2012) 870 F.Supp.2d 556, 566.) The applicable guidance for public land use practices, *HUD/DOJ Joint Statement on State and Local Land Use Practices*, notably contains no such suggestion. Indeed, the California Department of Housing and Community Development guidance on this subject contemplates that jurisdictions may charge at least a "minimal" processing fee. (See <http://www.hcd.ca.gov/community-development/building-blocks/program-requirements/addressremove-mitigate-constraints.shtml>.)

Additionally, section 12161(a)(11) 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. The obligation to provide translations in this area is already well

addressed by several existing laws. (*See, e.g.*, Water Code section 116450; Title VI of the Civil Rights Act of 1964 as implemented by Executive Order 13166; Government Code sections 7290 et seq. [the Dymally-Alatorre Bilingual Services Act].) 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. The regulations should clearly avoid any attempt to create obligations that the legislative process has declined to impose.

We propose the following revision to this subsection, including combination of paragraphs (1) and (2) to improve clarity and eliminate conflict with governing statute. Further, language pertaining to “toxic” land uses in subsection (a)(10) are wholly unauthorized by FEHA and have been removed. (*See El Pueblo v. Kings County Bd. of Supervisors* (Jul. 3, 2012, F062297 [nonpub. opn.] [2012 Cal. App. Unpub. LEXIS 4984].):

(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 ~~has~~causes a discriminatory effect on members of a protected class pursuant to Article 7, ~~including a practice that does any of the following in connection with housing opportunities or existing or proposed dwellings. 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, adversely impacts, or renders infeasible the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to housing opportunities; or (2) M~~m~~akes housing opportunities unavailable or denies dwellings to individuals or intended occupants of dwellings;~~

~~(3)(2) Imposes different requirements than generally imposed that deny, restrict, condition, adversely impact, or render infeasible unavailable housing opportunities or the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to housing opportunities or existing or proposed dwellings;~~

~~(4)(3) Provides inadequate, inferior, limited, or no governmental infrastructure, facilities, or services essential for housing opportunities, such as water, sewer, garbage collection, code enforcement, or other municipal infrastructure or services, or basic utilities, 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, or otherwise makes unavailable such essential infrastructure, facilities, or services;~~

~~(5)(4) Denies, restricts, conditions, adversely impacts, or renders infeasible/unavailable the use of privileges, services, or facilities associated with essential for housing opportunities or existing or proposed dwellings, ~~or otherwise makes unavailable such privileges, services or facilities;~~~~

~~(6)(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;

~~(7)(6)~~ In the adoption, operation or implementation of housing-related programs, denies, restricts, ~~adversely impacts~~, conditions, or renders infeasible ~~unavailable~~ 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;

~~(8)(7)~~ Refuses or fails to make reasonable accommodations in public or private land use practices or services related to the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use, or in connection with residential real estate or existing or proposed dwellings, including charging a fee for seeking or processing a reasonable accommodation, or 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 that~~ takes into consideration different criteria ~~or uses different processes~~ than those required for consideration as a reasonable accommodation;

~~(9)(8)~~ Refuses or fails to make, or allow to be made, reasonable modifications in a dwelling when such modifications are required by law; or

~~(10)~~ 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

~~(11)(9)~~ Denies, restricts, conditions, ~~adversely impacts~~, or renders infeasible ~~unavailable~~ 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 otherwise makes housing opportunities unavailable~~ 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 certain contracts and agreements as set forth in 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.

Council response: In regard to the comments and proposed changes concerning subsection 12161(a)(3)(H) (ultimately renumbered as 12161(b)(8) (reasonable accommodations)), the Council disagrees with the comment regarding the relationship of reasonable accommodation requests to existing land use processes. The regulation allows public entities to use their variance and conditional use permit processes *so long as* those processes otherwise comply

with the standards for reasonable accommodations set out in Sections 12176 et seq., including such provisions as maintaining confidentiality, using the interactive process, and using only permissible grounds for denial. This is consistent with the case law and the Attorney General opinion. While some of these processes may be consistent with Section 12176, many conditional use permit and variance processes use standards and procedures that may be inconsistent with the requirements under the Act for considering and acting upon a request for a reasonable accommodation. Public entities need to be cognizant of these differences and ensure that whatever process they use meet the legal requirements for consideration of reasonable accommodation requests. Discriminatory or burdensome permit processes may even give rise to municipal liability. *See Pacific Shores Properties, LLC v. City of Newport Beach* (9th Cir. 2013) 730 F.3d 1142, 1148 (“[T]he costs borne by the Plaintiffs to present their permit applications” were compensable.) While the Council disagrees with the comment, it ultimately revised the text to make it clearer. The relevant text now reads: “...or using land use permitting processes for variances, conditional use permits, or other land use approvals rather than a reasonable accommodation process to respond to a request for a reasonable accommodation if the variance or conditional use process takes into consideration different criteria or uses different procedures than those required by this article for considering requests for a reasonable accommodation;...”

We note, in regard to the reference to the Joint HUD/DOJ statement and other documents cited, that those documents are consistent with the proposed regulation. See, for example, the Joint Statement of the Dept. of Justice and the Dept. of Housing and Urban Development, *State and Local Land Use Laws and Practices and the Application of the Fair Housing Act* (November 10, 2016), referenced in the Supp. ISOR, Questions 10, 20-24, which provides that local governments may use local land use procedures to respond to requests for reasonable accommodations *so long as they otherwise comply with their FHA obligations, including those described in Questions 10, 20-24, and so long as they are not “otherwise unreasonably burdensome or intrusive or involves significant delays.”* Question 22. This includes engaging in the interactive process (Question 21); limited reasons for denial of the request (Question 20); that the request need not be made in a particular manner or at a particular time (Question 22); that the procedures cannot be onerous or require information beyond what is necessary to show that the individual has a disability and that the requested accommodation is related to that disability, including not usually requiring medical records (Question 23); that the procedures are flexible enough to accommodate the needs of individuals making a request, including accepting and considering requests that are not made through the official procedure (Question 23); and that a request for accommodation in zoning ordinances may be made at any time (Question 25.)

Other 9th Circuit and California cases cited by the comment are not persuasive. See, e.g., *Enriching, Inc. v. City of Fountain Valley* (9th Cir. 2005) 151 Fed. Appx. 523 (unpublished, noncitable case interpreting the ADA, not FEHA, where the City did engage in the interactive process outside of the usual procedures, and had preliminarily agreed to accommodations, but jury could find that the entity seeking the accommodations failed to continue to engage in good faith); *Solid Landings Behavioral Health, Inc. v. City of Costa Mesa* (C.D. Cal. 2015) 2015 U.S. Dist. LEXIS 52475 (FHA case, there were reasonable accommodation procedures but insufficient

discussion of details of the procedures to determine if would have complied with FEHA or the HUD/DOJ FHA Guidance); *AKI Family Ltd. P'ship v. City of San Marcos* (S.D.Cal. 2007) 2007 U.S. Dist. LEXIS 12986) (state law claims dismissed due to dismissal of federal claim, case dismissed as unripe and did not address reasonable accommodations, references to FHA were *dicta*.)

Nor does the regulations impose a new program on municipalities. It specifically allows them to use their current programs so long as those comply with FEHA. Similarly, the regulation is not in conflict with the Public Records Act because it requires confidentiality *unless disclosure is required by law* (subsection (b)(1)(D)).

The Council disagrees with the comments about fees and declines to adopt the suggested changes. The comment about fees conflates fees for processing reasonable accommodation requests and generally applicable fees. Government Code 12927(c)(1) provides that discrimination "includes refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling." Since individuals are required to respond to requests for a reasonable accommodation as a matter of law, public entities cannot charge them for making a request or for the entity's consideration of such a request. *See also* subsection 12180(a)(2), which provides that a person considering an accommodation request may have to incur some costs to respond to the requests, and that such costs do not constitute grounds for denial, unless they constitute an undue financial or administrative burden pursuant to Sections 12179(a)(4) and 12179(b). *See Giebeler v. M&B Associates* (9th Cir. 2003) 386 F.3d 1143, 1152-53 (accommodations need not be free of all possible cost to the landlord). *See also, Question/Answer No. 11 in Joint Statement of the Department of Housing and Urban Development and the Department of Justice on "Reasonable Accommodations Under the Fair Housing Act," (HUD/DOJ Statement on Reasonable Accommodations)* May 17, 2004, available at <http://www.justice.gov/crt/about/hce> or https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf. (Housing providers may not require persons with disabilities to pay extra fees or deposits as a condition of receiving a reasonable accommodation.) The same principle applies to other entities covered under the Act.

As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the FHA, specifically 42 U.S.C. sections 3604-3606, 3617, 3631, and particularly 42 U.S.C. section 3604, subdivisions (f)(1), f(2), and f(3)(B), and their implementing regulations, 24 C.F.R. sections 100.204, 100.202(c), and case law interpreting those provisions. Further, the proposed section provides rights and remedies that are equal to or greater than the equivalent American with Disabilities Act provisions related to reasonable accommodations, pursuant to Government Code section 12926.1(a).

Independently of the prohibition on charging fees to consider, process, or grant a request for a reasonable accommodation, requests to waive fees that are generally applicable to all residents or individuals may also constitute appropriate requests for reasonable accommodations under the provisions of Sections 12176 *et seq.* For example, a generally applicable fee charged to provide a designated parking space might be waived as an accommodation for an individual with a disability who needs a specific accessible parking space,

or a guest parking fee might be waived as an accommodation for an attendant who needs to park near the person with a disability to assist them with transit. *See, e.g. United States v. California Mobile Home Park Management Co.* (9th Cir. 1994) 29 F.3d 1413, 1416 -1418 (a landlord's refusal to waive generally applicable fees may, under some circumstances, constitute discrimination on the basis of disability); *McGary v. City of Portland* (9th Cir. 2004) 386 F.3d 1259, 1263-64 (plaintiffs in *California Mobile Home Park Management* and *McGary* “plausibly claimed that the use and enjoyment of their homes were impaired by financial burdens that the defendants refused to mitigate though accommodation”); *Samuelson v. Mid-Atlantic Realty Co., Inc.* (D.Del. 1996) 947 F.Supp. 756, 761-62 (“It is clear that generally applicable fees can interfere with the use and enjoyment of housing by people with disabilities.” Plaintiff’s claim for return of late charges and penalties due to disability-related early lease termination stated claim for failure to accommodate).

The language referred to in the comment from the California Department of Housing and Community Development (HCD) web page misrepresents the information on the page and takes it out of context. HCD does not opine specifically on the legality of fees for reasonable accommodations. Instead, HCD describes a variety of possible approaches to address land use barriers and discrimination against people with disability. As part of that discussion, HCD provides a “sample” program that contains the following exemplar policy: “Sample Program 3: Reasonable Accommodation Ordinance. The city will adopt a written, reasonable-accommodation ordinance to provide exception in zoning and land use for housing for persons with disabilities. This procedure will be a ministerial process, *with minimal or no processing fee*, and will be subject to approval by the Community Development Director applying [the] following decision-making criteria ...” (Emphasis added.) Contrary to the comment’s suggestion, the sample does not imply that that a fee in excess of a ministerial fee would be acceptable (Comment characterizes the HCD language as allowing entities to charge at least a “minimal” processing fee, implying greater fees would be acceptable to HCD). In all other respects, the suggested Housing Element policies from HCD, including Sample Program 3, appear to be entirely consistent with the proposed regulations. See: “Develop formal procedures that ensure reasonable accommodation for housing for people with disabilities in accordance with fair housing and disability laws. Amend the locality’s municipal code to provide clear rules, policies, and procedures for reasonable accommodation in order to promote equal access to housing. Policies and procedures should be ministerial and include identifying who may request a reasonable accommodation (e.g. persons with disabilities, family members, landlords, etc.); timeframes for decision-making; and provision for relief from the various land-use, zoning, or building regulations that may constrain housing for people with disabilities.” See also: “Regularly monitor the implementation of the jurisdiction’s ordinances, codes, policies, and procedures to ensure they comply with the “reasonable accommodation” for disabled provisions and all fair housing laws.” We also note that HCD indicates that any such procedures need to be “in accordance with fair housing and disability laws.” To the extent there is an inference from HCD that minimal fees would be acceptable, such an inference would be overridden by these regulations.

In regards to the comment about former subsection 12161(a)(11), now subsection 12161(b)(11)), the Council disagrees with the comment. The section is explicit that “nothing in

this section shall be interpreted to expand the obligation to provide translations. . . .” beyond those existing in various statutes, so no further clarity is needed. The Council does agree with certain revisions proposed, and therefore has added some suggested clarifying language as well as additional references to several of the statutes cited by the commenter, including adding the phrase “documents, notices, proceedings” and adding references to Government Code section 7295, Water Code section 116450, and other statutes regarding interpretations and translations.

The Council declines to delete the references to toxic, polluting, and or hazardous land uses in subsection 12161(b)(10) (formerly subsection 12161(a)(11)). Practices relating to toxic land uses may, depending on the facts, constitute intentional discrimination pursuant to 12161(a)(1) or have a discriminatory effect pursuant to 12161(a)(2), just like other land use practices. The unpublished case cited by the commenter is not controlling or persuasive.

Comment: As drafted, subsection (a) includes reference to a “legally sufficient justification”; while correct in the context of discriminatory effects liability, no such concept exists in the realm of intentional discrimination. The Council recognizes this fact by stating in proposed section 12063, “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.” However, the current draft of subsection (a) could be read such that a legally sufficient justification could apply in cases where intentional discrimination is alleged—and inadvertently cause confusion. Therefore, we recommend the following change, for clarity and consistency:

- (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~~
- (1) intentionally discriminates pursuant to Government Code section 12955.8(a) and any implementing regulations based on membership in a protected class, or,
 - (2) in the absence of a legally sufficient justification for the practice, any public or private land use practice that has a discriminatory effect on members of a protected class pursuant to Article 7, including a practice that does any of the following in connection with housing opportunities or existing or proposed dwellings:

Council response: The Council agrees that the section as formerly written incorrectly stated the applicable standard and has amended these provisions accordingly.

Comment: We have no major objection to the substance of this subsection. However, use of the phrase “unless there is a legally sufficient justification for the practice” immediately prior to the discussion of liability for intentional discrimination gives the impression that a legally sufficient justification may be used as a defense to an intentional discrimination claim. This statement conflicts with the rule stated in section 12063.

In addition, we recommend that “because of membership in a protected class” be added towards the end of the section to make clear that the activities enumerated in paragraphs (1) through (11) are only discriminatory to the extent they are based on

membership in a protected class. Without this addition, the section could be interpreted to prohibit the enumerated activities even when they are unrelated to membership in a protected class.

We recommend the following revisions:

(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 has a discriminatory effect on members of a protected class pursuant to Article 7 unless there is a legally sufficient justification for the practice. ~~This includes including a practice that does any of the following in connection with housing opportunities or existing or proposed dwellings~~ because of membership in a protected class:

Council response: The Council agrees with the content of this comment and has amended the provision accordingly to remove the ambiguities and to separate the liability provisions for intentional discrimination and discriminatory effect.

Section 12161(a)(3) (ultimately renumbered as Section 12161(b)(3)):

Comment: As drafted, it is unclear whether part (3) of subsection (a) includes land use practices that involve the failure to apply generally imposed requirements where that failure adversely impacts housing opportunity for protected classes. We therefore recommend the following revision to section 12161(a)(3) to clarify that such a land use practice and similar land use practices are prohibited by FEHA:

(a)(3) Imposes different requirements than generally imposed or fails to enforce general requirements in a manner that denies, restricts, conditions, adversely impacts, or renders infeasible housing opportunities or the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to housing opportunities or existing or proposed dwellings.

Council response: The Council agrees the provisions must explicitly bar failure to enforce mandated land-use requirements and has amended subsection 12161(b)(3) accordingly.

Section 12161(a)(7) (ultimately renumbered as Section 12161(b)(7)):

Comment: With respect to part (7) of subsection (a), we recommend the addition of the terms “land use,” “policies”, and “plans” as follows:

(a)(7) In the adoption, operation or implementation of housing or land use- related programs, policies, or plans...

Since the section addresses discriminatory land use practices, it is appropriate to include both housing and land use programs that impact housing opportunity in this provision. We recommend the inclusion of “policies” and “plans” in this section, because policies and plans, including general plans and specific plans, have been one of the principal mechanisms used to

deny and eliminate housing opportunities on a discriminatory basis. For example, general plans have been used to redesignate the land use of parcels with occupied housing for industrial facilities or truck routes in communities of color, thereby restricting the rights of owners and residents to use the housing for residential purposes or gain access to core infrastructure and services necessary to support housing, such as sewer or water. *See Comm. Concerning Cmty. Improvement v. City of Modesto* (2004) 583 F.3d 690, 714 (Municipality may not refuse municipal services like sanitation infrastructure for discriminatory reasons.).

Council response: The Council agrees with the comment in part, and has added “policies and plans” to the text. It is unnecessary to add “land-use” in subsection (b)(7)) because the entire section refers to “public and private land use practices,” and because the phrasing is inclusive, and thus land use-related activities are already covered, as well as being covered by (b)(8).

Section 12161(a)(3)(L) (ultimately renumbered as Section 12161(b)(12)):

Comment: Although the current regulations mirror the federal statute, they would be stronger if they explicitly affirm that land use practices that create or perpetuate patterns of segregation of protected classes are unlawful. Courts have repeatedly found that such practices are cognizable forms of discrimination under fair housing law, and that discriminatory effect can be proven by showing that a challenged practice adversely impacts a protected group or has the effect of perpetuating segregation. (*See Metropolitan Housing Development Corp. v. Village of Arlington Heights* (7th Cir. 1977) 558 F.2d 1283, 1288 (explaining two methods of establishing discriminatory effect); accord *Avenue 6E Investments, LLC v. City of Yuma, Ariz.* (9th Cir. 2016) 818 F.3d 493, 503, cert. denied (2016) 137 S.Ct. 295; *Mhany Management, Inc. v. County of Nassau* (2d Cir. 2016) 819 F.3d 581, 619-620 (discriminatory effect of zoning ordinance may be shown by harm to community generally or by perpetuation of segregation).) HUD has also issued regulations acknowledging perpetuation of segregation as a form of discriminatory effects discrimination. (*See generally* Implementation of the Fair Housing Act’s Discriminatory Effects Standard; Final Rule, 78 Fed. Reg. 11, 460 (Feb. 15, 2013) (noting at 24 C.F.R. § 100.500(a) that “[a] practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or *creates, increases, reinforces, or perpetuates segregated housing patterns* because of race, color, religion, sex, handicap, familial status, or national origin.” (Emphasis added.)) Accordingly, we recommend that the Council add a subsection under section 12161 to clarify that land use practices that create or perpetuate segregation violate FEHA:

(12) Perpetuates segregation, regardless of whether it also has a disparate impact on protected groups.

Council response: The Council agrees this language is supported by the Act, and has incorporated this suggestion in a new subsection 12161(b)(12) and section 12060(b). These sections, as ultimately phrased, prohibit discriminatory practices that “create, increase, reinforce, or perpetuate segregated housing patterns, independently of the extent to which it produces a disparate effect on protected classes.” These provisions identify a type of

discrimination that is explicitly covered in FEHA (Discrimination “includes the provision of segregated or separated housing accommodations,” Government Code section 12927(c)(1),) and they also ensure the regulation is at least as protective as federal law which recognizes segregative practices separately. *See* 24 C.F.R. § 100.500(a) (“A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of *persons* or creates, increases, reinforces, or perpetuates segregated housing patterns because of a protected status.”) (Emphasis added.) This type of discrimination has also long been recognized in fair housing case law, e.g. *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (7th Cir. 1977) 558 F.2d 1283, 1288; *Huntington Branch, NAACP v. Town of Huntington* (2d Cir. 1998) 844 F.2d 926, 937, *aff’d*, 488 U.S. 15 (1988) (per curiam); *Hallmark Developers, Inc. v. Fulton County* (N.D. Ga. 2005) 386 F.Supp.2d 1369, 1383; *Graoch Associates #33, L.P. v. Louisville/ Jefferson County Metro Human Relations Com.* (6th Cir. 2007) 508 F.3d 366, 378; *Avenue 6E Investments, LLC v. City of Yuma, Ariz.* (9th Cir. 2016) 818 F.3d 493, 503, cert. denied 137 S.Ct. 295 (2016); *Mhany Management, Inc. v. County of Nassau* (2d Cir. 2016) 819 F.3d 581, 619-620.

Section 12161(b): (ultimately renumbered as Section 12161(c)):

Comment: Particular care is required in this area, because 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." (*See* 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. 5.)

(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.

Council response: While the Council agrees that public entities are not bound by every single comment made by the public (and could not be, since comments are often contradictory), such comments may be relevant evidence in the determination of liability. However, the Council

disagrees that the language proposed in the comment is necessary. The proposed language addresses evidentiary standards that courts are in a better position to determine in the context of individual cases. Furthermore, the proposed language misstates the standards to be used by a court in some circumstances. Under Section 12062(b), the existence of *some* valid reasons may not be sufficient to establish a legally sufficient justification in response to a claim of discriminatory effect.

Section 12162. Specific Practices Related to Land Use Practices.

Comment: This section, as well as section 12161(a) and others, provides a general explanation of how land use practices may violate the Act, and then states that "those practices include" a lengthy list of specific actions and occurrences. 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. 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.

Additionally, we recommend removing section 12162(a), which appears to strongly suggest that "crime-free housing" ordinances are per se unlawful or subject to heightened scrutiny. This is beyond the Council's authority, and beyond the Legislature's wishes.

Further, we recommend amending section 12162(b) 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. The legislative history underlying Government Code section 53165 clearly acknowledges that "these ordinances can serve very legitimate needs. . .", and the Legislature provided parameters for such ordinances, but did not undertake to prohibit them. (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#].)

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. 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. . ."]. Moreover, this subdivision is poorly drafted, and will invite litigation over such

vague terms as "broad definitions of nuisance activities." California's statutory public nuisance provision is itself "broad defined," and FEHA certainly does not preclude government agencies from requiring that property owners take those actions necessary to avoid it. (See Civ. Code, section 3479; *Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040; 9 See also Gov. Code section 12995(b).) The legitimate concerns regarding "crimefree" ordinances raised in section 53165 and the HUD guidance are adequately covered in other subdivisions of section 12162, making subdivision (a) unnecessary and confusing.

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, ~~land ownership, tenancy, or any other land use benefit or housing opportunities~~, 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. ~~Those practices include actions to enact, modify, enforce, or implement.~~ 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:

- ~~(a) 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;~~
- ~~(b)~~(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;
- ~~(c)~~(b) Practices requiring persons to take actions against individuals based upon their calls to emergency services or visits to the property by emergency services;
- ~~(d)~~(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
- ~~(e)~~(d) Practices that violate, or mandate that other persons violate, Article 24.

Council response: The Council agrees in part and disagrees in part with the comment. The proposed regulations provide similar or greater protections to members of protected classes than both the HUD "Guidance on Application of Fair Housing Act Standards to the Enforcement of Local Nuisance and Crime-Free Housing Ordinances" and the HUD 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," and thus do not conflict with the federal Fair Housing Act. The examples in subsections (a) – (c) are prefaced by the language

that says that the practices in the examples are unlawful “to the extent that . . . [they] require conduct, that violates . . . the Act . . . or otherwise restrict, deny or make a housing opportunity unavailable *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...*” (Emphasis added.) The preface narrows the scope of the section to practices that are discriminatory under the Act because they constitute either intentional discrimination or have a discriminatory effect. The specific practices identified as examples are practices that violate other provisions of the regulations, other statutes, or have been found to be discriminatory, but they are examples prefaced by the opening language and subject to its terms. Therefore, the Council disagrees that any of the proposed changes are necessary. As required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the federal Fair Housing Act, including in the relevant guidance documents from HUD.

As noted in the Initial Statement of Reasons, the ordinances described, if they meet the prefatory requirements, violate the Act by restricting the availability of housing or otherwise denying housing opportunities to members of a protected classes. When an ordinance directs a private landlord to discriminate, the ordinance constitutes a violation of fair housing law. *See, e.g. Waterhouse v. City of American Canyon* (N.D. Cal. 2011) 2011 U.S. Dist. LEXIS 60065, *1, 13–15. While *Waterhouse* is unpublished and not controlling, the Council finds its analysis on this issue persuasive. The Court found that the “City of American Canyon is forcing the owners of a mobile-home park to discriminate on the basis of familial status through a series of city ordinances. This violates the federal Fair Housing Act.” *Id.* at *1. The Court held that the City’s actions in “enacting and enforcing the ordinances violate the Fair Housing Act by “mak[ing] unavailable . . . dwelling[s] to any person because of . . . familial status,” and further determined that “[t]he restrictions in the subject ordinances necessarily impede non-seniors from obtaining housing in the mobile-home park and thus discriminate on the basis of familial status.” *Id.* at *15. “Because each ordinance has purported to require or permit actions that are discriminatory under the Fair Housing Act, each has been invalid during all relevant periods.” *Id.* at 16.

The Council, has however, adopted a specific language change suggested by the commenter for clarity by adding the phrase “in connection with housing opportunities” to subsection (b), and has added subsection (d) to make it explicit, consistent with Government Code 12995(b) that nothing in this section affects the nondiscriminatory enforcement of nuisance laws.

The comment also suggests that: “As written, the regulations could have been interpreted to affect business regulations unrelated to housing.” The Council disagrees with this comment. The regulation on its face applies only to regulations related to housing. The unlawful practices described apply *only* “To the extent that ...practices... require conduct that violates ...the Act...or otherwise restrict, deny, or make a housing opportunity unavailable” because of intentional discrimination or because they have a discriminatory impact.

Section 12162(a) and (c):

Comment: California law currently prohibits local agencies (e.g., cities, counties, etc.) from “requir[ing] a landlord to terminate a tenancy or fail to renew a tenancy based upon the number of calls made by any person to the emergency telephone system relating to the tenant or a member of the tenant’s household being” a victim of domestic violence, sexual assault, stalking, human trafficking, or elder/dependent adult abuse. We suggest that the Council amend these provisions in order to (1) make clear that overly broad definitions of concepts such as “nuisance” or “criminal activity” should not be used to penalize individuals who call for or receive law enforcement or emergency services; (2) provide additional examples of the types of actions that should not be taken against someone for calling for (or receiving) police or emergency services; and (3) clarify that law enforcement or emergency service calls or visits should not trigger penalties if an individual summoned or received law enforcement or emergency services.

We therefore recommend the following changes to the draft text of subsections 12162(a) and (c):

(a) Practices requiring persons to take actions against or otherwise penalize individuals based upon broad definitions of nuisance activities (such as considering a certain number of phone calls to, or number of visits by, law enforcement or emergency services as a nuisance), criminal activity, or unlawful conduct – including, but not limited to: mandating initiation of eviction procedures proceedings against tenants or occupants; refusing to renew an existing tenancy; sending notices to or otherwise informing tenants or occupants that their dwelling or building is at risk of becoming or has been designated a “nuisance” property, a “troubled” property, or a similarly negative designation; or threatening or engaging in adverse actions against one or more individuals, including tenants, occupants or guests;

[...]

(c) Practices requiring persons to take actions against or otherwise penalize individuals based upon: ~~their~~ calls to law enforcement or emergency services made by these individuals or on their behalf; ~~or~~ visits to the property by law enforcement or emergency services; or the receipt of law enforcement or emergency services.

Council response: The Council agrees that some additional clarity is necessary, and has revised the regulation by revising subsection 12162(a) to specify that a single phone call is protected, by adding receipt of a visit or service by law enforcement or emergency services to the list of protected activities, and by including practices that prohibit renewal of an existing tenancy or requiring the initiation of adverse actions against one or more tenants, occupants, and guests. The previous subsection designated subsection (c) has been eliminated to avoid redundancy.

Section 12162(b):

Comment: I suggest that language be added to this section to make it similar to section 12270, which exempts or allows consideration of state or federal laws, such as Corp. Code section 7221, which allows associations to remove a director convicted of a felony.

Council response: The Council disagrees that a revision is needed to this section. Narrowly tailored, nondiscriminatory practices based upon specific statutory obligations would not be precluded by this section, which prohibits actions based on “broad definitions of nuisance” that are intended to discriminate or have a discriminatory effect.

Proposed Section 12162(f):

Comment: We recommend adding the following subsection to clarify that jurisdictions should not penalize owners because tenants or occupants at the property call or receive law enforcement or emergency services.

(f) Practices that designate a person’s dwelling or building a nuisance or that otherwise take actions against or penalize persons because an individual (e.g., a tenant or occupant) called or received law enforcement or emergency services at the person’s dwelling or building.

Council response: The Council agrees with the comment and has revised section 12162(a) to incorporate the concept that jurisdictions should not penalize owners because tenants or occupants at the property call or receive law enforcement or emergency services. This comment is also addressed above in in the Council’s response to the first comment under proposed sections 12162(a) and (c).

Article 18. Disability

Section 12176. Reasonable Accommodations.

Comment: The proposed reasonable accommodation examples should provide a guideline as to whether the requested accommodation should be granted. For instance, each of the examples in section 12180(b) end with the sentence: “Therefore, in the absence of additional relevant facts, the requested accommodation should be granted.”

Council response: The Council disagrees with the comment. The examples in subsections 12176(c)(8)(B) illustrate the interactive process, and provide guidance as to when an interactive process is required. The examples are not intended to direct a particular outcome, because additional facts would be required.

Section 12176(a):

Comment: The only objection we have to this subsection is the inclusion of a parenthetical which reads “i.e. a significant risk of bodily harm” after “direct threat” is mentioned. This

language is not included in statute. The HUD guidance on this issue refers to “a significant risk of substantial harm,” but does not limit the harm to bodily harm. (See <https://www.justice.gov/crt/us-department-housing-and-urban-development> at Question 5.) We do not read the direct threat exception to be so narrow as to only encompass significant risk of bodily harm. For example, in *Foster v. Tinnea* (1997) 705 So.2d 782 a tenant who “made inappropriate sexual comments to a female tenant, used extreme profanity, and repeatedly played loud and vulgar music on the premises” was found to constitute a direct threat. Similarly, in *Arnold Murray Const., LLC v. Hicks* (2001) 621 N.W.2d 171, a tenant who engaged in “abusive and threatening behavior,” including beating on the ceiling, yelling profanities, and standing naked in a doorway, was found to be a direct threat. As these cases show, the direct threat exception may be interpreted to include behaviors that may not be considered to pose a significant risk of bodily harm, but are nonetheless a health and safety issue. Accordingly, we request that the parenthetical be deleted. This same parenthetical appears elsewhere in the regulations and should likewise be removed (including sections 12179(a)(5) and 12185(d)(9)). We recommend the following revision:

(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).”

Council response: The Council disagrees with this comment. In order to rise to the level of a direct threat to the health and safety of others, there must be a significant risk of either bodily harm or substantial physical damage. A review of relevant case law makes clear that a determination that there is a direct threat cannot be based on speculation, fears based on stereotypes, minor incidents of unusual behavior, or *de minimis* risks. In each of the cases cited above, the behavior rose to the level that there was grounds to believe that there was a significant risk of harm to an individual that included the potential for bodily harm. For example, in *Foster*, the facts included physical fights on the premises and an incident where the individual chased children with a machete. In *Arnold Murray Construction*, the conduct described, including belligerent behavior and aggressive verbal threats, supported a conclusion that there was a risk of bodily harm.

Section 12176(b):

Comment: Most associations do not disclose information about a person’s disability. However, we need clarification on the extent of this duty of confidentiality. For example, when an association grants a request for a reasonable accommodation to allow an assistance animal to

be in the pool area with the person with the disability, there will be questions asked about why that person is entitled to be in violation of State Code of Regulations which prohibit animals in the pool area. Also, if the association approves a ramp for wheelchair access or a van accessible parking space which encroach onto common area as a permitted use under Civil Code Section 4600(f), and members question such a decision by the board, can the association safely say that it granted a reasonable accommodation to a disability and leave it at that without violating Section 12176(b)?

Council response: The Council understands the concern behind the comment, but declines to make any change to the proposed regulation. Section 12176(b)(1)(D) allows disclosures if required by law. Alternatively, in many instances explanations can be made without disclosing the identity of the person with a disability or other identifying information.

Section 12176(b)(1):

Comment: 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 and Ralph M. Brown (Open Meetings) Act. 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. (See 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.)

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 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). Similarly, where a request for accommodation is considered by a collective body, the Brown Act generally requires that any materials provided to the body be made available for public inspection.

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. However, in the context of government decision-making, the prospect that

some interested persons might make inappropriate comments is no warrant to silence those who could have constructive input. The substantive goals of these regulations can be achieved without creating an opaque and unaccountable governmental process.

(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. Required by law.

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

Council response: The Council disagrees with the comment and rejects the proposed changes. A request for an accommodation is an individualized determination, based on the individual with a disability's need for the accommodation. It in fact *does* "preclude the local government from seeking or obtaining input from potentially interested parties regarding the requested accommodation," other than individuals in the local government who are necessary to evaluate or implement the accommodation, and individuals who can assist the individual with a disability to confirm the disability or the need for an accommodation. It differs from other land use ordinances, many of them involving public input from third parties, and which are based on policy considerations other than providing equal opportunities to individuals with disabilities.

Further, local governments routinely balance overlapping competing legal obligations, particular individual privacy considerations. Public Records Act requests contain a variety of exemptions that might apply in this situation, including possibly section 6254.20, which protects electronically collected personal information, including information that identifies or describes an individual user, including, but not limited to, his or her name, social security number, physical description, home address, home telephone number, financial matters, and medical history. There may be additional exemptions that apply. If not, subsection (b)(1)(D) allows disclosures required by law.

Section 12176(c)(3):

Comment: We recommend adding another subsection within subsection (c)(3) to specify that local land use or zoning code may contain specific procedures for obtaining a reasonable

accommodation. 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.

(c)(3)(A) Except as provided in paragraph (B), arequest 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).

...

(c)(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.

Council response: The Council declines to add the proposed language. This comment is addressed above in in the Council’s response to the first comment under proposed section 12161(a).

Section 12176(c)(7) :

Comment: Subsection (c) is incomplete without a section on economic accommodations. Case law has established that reasonable accommodations may also include financial accommodations necessary to overcome disability-caused barriers to tenancy. (*See e.g. Giebeler v. M&B Associates*, (9th Cir. 2003) 343 F.3d 1143, 1152 & n. 6.) As the United States Supreme Court explained in *US Airways, Inc. v. Barnett*, “Accommodations are not limited to

the immediate manifestations of a disability, but may also address the practical needs caused by a disability.” (*US Airways, Inc. v. Barnett*, 535 U.S. 391, 505 (2002); Although *Barnett* involves a claim under the American with Disabilities Act (ADA), courts often look to the ADA for guidance on the reach of the reasonable accommodation requirements of the Fair Housing Act. *Giebeler*, 343 F.3d at 1149.) We therefore propose the following paragraph be inserted before the current paragraph (7):

(7) An individual with a disability may request a reasonable accommodation in financial policies when a modification or change of such policies is necessary to accommodate a disability. Such economic accommodations may include: waiving guest fees; making an exception to a policy of not accepting Section 8 vouchers; waiving a rule requiring that rent be paid on the first of the month; allowing a tenant to relocate to a different unit without an otherwise applicable rent increase; and allowing a prospective tenant to use a co-signer when their limited income, so limited because of a disability, does not qualify them for the unit.

Citations: (“[T]he ‘imposition of burdensome policies, including financial policies, can interfere with disabled persons’ right to use and enjoyment and their dwellings, thus necessitating accommodation.” *McGary v. City of Portland* (9th Cir. 2004) 386 F.3d 1259, 1263.; *United States v. California Mobile Home Park Management Co.* (9th Cir. 1994) 29 F.3d 1413, 1416-17); *Freeland v. Sisao LLC* (E.D.N.Y. April 1, 2008) No. CV-07-3741, 2008 WL 906746; *Samuelson v. Mid-Atlantic Realty Co., Inc.* (D. Del.1996) 947 F.Supp. 756, 759-62; *Bentley v. Peace and Quiet Realty 2 LLC*, 367 F.Supp.2d 341, 345 (E.D.N.Y. 2005); In *Giebeler v. M&B Associates*, (9th Cir. 2003) 343 F.3d 1143, 1152 & n. 6., the Ninth Circuit found that a disabled individual, who was unable to work as a result of his disability and therefore make enough money to qualify for the apartment he wished to rent, was entitled to a reasonable accommodation to alter the apartment complex’s no co-signer policy, and allow his mother to co-sign.)

Council response: The Council agrees that case law supports the addition of a provision addressing economic accommodations and has added this provision as suggested in subsection (c)(7). The Council declines to adopt all of the proposed examples. The Council has selected representative examples from applicable case law that it finds appropriate and sufficient to provide clarity and other examples are not necessary.

Section 12176(c)(7) (ultimately renumbered as Section 12176(c)(8)):

Comment: We commend the Council for making it clear that failure to reasonably accommodate a disability constitutes a defense to an unlawful detainer, and clarifying that a request for accommodation may be made at any time during the eviction process. (*Douglas v. Kriegsfeld Corp.* (D.C. 2005) 884 A.2d 1109.) We suggest adding a citation to *Douglas* in the notes section in support of this provision.

Council response: The Council appreciates the comment. We concur that *Douglas v. Kriegsfeld Corp.* (D.C. 2005) 884 A.2d 1109 provides relevant persuasive authority consistent with the

proposed regulations. However, the Council declines to include the citation in the reference notes. See 1 C.C.R. section 14(b).

Comment: We continue to have serious concerns about this subsection in its entirety. It remains unclear why unlawful detainer actions have been singled out, and we are very concerned about these regulations being used to encourage delay tactics in unlawful detainer actions.

Council response: The Council disagrees with the comment. Subdivision (c)(7)(A) is necessary to clarify that a tenant may raise an alleged failure to provide a reasonable accommodation in an unlawful detainer action. This clarification is necessary because in some cases unlawful detainer courts have not allowed defendants in unlawful detainer actions to raise this defense. This may be a misconstruction arising from the language in Government Code 12955(f), which prohibits delays in unlawful detainers arising solely from claims of retaliation under FEHA, or a misapplication of other inapplicable provisions of the Civil Code. Regardless of the cause of the confusion, raising a defense of discriminatory conduct (including an alleged failure to provide a reasonable accommodation) in an unlawful detainer is appropriate. The mere fact that a defense is raised and must be addressed during the litigation of the matter does not constitute an unwarranted delay.

Comment: Section 12176(c)(7)(A) [now renumbered as Section 12176(c)(8)(A)] states that failure to provide a reasonable accommodation may be raised as a defense to an unlawful detainer action. This statement is unnecessary because section 12010(a)(2) already provides that a discriminatory housing practice may be raised as defense in an unlawful detainer action. Failing to provide a reasonable accommodation is a discriminatory housing practice. An additional provision stating that failure to provide a reasonable accommodation may be raised as a defense to an unlawful detainer action is unnecessary.

Subsection (c)(7)(A) [now renumbered as Section 12176(c)(8)(A)] also fails to require any nexus between the unlawful detainer action and the alleged failure to reasonably accommodate. In light of the issues in the phrasing of this section, and its superfluity, we recommend this subsection be deleted.

Council response: The Council disagrees with the comment. Subdivision (c)(8)(A) is necessary to clarify that a tenant may raise an alleged failure to provide a reasonable accommodation in an unlawful detainer action. This clarification is necessary because in some cases unlawful detainer courts have not allowed defendants in unlawful detainer actions to raise this defense. This may be a misconstruction arising from the language in Government Code 12955(f), which prohibits delays in unlawful detainers arising solely from claims of retaliation under FEHA, or a misapplication of other inapplicable provisions of the Civil Code. Regardless of the cause of the confusion, raising a defense of discriminatory conduct (including an alleged failure to provide a reasonable accommodation) in an unlawful detainer is appropriate. The mere fact that a defense is raised and must be addressed during the litigation of the matter does not constitute an unwarranted delay.

Furthermore, the Council disagrees that any “nexus” language is needed. No additional language is necessary because courts in unlawful detainer actions will evaluate the merits of the affirmative defense based on the specific allegations and facts in each case.

Comment: Section 12176(c)(7)(B) [now renumbered as Section 12176(c)(8)(B)] states that a request for a reasonable accommodation may be made at any time. Therefore, to state it may be made during the unlawful detainer process or after is unnecessary. Furthermore, as stated above, if the Council wishes to make clear that the obligation to consider requests for reasonable accommodation remain during the extent the tenant occupies the property, the Council should state that, rather than including language on trials, and unlawful detainers. Reasonable accommodation requests should ideally and will generally be made when a tenant with a disability requires an accommodation. The language in this section and in particular the example in (c)(7)(B)(i) is highly problematic, as it could easily be read to suggest that making a request at any time will result in an accommodation of a disability.

The example in 12176(c)(7)(B)(i) states that an individual needed an accommodation to pay rent on the 5th rather than the first day. The example does not state that such a request should ideally be made when the lease was formed, or barring that after the tenant realized the problem, or, worse but still better, prior to a landlord retaining an attorney to file an unlawful detainer once the tenant was served by a three-day notice. The example suggests the first time the request is made is at trial and then could still be considered as a reasonable accommodation. At this stage, it is more likely than not that the landlord will have a strong undue hardship claim. This example could lead persons to delay requests, or to believe that making a late request is no different than making an earlier request. Further, it could be used by unscrupulous tenants to utilize a late reasonable accommodation as a delay tactic, as the example does not bring up the issues with making a late reply. We request the deletion of section 12176(c)(7)(B)(i).

Council response: The Council disagrees with the comment. Subdivision (c)(8)(a) is necessary to clarify that a tenant may raise an alleged failure to provide a reasonable accommodation at any point in an unlawful detainer action. This clarification is necessary because in some cases unlawful detainer courts have not allowed defendants in unlawful detainer actions to make a request at this point, or have determined that late requests do not constitute a defense to an unlawful detainer. This may be a misconstruction arising from the language in Government Code section 12955(f), which prohibits delays in unlawful detainers arising solely from claims of retaliation under FEHA, or a misapplication of other inapplicable provisions of the Civil Code. Regardless of the cause of the confusion, making a request at later times does not necessarily create a delay. The landlord or plaintiff in the unlawful detainer action is required to address the request and engage in the interactive process under section 12177, and is also entitled to consider any applicable grounds to deny the request under section 12179 such as undue burden. The mere fact that a request is made and must be addressed during the litigation of the matter does not alone constitute an unwarranted delay.

Comment: We are concerned that both examples focus on “eleventh hour” requests and include no discussion of the real world concerns that are likely to come into play in such situations.

The first example of Rowan notes that Rowan waits until trial to request a reasonable accommodation to be able to stay in his housing and pay his rent on the sixth day of each month. However, there is no discussion of issues that would have a direct bearing on whether the accommodation would pose an undue burden; for example: (1) whether Rowan is able to immediately cure the arrearage or is requesting a payment plan, (2) whether Rowan is seeking to have the unlawful detainer case immediately dismissed or is willing to enter into a stipulated agreement, (3) whether Rowan is willing to reimburse some or all of the landlord’s expenses incurred as a result of Rowan’s failure to request the accommodation until the day of trial, and (4) whether Rowan is willing to make future rent payments by certified funds in order to mitigate the delay caused by the later due date. In addition, there are many case-specific factors which affect the determination of whether a request to delay a rent due-date poses an undue burden. For example, a request to delay a rent due date is much more likely to pose an undue hardship on a small independent rental owner than on a larger corporate landlord. There may also be additional administrative burdens depending on who the landlord is, and what their normal processes are.

The second example involves Chelsea, who requests additional time to move out after the landlord was successful in obtaining an unlawful detainer judgment. Again, this example does not include any discussion of the real world factors that are likely to affect whether the accommodation is reasonable; for example: (1) whether Chelsea is able to move her furniture prior to the lock-out date, (2) whether the landlord has contractors scheduled to perform work on the unit to prepare it for re-rental, and (3) whether Chelsea is willing to compensate the landlord for the additional time she will be occupying the unit.

Council response: The Council disagrees with this comment. These examples are not intended to provide an extensive discussion of potential issues that might arise in regard to a request for an accommodation. The primary function of these examples is to illustrate when reasonable accommodation requests *must be considered*, not to explore potential scenarios in which a request might be lawfully granted or denied. The examples specifically state: “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.” The issues raised by the comment are encompassed by that portion of the example.

Comment: This section would benefit from an additional example regarding unlawful detainers, where reasonable accommodation requests are often met with confusion. Individuals with disabilities often have default judgments entered against them in these cases, because the response deadline is only five days. A disability may make it difficult for the individual to get to the courthouse, or to understand and complete unlawful detainer pleading forms. There is a great deal of misunderstanding among landlord and tenant advocates, and courts, regarding the availability of a reasonable accommodation in the context of a request to vacate a default

judgment. To aid the public in resolving these disputes in accordance with fair housing law, we suggest the Council include an example that specifically addresses reasonable accommodations in the context of a post-judgment unlawful detainer. We suggest the following:

(c)(7)(B)(iii) Zara is an individual with a disability that makes her susceptible to infection and frequent hospitalization. Zara’s landlord files an unlawful detainer against her and serves her by posting and mailing. During that time, Zara is hospitalized and is unable to file a responsive pleading. Her landlord obtains a default judgment against her and schedules a lock-out with the sheriff. When Zara learns about the eviction case, she makes a request to her landlord to halt the sheriff’s lock-out until she is discharged from the hospital and able to respond to the unlawful detainer. In the absence of additional relevant facts, the landlord should grant her request for a reasonable accommodation.

Council response: The Council does not believe another example would be useful at this time, although the Council agrees that there are situations in which a post-judgment request for an accommodation should be considered. Subsection 12176(c)(8)(B) explicitly provides that “A request for a reasonable accommodation in unlawful detainer actions can be made at any time during the eviction process, including . . . in certain circumstances *after eviction*.” (Emphasis added.)

Section 12177. The Interactive Process.

Section 12177(c):

Comment: “Interactive process” is a term of art that only applies to the part of the process which occurs after the disability and disability related need have been established. We recommend that the portion of the process dedicated to establishing the need for the accommodation be referred to separately from the interactive process.

Section 12177(c) highlights one of the problems with including verification of the disability and disability related need as part of the interactive process. Read literally, this section requires the provider to attempt to find an alternative accommodation even though the reason for denial of the accommodation is that the individual for whom the accommodation is requested is not disabled and/or does not have a disability related need for the accommodation. At a minimum, this section should be revised to correct this issue.

In addition, we continue to be concerned by the requirement that the housing provider must try to identify alternative accommodations when it is believed that the requested accommodation cannot be granted. The HUD guidance on this issue requires only that “the provider should discuss with the requester whether there is an alternative accommodation that would effectively address the requester's disability-related needs....” (See <https://www.justice.gov/crt/us-department-housing-and-urban-development> at Question 7.) Because in many situations the housing provider may have only very limited information about the individual’s functional limitations or needs, it may be difficult for a housing provider to identify an alternative accommodation. While the person considering the request may (and often times will) try to identify an alternative accommodation as part of this discussion, it

should not be required. As is discussed in this subsection and in the HUD guidance, the individual with a disability, not the person considering the request, has the most accurate knowledge about the functional limitations posed by their disability and is therefore in the best position to propose alternative accommodations once it is explained why the requested accommodation is not feasible. We recommend that the subsection be revised to be consistent with the HUD guidance. We recommend the following revisions:

(c) After the disability and disability related need for the accommodation have been established, if ~~if~~ the person considering the request believes that the initially requested accommodation cannot be granted for a reason permitted under section 12179(a)(3)-(6), the person considering the request ~~must try to identify if~~ discuss with the requester whether 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.

Council response: The Council disagrees with the interpretation of "interactive process" suggested by the comment. The term "interactive process" can be used to describe a variety of communications relating to requests for reasonable accommodations. However, the Council agrees that further clarification is necessary in response to the second paragraph above, in order to distinguish among situations where a denial is appropriate because there is no disability or no disability-related need for the requested disability, and those situations that require further communications about the extent of the accommodation. Therefore, the Council has modified subsection 12177(c) to provide that certain steps are now limited to denials based on subsections 12179(a)(3)-(6).

The Council disagrees with the remainder of the comment. It is reasonable to require a person considering a request to suggest alternative accommodations if they cannot comply with the accommodation as initially requested. That individual may be in a better position to understand the scope of options available in relationship to potential undue burden and fundamental alteration. The purpose of the requirement for an interactive process is to facilitate meaningful communication about options that will work for both parties. The specific language of the regulation is that the person "must try to identify" an alternative. Similarly, the person requesting the accommodation is free to suggest alternatives. The likely outcome of such a dialogue is a better solution for all. However, as the regulatory language suggests, an appropriate accommodation may not be possible in all situations covered by section 12179.

The Council has accepted the typological correction, deleting the unnecessary word “requestor’s.”

Section 12177(f):

Comments: We suggest subsection (f) be revised to clarify that a failure to respond to an accommodation request within a reasonable time constitutes a denial of the requested accommodation. (*See Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Commission*, 121 Cal.App.4th 1578, 1598 (2004) (landlord must ask for more information if insufficient information is provided with a reasonable accommodation request); *Jankowski Lee & Assoc. v. Cisneros*, 91 F.3d 891, 895 (7th Cir.1996) (as amended Aug. 26, 1996) (“If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.”)) Under federal law, the failure to respond within a reasonable time has the same effect “as an outright denial.” (*Bhogaita v. Altamonte Heights Condo. Ass'n, Inc.*, 765 F.3d 1277, 1286 (11th Cir. 2014), citing *Groome Res. Ltd. v. Parish of Jefferson*, 234 F.3d 192, 199 (5th Cir.2000). “An undue delay in responding to a reasonable accommodation request may” constitute a failure to accommodate. Department of Justice and HUD, Joint Statement on Reasonable Accommodations at 11 (May 17, 2004), available at https://www.hud.gov/sites/documents/DOC_7771.PDF (last visited March 12, 2018).) The Council should ensure that these regulations are at least as protective and comprehensive as federal regulations by incorporating these concepts. We therefore suggest the following change:

(f) A failure to reach an agreement on an accommodation request after a reasonable attempt to do so, or failure to respond to an accommodation request within a reasonable time, 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.

Council response: The Council agrees there is value in clarifying that the failure to respond to a request for a reasonable accommodation within a reasonable time may constitute a denial. The Council has added clarifying language to subsection (e) to this effect.

Comment: We request the words “based on failure to provide legally relevant information that was requested consistent with the regulations” be added after “denial of the initial request.” This appears to be the intent of the sentence, but without this language we are concerned the same accommodation which was determined to be a direct threat, fundamental alteration, or

undue burden could be requested time and time again and would have to be considered anew each time. This would be a monumental waste of time and resources.

(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 based on failure to provide legally relevant information that was requested consistent with the regulations, 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.

Council response: The Council disagrees with the commenter's suggested language because it only addresses one possible situation where a later request must be considered, rather than making it clear that later requests must always be considered. However, the Council realized that the provisions in subsection (g) were not clear. The concepts have now been broken down into two subsections (f) and (g). Subsection (g) continues to address the circumstances under which responses, failures to respond, or failures to provide relevant information may constitute a denial of the requested accommodation or grounds for denial of the request. Subsection (g) now addresses more clearly that individuals may make more than one request for an accommodation, either to make the same request at a later date, or to request additional or different accommodations at the same or a later time, and that each request must be considered on its own merits. This is necessary because individual's disabilities, needs and circumstances change over time, and because individuals may be able to obtain documentation that was previously unavailable to them. To the extent the commenter is concerned about excessive demands on resources, we note that if all the information and circumstances are identical, it should not require a great deal of time to address the new request. However, if information and circumstances are different, such changes must be taken into account and addressed.

Section 12178. Establishing that a Reasonable Accommodation is Necessary.

Comment: Section 12178 would be strengthened by citing to case authority in the notes section explaining the expansive definition of an "equal opportunity to use and enjoy a dwelling or housing opportunity." We recommend that the Council cite court cases interpreting this phrase including: *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995) (holding that accommodation is necessary if it affirmatively enhances a disabled tenant's quality of life by ameliorating the effects of the disability); *Giebeler v. M&B Assocs.*, 343 F.3d 1143, 1155 (9th Cir. 2003) (but for the accommodation the disabled person will likely be denied equal opportunity to enjoy the housing of their choice); and *Auburn Woods I Homeowner's Ass'n. v. Fair Employment and Housing Commission*, 121 Cal. App. 4th 1578, 1596 (2004) (without the accommodation, a

landlord's rules, policies or practices interfere with a disabled person's right to use and enjoy their dwelling.) The Council's inclusion of a wide range of individuals under section 12178(f) is supported by federal guidance, which also provides that the individual requesting the accommodation may establish the existence of the disability through her own statement. (Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations Under the Fair Housing Act* ("Joint statement") (May 14, 2004), example 18, p. 13. Available at: https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf.)

Council response: The Council agrees that these cases and the Joint Statement provide relevant persuasive authority consistent with the proposed regulation, but declines to include them in the reference notes. See 1 C.C.R. section 14 (b).

Section 12178(d):

Comment: We have five questions regarding the provisions of this section.

First, a person can have a diagnosis that is not a disability, such as allergic rhinitis. In a request for accommodation for a specially wired air conditioner that "should help" with allergy symptoms, can the questioner ask the treating health professional if a different type of air conditioner such as a portable one or one using fewer amps be sufficient to alleviate the disabling condition?

Second, for a resident who wants a "comfort" or "support" animal, the reason commonly given for the accommodation is "stress." It is very difficult for a member-run administrator or its professional staff to determine the level of disability that merits an animal to address a specific need. What level disability does a person have to have in order to merit an accommodation? How much de-stressing does a person need to merit an animal that is too heavy under the rules? What questions are allowed?

Third, to what extent can a homeowner's association representative ask a doctor, e.g., a psychologist, to state (1) the level of disability and (2) what particular function of the support animal is needed to relieve the stress? How far can our line of questioning go, if a doctor says the animal is needed?

Fourth, there have been studies that show having a pet reduces high blood pressure. Is that a sufficient statement to merit a reasonable accommodation for a dog that is excessively heavier than the allowable weight limit? Is a general study sufficient to warrant a reasonable accommodation for an additional animal?

Fifth, can a homeowner's association, in granting an accommodation for an individual to bring in a support animal that substantially exceeds the weight limitation under HOA rules, require a disabled person who lives in an upper level unit install sound-buffering padding on the floor?

Council response: In response to the first and fourth sets of questions, these provisions only govern reasonable accommodations for persons with disabilities. "Disability" is defined in the Act, including at Government Code sections 12926(j) (mental disability), 12926(m) (physical

disability), 12926.1(b) (legislative findings and declarations) and 12955.3 (disability). Allergic rhinitis or high blood pressure may constitute a disability if either condition meets the criteria set out in these definitions. Whether a particular air conditioner or support animal is necessary to afford an individual with such a disability an equal opportunity to use and enjoy a dwelling unit must be determined under the procedures set out in proposed Sections 12176-12180. Often, where no structural changes are needed, a request to add a removable window air conditioner is a request for a reasonable accommodation. Note, however, that under some but not all circumstances installation of an air conditioning system might constitute a request for a reasonable modification (physical alteration of the premises.) These regulations do not address reasonable modifications. The Council may consider including reasonable modifications for people with disabilities in future rulemaking actions.

In response to the second set of questions, the determination whether a person's support animal should be considered a reasonable accommodation is based upon whether the person has shown that the accommodation fulfills a disability-related need – that is, whether without the accommodation the person is denied the equal opportunity to use and enjoy their dwelling. (Section 12176(a).) There is no distinction between “levels” of disability. If the person does have a stress related disability, the inquiry is whether the requested support animal is necessary to afford an individual with such a disability an equal opportunity to use and enjoy a dwelling unit. Such a request must be determined under the procedures set out in proposed Sections 12176-12180.

In response to the third set of questions, under the proposed regulations, if the disability or disability-related need for the support animal is not known or readily apparent, it is permissible to seek additional information under Section 12178. However, the individual with a disability can provide information themselves or from any reliable third party, and the person providing medical information need not be a doctor or medical professional (Section 12178(g).) Information may only be obtained as furnished by the person requesting the accommodation or their representative, and only to the extent that it is necessary to establish the disability-related need for the accommodation. Section 12178.

In response to the question about general studies in the fourth set of questions, generally available information regarding the health benefits of a requested accommodation is not enough to warrant an accommodation; the person requesting the reasonable accommodation must show a nexus between that person's disability and the accommodation they have requested. This showing is subject to the requirements of sections 12178.

In response to the second, fourth, and fifth comments, no breed, size or weight limitation may be applied to assistance animals other than miniature horses under proposed subsection 12185(d)(5). Those restrictions bear no relationship to the permitted inquiries for either service animals or support animals. See also HUD Notice FHEO-2013-01, April 25, 2013, *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD Funded Programs* (2013), at 3 (“Breed, size, and weight limitations may not be applied to an assistance animal.” The FHEO notice is available at: https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF. See also other authorities cited in the Initial Statement of Reasons regarding this subsection; *Sabal Palm*

Condominiums of Pine Island Ridge Assn., Inc. v. Fischer (S.D. Fla. 2014) 6 F.Supp.3d 1272, 1282-1283 (under federal Fair Housing Act, condominium resident was entitled to large dog and was not required to accept a smaller dog as an alternative accommodation).

Section 12178(f):

Comment: There remain concerns with "self-verification" and the lack of parameters for establishing when the person with the disability is "reliable." In associations, regrettably, many residents are not truthful with regard to their alleged disabilities or the disability-related need for the accommodation. Additionally, per subsection (f)(5) [now renumbered as subsection (g)(5)], I am still concerned with the lack of specificity for determining what reliable verification is and who can provide it. The proposed regulations seem extremely vague and do not provide much guidance. See the very specific guidance from the Virginia Real Estate Board and Fair Housing Board, a state agency which issued advising guidance that allowed the housing provider to seek information on the following: (1) General location of where the care was provided as well as the duration of the care (such as the number of in-person sessions within the preceding year); (2) Whether the verifier is accountable to or subject to any regulatory body or professional entity for acts of misconduct; (3) Whether the verifier is trained in any field or specialty related to persons with disabilities or the particular impairment cited; and/or (4) Whether the verifier is recognized by consumers, peers, or the public as a credible provider of therapeutic care.

Council response: The Council disagrees with the comment. The Virginia example is not controlling authority, nor did the Council find it persuasive on this issue. The Council has provided a great deal of specificity in Section 12178. There are many circumstances under which an individual or family member can provide sufficient information to support a claim for an accommodation (for example, a mother of a low vision child). However, in order to provide further clarity, the Council has revised former subsection (f) to break it into two subsections. Subsection (f) describes more explicitly some types of self-certification methods, such as documentation of receipt of disability benefits, and defines credible statement. The new subsection (g) provides guidance as to the individuals or organizations who may be able to provide information about the disability or the disability-related need for the accommodation. Subsection (h) also addresses factors for determining whether a third party is reliable.

Comment: It is not clear if the language "can usually be provided" references the person with the disability's ability to self-verify or whether it is intended to mean that the person with the disability can obtain the verification from a third party. Also, it is unclear whether "credible" statement refers to the person with the disability providing "self-verification" or a credible statement from some third party.

Council response: The Council has clarified the language of this provision in order to address these concerns. Language has been added regarding self-certification methods and clarifying

that “credible statement” in this context refers to a credible statement by the person with the disability.

Comment: Section 12178(f) states a person with a non-apparent disability may be able to verify that disability with a “credible statement.” We appreciate the Council’s attempt to provide a reasonable definition, but that definition still is problematic. It is hard to think of an actual workable example where a person with a non-obvious disability can establish their disability by their words alone and it also seems the only way would be to actually disclose the disability, which the law is intended to prevent. The Council should consider deleting section 12178(f) altogether.

Council response: The Council disagrees with the comment. There are numerous instances in which an individual with a disability could establish their disability through self-certification. For example, an individual may be able to describe that they have a vision disability as part of asking for an accommodation relating to provision of documents in a particular format, and that description would be seen as credible based on available information. Furthermore, the comment conflates the general legal prohibition against inquiring whether a person has a disability with the obligation of a person requesting an accommodation to disclose that they have a disability, although they need not disclose a specific diagnosis or medical information. See proposed section 12178(e).

Comment: We are concerned about this subsection’s statement that individuals can “usually” self-verify their disability and/or disability related-need for an accommodation by providing a “credible statement.” We also question whether a family member can be a reliable third party, where the family member is the one making the evaluation/determination of disability and/or disability-related need, as opposed to showing proof that the individual is entitled to disability payments. In addition, the explanation of what makes a statement “credible” (i.e. that a reasonable person would believe it) is unhelpful and not workable. Seasoned attorneys struggle with the “reasonable person” standard. It is simply not realistic to expect a non-attorney property manager to assess the credibility of a statement based on a reasonable person standard without further guidance.

Council response: The Council disagrees with this comment. There are numerous instances in which an individual with a disability could establish their disability through self-certification. For example, an individual may be able to describe that they have a vision disability as part of asking for an accommodation relating to provision of documents in a particular format, and that description could be seen as credible based on available information. Furthermore, there are many circumstances under which a family member could provide sufficient information to support a claim for an accommodation (for example, a mother of a low vision child). The Council has clarified the language of this provision in order to address these concerns. Language has been added regarding self-certification methods and clarifying that “credible statement” in this context refers to a credible statement by the person with the disability.

Section 12179. Denial of Reasonable Accommodations.

Section 12179(a)(5):

Comment: We thank the Council for addressing the “direct threat” issue in detail in these regulations, and making it clear that, consistent with case law interpreting the federal Fair Housing Act, housing providers must consider reasonable accommodations which would eliminate any threat. (*Sinisgallo v. Town of Islip Hous. Auth.* (E.D. NY 2012) 865 F. Supp. 2d 307, 336; *Roe v. Sugar River Mills Assocs.* (D.N.H. 1993) 820 F. Supp. 636, 640.) We suggest one minor addition to clarify that the housing provider has the burden of proving that no reasonable accommodation will eliminate or acceptably minimize the risk posed to other residents, before moving forward with eviction proceedings against the individual experiencing the disability. (*Id.*; *Arnold Murray const., L.L.C. v. Hicks*, 621 N.W.2d 171, 175 (S.D. 2001).) We suggest adding the following subsection:

(a)(5)(C) The burden is on the housing provider to show, through individualized assessment, that no reasonable accommodation will curtail the risk of injury or substantial physical damage to the property of others before denying the accommodation.

Council response: The Council declines to adopt the proposed language regarding burden of proof. Proposed sections (a)(5) and (a)(5)(B)(ii) make explicit the obligation of a person concerned about a direct threat to consider, during the interactive process, whether any risks can be sufficiently mitigated or eliminated by any additional or alternative reasonable accommodations.

Section 12179(a):

Comment: Specifically regarding the list of allowable reasons for the denial of a requested accommodation, enumerated at section 12179(a):

How is the questioner to render a decision to deny the accommodation without knowing what the disability is, if we cannot ask what it is?

Can we ask, "What is the functional limitation?" How is the questioner to determine if the person requesting an accommodation is not an individual with a disability?

Is one visit to a health practitioner sufficient to warrant a professional diagnosis of disability for the purposes of getting a reasonable accommodation for stress-related conditions? If so, can a one-time interview online with a psychologist sufficient to honor a diagnosis of stress sufficient to get an additional animal?

Council response: The Council declines to make any changes based on these comments, or to adjudicate hypothetical situations. The procedures and guidance in proposed Sections 12176-12180 describe the nature and types of information that may be requested, the obligations to engage in an interactive process if questions arise, and the individuals who may be appropriate

for providing additional information. Proposed section 12185(c)(2) addresses on-line certifications relating to support animals.

Section 12179(b)(2) and (b)(5):

Comment: Sections 12179(b)(2) and (b)(5) relate to looking at the resources of the person who has been asked to grant the accommodation, including a consideration of the resources of larger entities. This may result in very large and expensive discovery requests. In addition, it is also unclear how this provision would apply to a small “mom and pop” landlord who has their property managed by a larger management company. For example, a tenant requests an accommodation to pay rent later in the month after he/she gets his/her social security check. Mom and Pop need the rent paid on the due date because they rely on that money to pay the mortgage on the property, but the management company is the party reviewing the request as the agent for the owner. While the large management company could withstand a delay in payment, it is not their bottom line that is affected by the rent payment. This subsection should be clarified to indicate that the resources of the party who actually bears the cost of the requested accommodation should be considered.

(b)(2) The financial resources of the person who will bear the cost of ~~has been asked to grant~~ the accommodation;

...

(b)(5) Where the entity which will bear the cost of ~~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

Council response: The Council disagrees in part with the comment regarding subsection (b)(2) because the person who bears the cost is not necessarily the person legally obligated. Instead, the language in subsection (b)(2) was ultimately modified to refer to “the financial resources of the person or persons who have a duty under the Act to provide the accommodation.” This is a more appropriate description than the one proposed in the comment. In many cases the person being asked to provide the accommodation is, or acts for, the person or persons who have a duty to provide the accommodation. The determination of which person or persons has such a duty and must bear the cost of the requested accommodation is a factual case-by-case determination. In any given situation, depending on a variety of circumstances including statutory and contractual obligations, there may be more than one party responsible for contributing to or providing the accommodation (for example, an insurer). However, individuals with a legal obligation to provide the accommodation cannot contractually abrogate the obligation to provide the accommodation by agreeing that someone else must bear the cost.

The Council declines to make the requested change to subsection (b)(5). The change in subsection (b)(2) is sufficient because it identifies as a factor the *person or persons* whose

financial resources are to be considered. Subsection (b)(5) expands on (b)(2) to describe *the scope of the resources* that must be considered.

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

Section 12180(a)(1):

Comment: As previously mentioned with regard to section 12161(a), it is appropriate on a case-by-case basis that a government entity might charge a reasonable, non-discriminatory fee for a reasonable accommodation. With regard to the proposed additional language below, see *United States v. California Mobile Home Park Management Co.* (9th Cir. 1994) 29 F.3d 1413, 1418.

(a)(1)(A) Except as provided by 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.

(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.

Council response: The Council disagrees with this comment and declines to adopt the proposed revisions. This comment is addressed above in in the Council's response to the first comment under proposed section 12161(a) in the section responding to comments received during the initial 45- day comment period. To the extent it is not addressed above, the Council notes that *United States v. California Mobile Home Park Management Co.* does not address fees to process a reasonable accommodation request, but waivers of generally applicable fees, and therefore it does not support the proposed revisions.

Section 12180(b):

Comment: A federal district court in Virginia recently concluded that a residential landlord must consider an accommodation request in the admissions process when an applicant's criminal history is related to his/her disability. *Simmons v. T.M. Associates Management*, 2018 WL 882396 (W.D. Va. Feb. 14, 2018). In order to further illustrate that a housing provider or other covered entity must consider a request for an accommodation, the Council should add a fact pattern in section 12180(b) that reflects this specific scenario or cite to *Simmons v. T.M. Associates Management* in the Statement of Reasons.

Council response: The Council agrees that *Simmons v. T.M. Associates Management*, (W.D. Va. Feb. 14, 2018) 2018 WL 882396 provides relevant persuasive authority consistent with the

proposed regulations. However, the Council declines to include the citation in the reference notes. See 1 C.C.R. section 14(b). The Council also declines to add an additional exemplar fact pattern. The Council has selected representative examples from applicable case law that it finds appropriate and sufficient to provide clarity, and other examples are not necessary.

Section 12180(b)(2):

Comment: Regarding the example at section 12180(b)(2), it should be noted that the representative payee would fall under the section herein that requires a representative be authorized to act on behalf of the person with the disability. Miguel would need to provide authorization to the apartment owner that the third party payee representative was indeed authorized. This would affect community associations specifically, where an owner may want to have his/her bills paid by a third party representative. The association would require simple verification from the owner that a person was authorized to address financial or other issues on his/her behalf.

Council response: The Council partially agrees with the comment. Pursuant to proposed subsection 12176(c)(2), it is correct that “[t]he 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).” However, there may be a variety of ways to establish the appropriate authority. It can be provided by the individual with the disability in a simple oral or written verification, as noted by the comment. In some situations, particularly if the individual with a disability is unable to act independently, the individual acting on behalf of the person with a disability may be able to present appropriate legal documents demonstrating their authority to act. This might include legal documents authorizing a representative to make payments on behalf of the person with a disability, a similar power of attorney authorizing someone to make payments, conservatorship or guardianship papers whose specific terms establish authority to act, or other documents or information. The individual with a disability normally retains the authority to approve or withdraw approval regarding someone acting on their behalf.

Section 12180(b)(5):

Comment: Regarding the example at section 12180(b)(5), we recommend the following revisions:

(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~~ reasonable 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 an assistance ~~support~~ animal, the animal would be permitted pursuant to subsection 12185(b) without the need to request an accommodation.)

Council response: The Council declines to make the proposed revisions. In regards to the last sentence, the proposed revision is incorrect. The sentence as written appropriately distinguishes the different provisions applicable to service animals compared to support animals (both of which are assistance animals.) See proposed section 12005(d) (Assistance animals include service animals and support animals.) Service animals are described in section 120005(d)(1). Support animals are described in section 120005(d)(2).

Section 12180(b)(5) and (b)(7):

Comment: We are concerned that by concluding each example in this section with the statement that the accommodations “should be granted,” these types of accommodations will, in effect, be treated as presumptively reasonable regardless of the facts. We are particularly concerned respect to the examples in subsections (b)(5) (accommodation to allow a guest’s emotional support animal) and (b)(7) (accommodation to expedite elevator repair). We request that the Council provide authority for its position that housing providers are required to accommodate guests of tenants. In addition, we request that the Council provide guidance regarding the extent of this duty and, at a minimum, remove the conclusion that the accommodation “should be granted,” and instead simply conclude that the accommodations must be considered. As discussed during previous meetings, removing the conclusion that an accommodation should be granted does not defeat the purpose of having examples. Rather,

presenting fact patterns in which a request for reasonable accommodation may come up is, in and of itself, beneficial because it helps educate the public on the broad range of situations in which accommodations may be necessary. Taking the additional step of concluding that an accommodation should be granted is unnecessary, and in fact detracts from the fact that all requests for accommodation must be considered on a case by case basis.

Council response: The Council declines to adopt the suggestion. Both example (5) and example (7) have explicit language that the conclusions in the examples only apply “in the absence of additional relevant facts . . .” or other potential defenses. Each example in the subsection explicitly provides qualifying language that the outcome depends on the absence of additional relevant facts. This language addresses the concerns raised by the comment. Because the situations are fairly common, they provide general and necessary guidance to the general public as to how such request should be evaluated, while making it clear that the outcomes are specific to particularly factual situations.

Section 12180(b)(6):

Comment: The example at section 12180(b)(6) goes beyond FEHA’s provisions and should be removed. The Council 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.

(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. ~~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).~~

Council response: The Council disagrees with the comment. A slight encroachment into a wide easement, sidewalk, or public right-of-way may in fact be a reasonable accommodation if necessary to install a ramp to someone's home, for example, if it does not impede traffic and does not provide a permanent easement or permanent conveyance of the public property. Similarly, curb parking spaces designated for parking for people with disabilities ("blue spaces") are often established as a reasonable accommodation in a municipal roadway right-of-way in front of the home of a person with a disability. *Bassilios v. City of Torrance* (C.D. Cal. 2015) 166 F.Supp.3d 1061 (reasonable accommodations can be required in City owned street under the Americans with Disabilities Act.) The proposed section provides rights and remedies that are equal to or greater than the equivalent American with Disabilities Act provisions related to reasonable accommodations, pursuant to Government Code section 12926.1(a).

Each request must be considered on its own merits under sections 12176 et seq. We do concur with the comment that reasonable accommodations are not generally intended to grant *permanent* interests or ownership in public property, and any request for a permanent interest in public property would have to be evaluated in the context of the undue burden and fundamental alteration defenses.

Comment: Regarding the example at section 12180(b)(6), although this example does not address a common interest development, most associations do not own and cannot grant interest in common areas unless the CC&Rs provide. Thus, some associations may have difficulty conveying property to allow for a ramp or other accommodation if the association does not have authority over the area in question.

Council response: The Council disagrees with the comment. Common interest developments must regulate the use of common areas in compliance with the Act. There are many situations where a ramp or other accommodation may be provided in a common area without exceeding the scope of the authority of the common interest development. *See Astralis Condominium Assn. v. Secretary, U.S. Dept. of Housing and Urban Development* (1st Cir. 2010) 620 F.3d. 62 (upholding ALJ's determination that condominium violated the Act by denying parking places to individuals with disabilities); *Southern California Housing Rights Center v. Los Feliz Towers Homeowners Assn.* (C.D.Cal. 2005) 426 F.Supp.2d 1061, 1064-67 (denying condominium's motion for summary judgment regarding refusal to provide accessible parking spaces, where manager's space or guest spaces might be appropriate). Each request, including ramps, must be considered on its own merits under Sections 12176 et seq. One possible option is to provide a conveyance of a grant of exclusive use of a portion of a common area to provide an accommodation, for example by allowing a ramp to extend into a common area. California Civil Code sections 4600(b)(F) (grants of exclusive use of common areas for disability accommodations); 4600(b)(J)(grants of exclusive use of common areas to comply with governing law). Such accommodations may not need to include a *permanent* transfer of ownership of common interests. To the degree that the comment is concerned about

conveyances of permanent interests in property, any request for a permanent interest in common area property would have to be evaluated in the context of the undue burden and fundamental alteration defenses under proposed section 12179. The comment is also addressed in the response to the comment immediately following this one. We note in some circumstances that a request for a ramp may constitute a request for a reasonable modification rather than a reasonable accommodation. The current rulemaking does not address reasonable modifications for people with disabilities (i.e. physical modifications to housing). The Council will consider including reasonable modifications for people with disabilities in future rulemaking.

Section 12180(b)(7):

Comment: Regarding the example at section 12180(b)(7), most community associations do not fall under the ADA, since most are not places of public accommodation. Thus, most associations would be under no legal obligation to install an elevator. Additionally, associations have no legal authority to move residents from one residence to another, since the association does not own the residences. Thus, this example would not be applicable to an association, despite that governing bodies of common interest developments are included within the definition of “owners” in section 12005(u) [ultimately renumbered as section 12005(t)]. If Teresa wants to add a chair lift at her own expense, the association would allow this with appropriate engineering plans to make sure it was safe for her use.

Council response: The Council disagrees with the comment. The draft regulation interprets the Fair Employment and Housing Act, not the ADA, so the first comment is not relevant. Nothing in Example 7 discusses *adding or installing* an elevator where one does not exist. However, failure to maintain an elevator in common areas of a common interest development, where the elevator is necessary to provide access to an individual with a disability, could give rise to a request for a reasonable accommodation, and there may be an obligation to maintain or repair the elevator or to provide an alternative accommodation. Failure to maintain or repair an elevator may also violate other legal requirements. In terms of appropriate accommodations, the Council does concur that a common interest association may not, in many circumstances, have the ability to require transfer of owned units, but they may in some circumstances have authority over or have common management of rental units in the development, in which case the example may apply to them. Or it may be possible to provide temporary relocation expenses during the time it takes to repair the elevator. In regard to the stair lift, the current draft regulations do not address requests for reasonable modifications to premises, and whether installation of a chair lift would constitute a request for an accommodation or a request for a modification would depend on the facts, including whether the changes involved an individual unit or common areas. *See HUD v. Ocean Sands, Inc.* (1993 HUD Office of Administrative Law Judges) 1993 WL 343530 (condominium’s refusal to allow resident with mobility disabilities to install a ramp, wheelchair lift and wooden walkways violated federal Fair Housing Act.) The Council will consider including reasonable modifications for people with disabilities in future rulemaking.

Section 12185. Assistance Animals.

Section 12185(b):

Comment: We are extremely concerned about this subsection's elimination of a housing provider's ability to verify that a purported service animal is, in fact, a service animal. If implemented without the inclusion of some sort of verification method, this regulation will very likely be used by individuals to avoid the reasonable accommodation process for support animals, and will also likely be abused by non-disabled individuals who desire to keep a pet despite a no-pet policy.

First, we disagree with the Council's expansive reading of the Unruh Act to apply this ADA requirement to situations that do not involve public accommodations or public entities. The limitation on inquiry about service animals comes from ADA regulations (28 CFR 35.136 and 28 CFR 36.302) which apply to public accommodations and public entities. While it is true that the Unruh Act states that a violation of the ADA is also a violation of the Unruh Act, it does not state that the ADA's provisions applicable to public accommodations and public entities are also applicable to all housing accommodations regardless of their status as public accommodations or public entities. We recognize that to the extent a housing accommodation is a public accommodation or public entity it is subject to ADA requirements, but we reject an application of ADA requirements beyond the terms of the ADA itself.

Second, we recognize that the Unruh Act (Civil Code Sections 54.1 and 54.2[, which is the Disabled Persona Act]) includes a right for individuals with disabilities who utilize guide dogs, signal dogs, and service dogs to have those animals in housing accommodations, and that this right is separate from the right to be reasonably accommodated. The Unruh Act specifically prohibits the housing provider from charging a fee or deposit for these animals, but we are not aware of anything in the Unruh Act which would prohibit a housing provider from requesting that the individual provide information to establish that the animal is, in fact, a guide dog, signal dog, or service dog, as defined in the Unruh Act. This situation is analogous to the Unruh Act's requirement that housing providers reasonably accommodate persons with disabilities. The statute itself (Civil Code Section 54.1(b)(3)(B)) does not specifically include provisions about the housing provider's ability establish that the person is entitled to accommodation (i.e., that they are disabled and have a disability related need), but this verification is permitted. Similarly, we believe that to the extent the service animals discussed in the Unruh Act must be permitted is non-public areas of the property, it is a reasonable interpretation of the statute to permit the housing provider to request verification that the animal is in fact a guide dog, signal dog, or service dog, as defined in the Unruh Act.

Accordingly, we recommend the subsection be revised as follows:

(b) Persons, including tenants, occupants, invitees, owners, and others, are permitted to have guide dogs, signal dogs, service dogs as defined in Section 12005(d)(1)(A)-(C) ~~service animals in all dwellings (including common use and public use areas), residential real estate, and other buildings involved in residential real estate transactions,~~ without the requirement to utilize a reasonable accommodation process, subject to the

~~following 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.~~

(1) The Owner may request that the person with the purported guide dog, signal dog, or service dog provide reliable information (as described in Section 12178(f)-(g)) that:

(A) Is necessary to establish that the individual has a disability, and;

(B) Describes the disability-related task the guide dog, signal dog, or service dog has been trained to perform.

(2) It is not permitted to ask the individual with a disability to demonstrate the task described in paragraph (1)(B).

(3) The Owner may not request the information described in paragraph (1) if the information is apparent or already known to the Owner.

(4) The Owner must permit the person a reasonable opportunity to provide the information requested pursuant to paragraph (1), during this time the Owner may not refuse to permit the person to keep the purported guide dog, signal dog, or service dog on the premises.

(5) There may be other legal obligations relating to assistance animals, such as the Americans with Disabilities Act, which may further restrict the nature and type of inquiry that may be made concerning assistance animals. For example, 28 CFR 35.136 and 28 CFR 36.302 limit the inquiry that public entities and public accommodations can make to determine if an animal is a service animal to the following two questions: 1) “Are you an individual with a disability?” and 2) “What is the disability-related task the animal has been trained to perform?”

Council response: The Council disagrees with the comment and declines to revise the proposed regulation as suggested by the comment. As the comment acknowledges, individuals with disabilities are entitled to service animals as of right under California law. Civil Code section 54.1(b)(6)(A), Civil Code section 54.2. Unlike support animals, no request for a reasonable accommodation is required for an individual with disabilities to be accompanied by or have a service animal in their home or to enjoy other housing opportunities. Therefore, the scope of permissible inquiry for service animals is much narrower than that for individuals with support animals. The Council agrees that the Americans with Disability Act (ADA) does not generally apply to private housing, other than certain areas that are public spaces. However neither the Act nor Civil Code sections 54.1 and 54.2 identify any specific verification requirements. Conceivably, no verification questions are permitted. However, in order to provide guidance and clarity to the public, the Council determined that some minimal verification requirement is appropriate. The Council looked to the ADA by analogy to see how it addressed service animals permitted as of right. The Council has determined that the two questions permitted under the Americans with Disability Act represent an appropriate balance between reasonable inquiry and privacy under the Act, given the right to have a service animal. The Council finds that those

questions are the appropriate level of inquiry under the Act, in order to be consistent with the relevant Civil Code provisions. Furthermore, this ensures consistency across a wide variety of situations, since the same questions are permitted under a variety of statutes. Therefore, the Council is adopting those questions in proposed subsection 12185(b). See 28 CFR section 35.136(f) and 28 CFR section 36.302(c)(6) (limited inquiries permitted under the ADA for service animals).

Pursuant to Government Code section 12955.6, the proposed subsection provides greater rights and remedies to individuals with disabilities who use service animals than does the federal Fair Housing Act, because Civil Code sections 54.1 and 54.2 allow service animals as of right and no request for a reasonable accommodation is necessary. Further, it is appropriate to look at the ADA for guidance, since Civil Code section 54.2 provides that: "A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section, and this section does not limit the access of any person in violation of that act." This is consistent with Government Code section 12926.1(a) ("The law of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 (P.L. 101-3361"), Civil Code section 54(c)(a violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation" of the Disabled Persons Act, Civil Code Section 54 *et seq.*"), and Civil Code section 54.1(b)(1) ("Individuals with disabilities shall be entitled to full and equal access, as other members of the general public, to all housing accommodations . . . , subject to the conditions and limitations established by law, or state or federal regulation, and applicable alike to all persons.") Although the federal act provides a floor of protection, this state's law has always, even prior to passage of the federal act, afforded additional protections." Therefore, the proposed subsection is necessary to make explicit that the Act provides rights and remedies related to service animals that are equal to or greater than those in the ADA. See specifically 28 CFR section 35.136(f), and 28 CFR section 36.302(c)(6); *Joint Statement of the Department of Housing and Urban Development and the Department of Justice on "Reasonable Accommodations Under the Fair Housing Act,"* May 17, 2004 (*HUD/DOJ Reasonable Accommodations Under the Fair Housing Act*), available at <http://www.justice.gov/crt/about/hce> or https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf; HUD FHEO Notice: FHEO-2013-01, April 25, 2013, *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs*, April 25, 2013 (*FHEO Notice*), available at https://www.hud.gov/sites/documents/SERVANIMALS_NTCFHEO2013-01.PDF; 24 C.F.R. 5.303; and *HUD Final Rule, Pet Ownership for the Elderly and Persons with Disabilities*; 73 FR 63834.01, 2008 Westlaw 469049 (October 27, 2008) (provisions allowing pets in public housing); *DOJ Revised Requirements on Service Animals*, July 12, 2011 (*DOJ Service Animal Requirements*), available at https://www.ada.gov/service_animals_2010.htm; and DOJ guidance document: *Frequently Asked Questions about Service Animals and the ADA*, July 20, 2015 (*DOJ FAQ on Service Animals*), which can be found at https://www.ada.gov/regs2010/service_animal_qa.pdf.

Further, to the extent the cases are consistent with underlying state law pursuant to Government Code section 12955.6 and Government Code section 12926.1(a), the regulations

take into consideration cases interpreting the federal Fair Housing Act, Section 504 of the Rehabilitation Act, and the Americans with Disabilities Act. *Sisemore v. Master Financial, Inc.* (2007) 151 Cal.App.4th 1386, 1420 (“[c]ourts often look to cases construing the FHA, ... when interpreting FEHA”) (“*Sisemore*”); *Auburn Woods I Homeowners Assn. v. Fair Employment and Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 (“Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA.” (“*Auburn Woods I.*”))

The Council declines to adopt the proposed additional language regarding verification. First, under the ADA, no additional inquiries are permitted. 28 CFR section 35.136(f); 28 CFR section 36.302(c)(6); *FHEO Notice*, at 5. Second, given the enormous variety of tasks that service animals provide for people with disabilities, it is not feasible or appropriate to request further verification beyond the statements of the individual with a disability. Any further questioning would be unduly intrusive, and not warranted or consistent with the civil rights purpose of the Fair Employment and Housing Act and Civil Code 54.1 and 54.2. See Government Code sections 12920, 12921, and 12926.1; Civil Code sections 54, 54.1, and 54.2. It is also not feasible to craft an appropriate verification system beyond the two questions. For example, service animals may be individually trained by the owner for many tasks, such as pulling a wheelchair or responding to a doorbell or to rising anxiety, and there is no objective additional verification that could be required. Similarly, there are animals that have an innate ability to detect that a person with a seizure disorder is about to have a seizure, and have been trained by the individual with a disability to let the individual know ahead of time so that the individual can prepare, and often to provide further assistance during the seizure. It is not possible to verify such a task in advance. See *DOJ FAQ on Service Animals*, Question/Answer 5 (“People with disabilities have the right to train the dog themselves and are not required to use a professional service dog training program.”); and Question/Answer 6 (If a dog “has been trained to sense that an anxiety attack is about to happen and take a specific action to help avoid the attack or lessen its impact, that would qualify as a service animal.”)

While it declines to adopt the specific proposed addition numbered (b)(4), the Council does concur with the substance of the proposed addition in so far as it bars even the two identified questions if the disability and need for the service animal are known or apparent. Generally, persons “may not make the two permissible inquiries set out above when it is readily apparent that the animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).” *FHEO Notice* at 5; 28 C.F.R. section 36.302(c)(6); 28 C.F.R. section 35.136(f). Similarly, the Council agrees with the content of the comments in the proposed addition numbered (b)(5), but no change in the proposed regulation is needed because these points are already covered by proposed subsection 12185(d)(1).

Although individuals with service animals may not be asked additional questions, they still must provide appropriate control over their service animal. As required by Civil Code section 54.1(b)(6)(B), reasonable conditions can be placed on both service animals and support animals. For example, the provisions applicable to all assistance animals in subsections 12185(d)(3) and (d)(6) allow owners to impose reasonable conditions on service animals and

recover for any damage. Therefore, any problems created by a particular service animal can be addressed. Similarly, no assistance animal, including a service animal, need be allowed if it constitutes a direct threat under the provisions of proposed subsection 12185(d)(9). A number of other provisions apply equally to service animals and support animals, as set out in proposed subsection 12185(d).

Comment: We are concerned about ongoing problems related to service animals, where a person with a disability does not understand the distinction between a service animal and an assistance animal, or where the person with a disability requests a service animal which does not appear to be able to provide the service described. We don't want to have any issues with section 12185, and its requirement that an individual with the disability not be asked to demonstrate the disability-related task the animal has been trained to do. Accordingly, being limited to asking only the two questions regarding service animals may be fine in most circumstances. However, to address situations where the physical size of the service animal or some other readily apparent question exists with regard to the capacity or ability of the service animal to perform the disability-related task, we suggest something like the following additional questions and language may be appropriate:

(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. The following additional inquiries cannot be made unless it is readily apparent that the service animal may not be able to perform the disability-related task, or if a reasonable person would not question whether the service animal appeared able to perform the disability-related task:

3) "Is there any obvious or apparent reason that the service animal may not be able to perform the disability-related task(s)?" 4) "If so, then is there additional information that can be provided to support the request for the service animal concerning its ability or capacity to perform the disability-related task(s)?"

Council response: The Council disagrees with the comment and declines to revise the proposed regulation as suggested by the comment. This comment is addressed above in in the Council's response to the first comment under proposed section 12185(b) in the section responding to comments received during the initial 45- day comment period. To the extent it is not addressed above, the size or weight of a support animal is not a basis for denying a request for a reasonable accommodation. See proposed subsection 12180(d)(5); *Sabal Palm Condominiums of Pine Island Ridge Assn., Inc. v. Fischer* (S.D. Fla. 2014) 6 F.Supp.3d 1272, 1282-1283 (under federal Fair Housing Act, condominium resident was entitled to large dog and was not required to accept a smaller dog as an alternative accommodation.)

Comment: The two-question limitation for service animals is required under the ADA, of which the Unruh Act is coextensive, and applies only to public accommodations. As HUD states in page 5 of FHEO Notice: FHEO- 2013-01 on Assistance and Service Animals, "The ADA definition of 'service animal' applies to state and local government programs, services activities, and facilities and to public accommodations, such as leasing offices, social service center establishments, universities, and other places of education."

Most courts have held that aside from commercial leasing offices, residential apartment complexes do not fall within the ADA's definition of public accommodations. *Holland v. Related Companies, Inc.*, 15-CV-03220- JSW, 2016 WL 3669999, at *4 (N.D. Cal. July 11, 2016, *Rodriguez v. Morgan*, CV 09-8939-GW CWX, 2012 WL 253867, at *8 (C.D. Cal. Jan. 26, 2012). Therefore, it is not correct to use the two-question without further inquiry standard for service animals in rental housing as opposed to say the leasing office and is not consistent with federal guidance on service animals.

Sections 54.1 and 54.2, the authority cited by proposed Section 12185(b), are silent on the two-question limitation and silent on the issue of verification.

However, *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) suggests it is acceptable to ask for verification, and also provides for a "reasonable accommodations" analysis. The court in that germinal case upheld the FEHC judge's finding regarding the companion animal at issue: "It is not disputed that [Auburn Woods] may have been entitled to further factual information, including medical documentation, supporting (the Elebiaris') request for accommodation." Tellingly, the court also stated "*And, because a service animal was not at issue here, there was no requirement that the Elebiaris present evidence that their dog was specially trained to alleviate their disabilities.*" (Emphasis added.) *Id.* This statement by the court plainly indicated that if Pookie had been a service animal, it would have triggered a requirement to present evidence, something that is not required or even permitted under the ADA's two-question limitation for public accommodations.

While we acknowledge that FEHA can provide rights and remedies related to service animals that are greater than or equal to those in the ADA, not allowing any verification on the part of an owner makes the service animal accommodation ripe for abuse and has the potential of making a mockery of the intent of the law. While service animals are different than support animals under the law, there still needs to be an ability for the owner, when necessary, to verify that the person requesting to keep a service animal is in fact disabled and that the animal in question is a service animal. Otherwise the abuse of the law we are seeing in the support animal context will simply be moved to the area of service animals once people realize that if they answer two questions the right way they get to have their dog or miniature horse on a property. We already see the abuse of the law in restaurants and other public accommodations.

We suggest the following change to section 12185(b):

(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 owner's ability to request verification as set forth below and

~~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.~~

(1) If a person with a readily apparent or known disability requests to keep a service animal and the need for that service animal is readily apparent or known, the owner may not request any further verification.

(2) If a person with an apparent or known disability requests to keep a service animal and the need for the service animal is not readily apparent or known, the owner may request verification that the animal is specially trained to alleviate the person's disability.

(3) If a person with a not readily apparent or known disability and a not readily apparent or known need for a service animal requests a service animal a landlord may ask for verification the person has a disability and for verification that the animal is specially trained to alleviate the person's disability.

(4) In areas of public accommodation as defined by the ADA, 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?"

(5) It is not permitted to ask the individual with a disability in any instance to demonstrate the task the service animal performs to alleviate the person's disability.

Council response: The Council disagrees with the comment and declines to revise the proposed regulation as suggested by the comment. This comment is addressed above in the Council's response to the first comment under proposed section 12185(b) in the section responding to comments received during the initial 45- day comment period. To the extent it is not addressed above, the two cases cited by the comment (*Holland v. Related Companies, Inc.*, and *Rodriguez v. Morgan*) and the FHEO notice do not compel a different conclusion. The Council agrees with the conclusion in the cases and the notice that the ADA does not generally apply to purely residential areas of private housing without government involvement, but refers to the ADA to ensure the Act does not provide fewer protections. Furthermore, the two cases cited are unpublished and not controlling.

In addition, the quote from *Auburn Woods* is dicta, as on its face it makes clear that a service animal was not at issue in the case, and thus the case is not controlling.

Section 12185(c):

Comment: We recommend the following revision to section 12185(c):

(c) Individuals with disabilities who have an assistance support animal may request a reasonable accommodation related to the individual's need for the assistancesupport

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 an ~~assistance-support~~ animal as a reasonable accommodation.

(2) An ~~assistance-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 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.

Council response: The Council disagrees with the comment and declines to accept the proposed revision. The regulations provide for different treatment for service animals and support animals. Individuals with disabilities are entitled to service animals in housing as a right under California law. Civil Code 54.1(b)(6)(A), Civil Code 54.2. Therefore, there is no basis for requiring individuals to make a request for a reasonable accommodation for a service animal, or for allowing extended questioning or verification in regard to service animals.

Section 12185(c)(2):

Comment: We appreciate the Council's recognition of a person's unique rights in housing to use a service animal. Section (b) accurately outlines the analysis when a person has a service animal in a dwelling. As the Council is aware, service animals are permitted as a right in all businesses, including housing, and do not require going through the reasonable accommodation process. (3 See Civil Code section 54.2; see also section 54.1(b)(6)(A).)

The Unruh Act also prohibits the restriction or denial of a tenant and their guest's access to facilities and services in an apartment complex. (*Glasby v. Mercy Hous., Inc.*, No. 17-CV-02153-DMR, 2017 WL 4808634, at *5 (N.D. Cal. Oct. 25, 2017) "The court finds that the Unruh Act applies to discrimination claims arising out of the operation and maintenance of rental housing." See also *Iniestra v. Cliff Warren Invs., Inc.*, 886 F. Supp. 2d 1161, 1170 (C.D. Cal. 2012); *Llanos v. Estate of Coehlo*, 24 F. Supp. 2d 1052, 1060 (E.D. Cal. 1998); *Cabrera v. Alvarez*, 977 F. Supp. 2d 969, 977 (N.D. Cal. 2013).) This means that every individual with a disability has the right to be accompanied by a guide dog, signal dog, or service dog, especially trained for that purpose, in any of the places specified in section 54.1, which includes housing accommodations. These rights are different than those affecting emotional support animals, which require a reasonable accommodation.

We understand that the Council has been asked to address the issue of alleged fraud in obtaining support animal certifications online, and suggest that the requirement for the person verifying the need for a support animal track the options already outlined in section 12178. Namely, the person conducting the online assessment must be familiar with the individual's disability-related need for the accommodation. Requiring that the person conducting that assessment be a medical professional narrows the options significantly for people with disabilities who are unable to leave their homes or afford costs associated with treatment by a doctor. Therefore, we propose the following language revision:

(c)(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 for the purposes of this subsection means an assessment based on personal knowledge of the individual's disability-related need for the accommodation that: contains 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 that does not include an assessment based on personal knowledge of the individual's disability-related need for the accommodation,~~ 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.

Council response: The Council agrees with the first two paragraphs of the comment, and appreciates the feedback. The Council declines to accept the proposed revisions. As noted in the Initial Statement of Reasons, online services that provide documentation that an individual has a disability-related need for a support animal is an area that is particularly susceptible to provision of inadequate or fraudulent documentation, given the prevalence and easy access to such internet services. However, some online services do provide accurate documentation that may otherwise not be readily available to individuals with disabilities. Therefore, proposed section 12185(c)(2) is necessary to set minimum standards relating to the reliability of such online documentation, in accord with proposed section 12178(f) that information from a reliable third party must be considered in evaluating a request for a reasonable accommodation. The proposed subsection balances the conflicting interest by establishing a presumption that an online "certification" is not reliable if it does not include an individualized assessment from a medical professional. This is an exception to the general rule that documentation from a medical professional is not required to establish a disability-related need for an accommodation. The section does allow individuals an option to provide additional information before a request may be denied on any grounds, not just the grounds suggested by the comment.

Section 12185(d):

Comment: There is a recent Vermont Supreme Court case, *Gill Terrace Retirement Apartments, Inc. v. Johnson*, 2017 VT 88, 2017 WL 4453007 (Vermont October 6, 2017) which enumerated factors to be considered in determining what a direct threat is. Those include the animal barking and lunging at people, as well as at other dogs.

Council response: The case cited by the comment is not dispositive or controlling. The Council notes, however, that the legal standards in the case are generally consistent with the proposed regulations, in so far as they were based on: (1) a determination related to a specific animal and did not deny an assistance animal generally; (2) evidence of multiple incidents that could create a significant risk of bodily harm which the court found credible beyond simply barking (such as that the dog was “people and dog aggressive” and that the dog owner “may not be able to control” the dog); and; (3) consideration of whether there were mitigation measures that might ameliorate the threat. Such mitigation measures, could for example, include obtaining specific training, medication, or equipment for the animal. *See, HUD Final Rule, Pet Ownership for the Elderly and Persons with Disabilities*; 73 FR 63834.01, 63837. The proposed regulations make explicit that such determinations are to be determined on the specific facts of each case.

Section 12185(d)(4):

Comment: Section 12185(d)(4) states that an individual may have more than one assistance animal. In a two-bedroom condominium, in a multi-family building, built pre-building code era in the 1940s, with no sound insulation, does there not appear to be a limit on animals, for the safety of the rest of the community?

In a homeowner’s association that has a one-pet rule, a couple buys a one-bedroom condo. Under the above-cited rule, each person can have 2 assistance animals each. Plus, since those animals are not considered pets, they could have the extra animal as a pet. Thus, there could be 5 dogs in a one-bedroom condo, with neighbors living in the same building. How is this reasonable in terms of density in a building? How is this fair to neighbors who could be disturbed by that number of animals in one unit? Likewise, in a two-bedroom unit, with two adults and two children, each of the four people would be entitled to an "assistance" animal - a dog each; plus one dog under the one-pet rule. There could be nine dogs in a two-bedroom unit with four people. It is becoming more and more commonplace for residents to claim that their animals are "support" or "companion" animals. In common parlance, the term "pet" is being replaced by the term "companion animal."

Council response: The requirement to respond to a request for a reasonable accommodation requires consideration of factors distinct from and independent of a general rule relating to pets, because the requests seeks an accommodation from the “one-pet rule.” In this context, the terms of the rule cannot be applied if an accommodation is warranted under proposed regulations section 12179 et seq.

Proposed regulation subsection 12185(d)(4) makes specific that individuals may be entitled to have more than one assistance animal, but each animal must be individually determined to meet the requirements of Article 18's provisions regarding assistance animals. Subsection 12185(d)(4) specifically provides that consideration of requests for multiple animals may include whether the cumulative impact of multiple animals in the same dwelling constitutes an undue burden or fundamental alteration. *See Janush v. Charities Housing Development Corp.* (N.D. Cal. 2000) 169 F.Supp.2d 1133 (Disabled tenant's alleged need for two birds and two cats to act as service animals supported her claim that landlord's eviction of tenant for violation of no pets policy violated the federal Fair Housing Act.); *See* DOJ guidance document: *Frequently Asked Questions about Service Animals and the ADA*, July 20, 2015 (*DOJ FAQ on Service Animals*), which can be found at https://www.ada.gov/regs2010/service_animal_qa.pdf, Question/Answer 13 ("Some people with disabilities may use more than one service animal to perform different tasks.")

Section 12185(d)(5):

Comment: Section 12185(d)(5) states the general rule that breed, size, and weight restrictions may not be applied to assistance animals. It would be helpful if the Council could explain whether such a restriction means the requested accommodation may be considered to place an undue financial or administrative burden on the owner. Several years ago, HUD issued a policy statement on dangerous breeds and insurance. That document provided information to HUD's investigators on how to view a landlord's defense of undue burden due to the insurance breed restriction issue. Essentially, HUD stated that it did consider that it may be a valid defense depending on the facts.

Some attorneys have had some success with getting insurance companies to make an exception to the breed restriction when the animal is an assistance animal for a disabled person. The argument is that insurance companies also have fair housing obligations. It would be helpful if the Council's regulations address the obligations of insurance companies under FEHA. For example, section 12155 appears to be sufficiently broad to encompass insurance companies in this type of situation, but it would be helpful in the Council could provide some guidance on this issue.

Council response: The breed, size, or weight of a support animal is not a basis for denying a request for a reasonable accommodation. *See* section 12180(d)(5). *See Sabal Palm Condominiums of Pine Island Ridge Assn., Inc. v. Fischer* (S.D. Fla. 2014) 6 F.Supp.3d 1272, 1282-1283 (under federal Fair Housing Act, condominium resident was entitled to large dog and was not required to accept a smaller dog as an alternative accommodation).

Whether a specific insurance provision violates the Act is a fact specific inquiry. The Council declines to address in detail the fair housing obligations of insurance companies, which are not specifically at issue in this rulemaking action, but does concur that insurance companies are likely to be covered by these proposed regulations when engaged in housing activities. *See, e.g.,* Government Code sections 12925(a) (broad definition of person), 12955(c), (g), (k) (selected provisions applicable to any person); *National Fair Housing Alliance v. Travelers*

Indemnity Company (D. D.C. 2017) 261 F.Supp.3d 20, 29-30 “There is a large body of case law holding that insurers—including insurers who sell products to landlords—can be held liable under the FHA . . .” The Council may consider the obligations of insurance companies in future rulemaking actions.

Article 24: Consideration of Criminal History Information in Housing

Article 24:

Comment: We are concerned that the regulations, on the whole, do not provide sufficient guidance to enable a housing provider to develop and implement a criminal history information practice which is compliant with the regulations. The more understandable these regulations are the more likely they are to be effective. We encourage the Council to consider the usefulness of these regulations from a compliance standpoint as it moves forward in this process.

Council response: The Council disagrees with the comment and concludes that the regulations (as amended) provide sufficient guidance to all parties regarding their rights and duties. The proposed regulations provide guidance to persons subject to the Act while leaving them maximum discretion to manage their businesses so long as their actions serve substantial, legitimate, nondiscriminatory business interests and there are no feasible alternative practices that would equally or better accomplish the identified business interest with a less discriminatory effect.

Comment: People released from incarceration face a monumental challenge when trying to find housing. We therefore commend the Council for addressing this critical issue through thoughtful regulations. Not only are formerly incarcerated persons competing for affordable housing with the 37 million Americans who live at or below the federal poverty level but they often face additional barriers such as overly restrictive admissions policies and discrimination. (U.S. Census Bureau, *Income and Poverty in the United States 2015*, available at: <https://www.census.gov/library/publications/2016/demo/p60-256.html>.) Stable, affordable housing is an urgent need for people leaving prison and is an essential factor in reducing recidivism. (Urban Institute, *Examining Housing as a Pathway to a Successful Reentry*, available at: <http://www.urban.org/sites/default/files/publication/24206/412957-Examining-Housing-as-a-Pathway-to-Successful-Reentry-A-Demonstration-Design-Process.PDF>; Faith E. Lutze, Jeffrey W. Rosky, Zachary K. Hamilton, *Homelessness and Reentry-A Multisite Outcome Evaluation of Washington State’s Reentry Housing Program for High Risk Offenders* (2013), available at: <http://journals.sagepub.com/doi/abs/10.1177/0093854813510164>.) Indeed, research shows that access to housing is critical to the successful reentry of former prisoners. We commend the Council for taking a leadership role in drafting regulations that make clear that housing providers and others who are subject to state and federal fair housing laws must ensure that any policies and practices that rely on criminal history in housing decisions are non-discriminatory.

As all levels of government across the country begin to recognize the public health, financial, and other impacts of restrictive screening policies, California’s regulations will surely become a model for the nation. With that in mind, we fully support the draft regulations in the current form.

Council response: The Council agrees with and appreciates the comment.

Section 12265. Prohibited Uses of Criminal History Information

Section 12265(b):

Comment: The Council should delete subsection (b) because it relies on the term “bright line policy,” which is difficult to distinguish from the term “blanket ban.” Bright line policies are defined as “categorical exclusions that do not consider individualized circumstances.” Section 12265(b)(1). Similarly, “blanket bans” are described as a “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 [...] interest or purpose.” Section 12269(a)(5). It is confusing to have such similar practices treated differently; while bright line policies are a potentially lawful practice under section 12265, blanket bans are prohibited under section 12269. It will be difficult to enforce these provisions because of the confusingly similar definitions, and we suggest deleting this subsection in its entirety.

If the Council chooses not to delete the entire subsection (b), it should consider deleting section 12265(b)(1) (stating that housing providers may lawfully “establish a bright line policy”) for several reasons.

First, section 12265(b)(1) is inconsistent with the rest of the regulations governing the use of criminal history in housing. It is difficult to think of a situation where a “bright line” policy by itself will be legally adequate under the proposed regulatory scheme. The proposed regulations prohibit the following: “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.” (Section 12269(a)(5).) Where a housing provider is using a “bright line” policy, therefore, it must also use a practice that conducts an individualized assessment of an individual’s circumstances. For example, if a provider of senior housing has a bright line policy of denying admission to applicants with a prior conviction for elder abuse, the housing provider must still conduct individualized assessments of applicants with prior convictions for other offenses. In our experience, it is rare for a housing provider to categorically exclude one type of conviction and disregard all others. Instead, housing providers usually apply a combination of mandatory and discretionary rules. To ensure that the proposed regulations reflect the realities of criminal records screening, therefore, the Council should delete the subsection that suggests that there will ever be a situation where a bright line policy by itself will be legally sufficient.

Second, the legal authority for such a statement is lacking. The Statement of Reasons seems to suggest that *El v. Southeastern Pennsylvania Transportation Authority* (“SEPTA”), 479 F.3d 232 (3d Cir. 2007) provides legal justification for a bright-line policy by itself. A close

reading of the *El* court’s decision, however, should cause the Council to reach the opposite conclusion. In *El*, an employer refused to hire applicants with a prior conviction for a violent offense and denied a job to the plaintiff because of a single 40-year-old conviction. (*Id.* at 235.) Although the court ultimately decided the case in favor of the employer, the court repeatedly stressed that its decision turned on the plaintiff’s lack of experts rather than the merits of the policy at issue. Indeed, the court highlighted its “reservations about such a policy in the abstract” and pointedly remarked that “[h]ad [the plaintiff] produced evidence rebutting [the defendant employer]’s experts, this would be a different case.” (*Id.* at 235, 247.) In light of the unusual posture of this case, the case should not be used to justify the proposition that bright line policies by themselves are permissible under the anti-discrimination principles of Title VII and, by analogy, Title VIII.

Should the Council continue to rely on *El v. SEPTA*, however, the regulatory language should at least reflect the nuance of the *El* decision. According to the court, a bright-line policy may be consistent with business necessity only if the policy “can distinguish between individual applicants that do and do not pose an unacceptable level of risk.” (*Id.* at 245.) Similarly, HUD’s April 2016 guidance explains that even if a policy excludes only some convictions, that policy must “accurately distinguish[] between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.” (U.S. Dep’t. of Housing & Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016), at 6.) Yet section 12265(b)(1) simply states that housing providers may “establish a practice that uses a ‘bright line’ policy.” This statement oversimplifies the housing provider’s obligations and contradicts the principles set for in the *El* case and the HUD guidance. (*Id.*) For a potential model to remedy this shortcoming, the Council need look no further than its own regulations on the use of criminal history information in employment, which mandates that “any bright line conviction disqualification ... properly distinguish between applicants or employees that do or do not pose an acceptable level of risk.” Cal. Code Regs tit. 2 § 11017.1(e)(2)(a). Similarly, the Council should amend section 12265(b)(1) to indicate that bright line policies must distinguish between individual applicants that do and do not pose an unacceptable level of risk.

Council response: The Council agrees with the commenter that former subsection 12265(b) was not clear and not likely to assist parties in understanding their respective rights and duties, so the Council has deleted it.

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

Section 12266(a):

Comment: We object to the burden of proof for the “no less discriminatory alternative” prong of the legally sufficient justification being placed on the respondent/defendant. We request

that the burden of proving the existence of a less discriminatory alternative be placed on the complainant/plaintiff.

Council response: The Council declines to modify the regulations in response to this comment. This comment is addressed above in the responses to 45-day comments regarding proposed section 12062.

Section 12266(b):

Comment: Section 12266(b) sets standards for a business to be found not in violation of the law if a business can meet certain burdens of proof. Similar to the analysis used in 12096.2 for assessing liability in disparate impact situations, this section requires entities to establish that there is no feasible practice that would equally or better accomplish the business interest. California or Federal law does not support the business bearing the burden of proving this to not be in violation of the law. Businesses should not be required to show there is no feasible less-discriminatory practice to obtain their objective, but just to show that the practice has a legitimate nondiscriminatory interest and that it carries out an identified business interest. The Council should either adopt the HUD burden-shifting approach or the language found in Government Code section 12955.8(b)(1).

Council response: The Council disagrees with the comment. This comment's concern regarding the difference between the proposed regulation and HUD's Final Rule is addressed above in the responses to 45-day comments regarding proposed section 12062. The Act as revised by A.B. 2244 in 1993 did not specifically allocate this burden, providing in Government Code section 12955.8(b)(1): "Any 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." However, the Council disagrees with the comment's suggestion to merely restate the language found in Government Code section 12955.8(b)(1). Pursuant to the Council's duty to clarify and implement the Act, the Council concludes that it is necessary for the regulations to specifically allocate the burden of proof in these cases in order to clarify the rights and duties created by the Act and to avoid waste of judicial resources determining which party bears the burden in each case. The comment's concern that California law does not support the proposed burden of proof is addressed above in the responses to 45-day comments regarding proposed section 12062.

Section 12266(b)(1):

Comment: We object to the heightened standard placed on business establishments. To resolve this issue, we request that the Council provide a definition for what makes an interest "necessary to the operation of the business," and that the definition make clear that a practice which serves a substantial, legitimate, and nondiscriminatory interest is sufficient. This will make the standards applicable to business entities and non-business entities the same. We recommend the following revisions:

~~(b)(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. A practice is necessary to the operation of the business when it is intended to serve a substantial, legitimate, nondiscriminatory interest, such as the safety of residents, employees, or property.~~

Council response: The Council disagrees with the comment. Government Code section 12955.8(b) specifically includes the requirement that the practice be “necessary to the operation of the business.” The same section specifies distinct burdens on “business establishments” and “establishments that do not involve a business.” The Council has no authority to depart from such a clearly stated distinction. Accordingly, the Council has provided two distinct rules for “business establishments” and “establishments that do not involve a business.” On the issue of necessity, the two standards (viz. subsections 12062(a)(1) and 12062(b)(1)) are parallel. Moreover, there is no basis for the comment’s assumption that the proposed regulation holds business establishments “to a higher standard than non-businesses” since under subsection 12062(b)(3) non-businesses have an additional element (“the identified purpose is sufficiently compelling to override the discriminatory effect”) that business establishments are not required to prove. The difference in standards is required by the statute, and takes into account factors that differ between business and non-business entities. The Council concludes that the examples provided in subsection 12266(b)(1) (“such as the safety of its residents, employees, or property”) are sufficiently illustrative to provide useful guidance regarding the meaning of an interest “necessary to the operation of the business.”

Comment: It is not clear how the standard for a directly-related conviction is different from the standard for determining whether the practice effectively carries out the identified interest, and then how that standard differs from the consideration of mitigating information. We request that the Council clarify these standards and when they must be applied. In addition, the requirement of this subsection for a housing provider to “demonstrate that a risk is more than speculative and is based on objective evidence” is ambiguous. The subsection includes an example that a recent 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. This example is not particularly helpful because it does not provide any explanation as to why the conviction is directly related, or what “objective evidence” supports the conclusion. The example seems to imply that conviction need only be rationally related to tenancy obligations and/or safety of residents or property and have occurred within an appropriately recent time period. If that is the case, we welcome that interpretation. However, that is not sufficiently clear from regulation as written, which seems to require much more. We request the Council clarify what exactly must be shown to comply with the requirement that the practice effectively carry out the interest.

Council response: The Council agrees with this comment that the prior proposed language was not clear and has amended the relevant provisions (*viz.* sections 12005(m) [ultimately renumbered as section 12005(k)] (directly-related conviction definition), and 12266(b)(2) (directly-related conviction standard)) including by deleting the language regarding demonstrating “that a risk is more than speculative and is based on objective evidence.” The Council has also amended the example in section 12266(b)(2) accordingly to add more clarity. The proposed regulations provide guidance to persons subject to the Act while leaving them maximum discretion to manage their businesses so long as their actions serve substantial, legitimate, nondiscriminatory business interests and there are no feasible alternative practices that would equally or better accomplish the identified business interest with a less discriminatory effect.

Sections 12266(b)(2) and (c)(2):

Comment: We suggest a technical correction to sections 12266(b)(2) and (c)(2). The regulations refer to “directly-related convictions.” It would be helpful to refer the reader back to section 12005(l) for the definition of “directly-related conviction.”

Council response: The Council agrees and has amended the text of this provision accordingly.

Section 12266(d):

Comment: We continue to be concerned that the determination of whether a less discriminatory alternative exists requires consideration of whether the practice allows for submission of individualized, mitigating information. This section strongly implies, and the Initial Statement of Reasons actually states, that use of an individualized assessment is a less discriminatory alternative. We object to this conclusion and request that the less discriminatory alternative examples calling for individualized assessment be removed. We further request that the Council provide authority for the position that individualized assessments reduce discrimination.

Council response: The Council disagrees with the comment. The comment misstates what the Initial Statement of Reasons provided. The Initial Statement of Reasons did not state that “use of an individualized assessment *is* a less discriminatory alternative.” Rather, it identified several situations in which an individualized assessment *could be* a less discriminatory alternative. The proposed regulation provides that if a challenged practice has been shown to have a discriminatory effect, in order to be lawful it must be necessary to achieve one or more substantial, legitimate, nondiscriminatory business interests, it must effectively carry out the identified business interest, and there must be no feasible alternative practice that would equally or better accomplish the identified business interest with a less discriminatory effect. The proposed regulation clearly states in section 12266(d) that “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 discussing the less discriminatory alternative element, HUD’s guidance on the use of criminal history states: “...[I]ndividualized assessment of relevant mitigating information beyond that contained in an individual’s criminal record is likely to have a less discriminatory effect than categorical exclusions that do not take such additional information into account.” U.S. Dept. of Housing and Urban Development, Office of General Counsel Guidance on Application of Fair Housing Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions (Apr. 2016) (HUD Guidance on FHA and Use of Criminal Records), p. 7. Because it is possible that consideration of relevant mitigation information might be a less discriminatory alternative than a categorical exclusion policy alone, section 12266(d)’s requirement (that the evaluation of whether there is a less discriminatory alternative to a challenged policy must include consideration of whether the practice allows for submission of individualized mitigating information) is logically necessary.

Section 12266(d):

Comment: This subsection describes various types of information that the Council contends “suggests that the individual is not likely to pose a demonstrable risk to the achievement of the identified interest.” However, in the Initial Statement of Reasons, the Council describes the various types of information very differently, saying that the information “may be relevant” because the individual “may be able to demonstrate” that they are not likely to commit such acts again. This is very different from how the regulation is framed, which essentially states that such information does demonstrate that the individual is not likely to pose a demonstrable risk. If a housing provider is required to consider mitigating information (as subsection (d) suggests) then this difference creates confusion as to how a housing provider must evaluate mitigating information. If an individual provides information of the type described in this subsection, must the housing provider accept that information as determinative of the risk posed by the individual? Is something more required? Is the individual responsible for demonstrating that the information reduces the risk they pose (as suggested by the Initial Statement of Reasons)? We further request that the Council provide authority for the contention that the types of information enumerated do, in fact, reduce the risk posed by individuals with directly related convictions.

Council response: The Council disagrees with the comment. The comment misinterprets the proposed regulation which states: “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.” The proposed regulation does not provide that the mere provision of such information in itself will constitute “mitigating information.” Whether any of the types of information listed in the proposed regulation will in a given case be credible and actually suggest that the individual is not likely to pose a demonstrable risk to the achievement of the identified interest – in other words constitute “mitigating information” – is a fact-specific and case-specific determination.

Each of the proposed types of information may be relevant to this determination because they may rationally relate to the likelihood that the individual will be less likely to commit the offense at issue.

Section 12266(d) and (e):

Comment: We suggest a revision to section 12226(d) and (e) and the definition of juvenile records. Section 12226(d) addresses the determination of whether there is a feasible, less discriminatory alternative to a criminal history information practice. The determination takes into consideration whether the practice provides the individual with an opportunity to present mitigating information, section 12226(d)(3), and also whether the practice requires independent consideration of mitigating information. (Section 12226(d)(1).) Mitigating information includes whether “the individual was a juvenile at the time of the conduct upon which the conviction is based.” (Section 12226(e)(1).) (This language is also confusing because a “juvenile” adjudication is not a criminal “conviction.” See Welf. & Inst. Code section 203.)

Taken together, the provisions are misleading: they suggest that it may be proper for a housing provider to consider information related to an adjudication in the juvenile justice system even if the individual does not offer that information in mitigation. As we have noted, California law generally does not allow the public access to juvenile case files. (Cal. Rules of Court, Rule 5.552; see also Riya Saya Shah & Lauren Fine, *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement* 13 (2014), <http://juvenilerecords.jlc.org/juvenilerecords/documetns/publications/national-review.pdf>.) Given the confidentiality of juvenile records, it is inappropriate for housing providers to consider an individual’s juvenile records unless presented by the individual for mitigation. We acknowledge that some minors may be subject to criminal proceedings in adult court. Therefore, to provide clarity to this section, we suggest the following changes to section 12266(e)(1):

“Whether the individual was a minor or young adult ~~juvenile~~ at the time of the conduct upon which the criminal conviction is based.”

Council response: The Council agrees this change provides clarity to this section and has amended the text of the provision accordingly.

Section 12266(e):

Comment: We strongly support the inclusion of disability-related conduct and the need for a reasonable accommodation as an example of mitigating information in section 12266(e).

Council response: The Council agrees with and appreciates the comment.

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

Section 12267(a)(1) :

Comment: Subsection 12267(a)(1) provides that the fact that a respondent has acted upon criminal history information differently for a member of a protected class than the respondent has acted for “comparable information” for another individual may demonstrate pretext. It is unclear what “comparable information” means in this context. For example, if two individuals had convictions for the same crime that were the same age, but one individual presented mitigating information and one did not, would this be considered “comparable information”? Further, while we do not necessarily disagree with the principle articulated in this section, it does bring into focus the problem with requiring individualized assessments. Particularly in the case of larger organizations, it is inevitable that a practice of conducting individualized assessments will result in two comparable situations being treated differently, despite no intent to discriminate.

Council response: The Council agrees with the comment and has amended the proposed regulation accordingly for greater clarity by revising the example to read: “For example, the fact that a respondent has acted upon comparable criminal history information, or comparable criminal history and mitigating circumstances information, differently for a member of a protected class than the respondent has acted upon such information for an individual who is not a member of a protected class may demonstrate pretext. Respondent’s consideration of any mitigating circumstances shall be among the factors considered in determining whether the use of criminal history information is pretextual.”

Section 12269. Specific Practices Related to Criminal History Information.

Section 12269(a)(3):

Comment: Subsection 12269(a)(3) correctly prohibits consideration of convictions that have been sealed or are otherwise rendered inoperative. This subsection would be more accurate and complete if it also referenced convictions for which the individual has been granted a certificate of rehabilitation under Penal Code 4852.01 et seq. Accordingly we propose the following additional language to subsection (a)(3):

(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); or for which a certificate of rehabilitation has been granted pursuant to Penal Code 4852.01 et seq.; provided that if this information was provided by an individual for purposes of offering mitigating information, a person may consider and use such information;

Council response: The Council agrees that the coverage of the section is more complete with the proposed language suggested by the commenter and has amended the text of the provision accordingly.

Section 12269(a)(3):

Comment: Note the typo in section 12269(a)(3) with reference to sealed appearing twice in the text.

Council response: The Council has corrected the error.

Section 12269(a)(5):

Comment: We suggest adding an additional example of an illegal blanket ban. In section 12269(a)(5), the Council should consider adding blanket bans against people on probation. Individuals may be on probation for a wide range of reasons, and a blanket ban against people on probation would disproportionately impact protected classes without furthering any legitimate interest or purpose. Section 12269(a)(5) should therefore read:

(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, and bans against anyone on probation.

Council response: The Council disagrees with the comment that the proposed regulation should be revised to include an example of bans against anyone on probation. The Council has selected representative examples from applicable case law that it finds appropriate and sufficient to provide clarity, and other examples are not necessary.

Section 12269(b):

Comment: The Council should consider a look back period that is shorter than the seven year period proposed by section 12269(b). Some reporting agencies do not verify criminal records, and provide reports with erroneous information that can lead people to lose their housing. A longer look back period increases the chances of inaccurate information. While California law attempts to address these issues by precluding the release of arrest information and limiting the reporting of convictions to crimes that date back seven years, the risk of errors in criminal background still exists and criminal background reporting may unnecessarily exclude individuals from housing. Accordingly, we propose that the look back period be limited to a period of no more than five years, which is consistent with HUD’s “Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions.”

Council response: The Council disagrees with the comment. The comment misunderstands the proposed regulation. The proposed regulation does not provide for or endorse any particular

look back period. Rather it only states what California Civil Code section 1785.13(a)(6) currently allows regarding inclusion of criminal history information in background reports. The proposed regulation frames the look back period issue as one a court may consider in its determination of whether there is a feasible alternative practice under subsection 12266.

Section 12269(c):

Comment: If a housing provider does intend to rely on criminal background reporting, the housing provider should be required to provide the applicant with notice that the housing provider intends to obtain a criminal background report and a notice of adverse action if the application for housing is denied based upon these reports, consistent with the federal Fair Credit Reporting Act, 15 USC section 1681a(b) and 15 USC section 1681m(a)(2).

Council response: The Council agrees that the regulations should specifically require housing providers to comply with the relevant provisions of the Fair Credit Reporting Act, as well as provisions of the California Consumer Credit Reporting Agencies Act and the California Investigative Consumer Reporting Agencies Act, and has amended the text of section 12269(c) accordingly. The Council notes that the federal Fair Credit Reporting Act was renumbered, and that the citations in the comment combine the prior numbering and the current numbering.

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

Comment: I foresee a potential problem relating to Corporations Code Section 7221, which allows a board of directors to declare vacant the office of a director who has been convicted of a felony. It appears now that boards of directors would have to analyze a specific director's circumstances surrounding their felony conviction and make an individualized assessment of the situation. Such a "blanket" exclusion from the board may be violative of section 12269. I appreciate some of the changes made by the Council to allow consideration of state and federal laws which allow or require consideration of background information. However, I remain concerned that this analysis would be very difficult because the intent of section 7221 was to avoid problems with theft of association funds by a director, or other types of crimes that would be inconsistent with the fiduciary duties and responsibilities of directors. I don't know how to reconcile this section of the proposed regulations with the Corporations Code's public policy concerns without having the association be challenged for arbitrary and selective decisions concerning convicted felons. Is it possible for the Council to consider a carve out that would indicate that following other statutory provisions concerning felony convictions would not be considered unlawful and that it would be considered legally sufficient justification under section 12270? Or a state law that would require consideration of criminal history under section 12270? As it stands, I would likely recommend that an association obtain a full criminal history of any director it was aware had been convicted of a felony, then meet with that director to discuss whether there was mitigating information director could provide that would impact the decision to not remove that director from the board.

Council response: The Council disagrees with the comment. There is nothing to prevent associations from designing policies in compliance with the proposed regulations on the use of criminal history information and its obligations under Corporations Code Section 7221, particularly since Corporations Code Section 7221 says that a board “may,” not “must,” remove a director under these circumstances. Moreover, the Council concludes this concern is sufficiently addressed by the acknowledgement in section 12270(a) that compliance with applicable laws may constitute an affirmative defense to a discriminatory effect claim under the Act.

COMMENTS RECEIVED DURING FIRST 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

General

Comment: As expressed in our prior letters, and oral comments at the June 21st meeting, it is not sufficient merely to recite that FEHA may provide broader coverage than federal law. Rather, there must be some indication that the statute adopted by the Legislature actually does so; the Council may not extend such broader protections of its own accord. *Green v. State of California* provides an instructive demonstration of this principle. After noting that “the Legislature intended to provide plaintiffs with broader substantive protection” in certain areas, the Supreme Court nonetheless found no legislative intent to depart from the applicable federal rule in others – rejecting the FEHC’s contrary regulation in the process. (*Green v. State of California, supra*, 42 Cal.4th at pp. 265-267.)

Council response: As noted by the commenter, the Council has the power to interpret, implement, and apply the statutory provisions of the Act. The proposed regulations do not exceed the Council’s authority, and are consistent with the terms and intent of the Act. Specific concerns about the Council’s authority or the scope of the Act are addressed where they are raised in the context of a specific proposed regulation.

Comment: The draft regulations do not address the crucial issue of who pays for accommodation of a disability, if it involves a physical modification to any part of the housing project. The joint HUD/DOJ interpretive documents have, over the years, indicated that the requesting party pays. However, past DFEH staff have stated that an accommodation which potentially benefited the entire housing project would be at the cost of the housing provider. This seems reasonable, but it is not written anywhere.

Council response: The current rulemaking does not address reasonable modifications for people with disabilities (i.e. physical modifications to housing). The Council will consider including reasonable modifications for people with disabilities in future rulemaking.

Comment: If the accommodation involves physical alteration of the housing project, must the alteration be restored after the disabled resident leaves the housing project? The DOJ/HUD interpretive guide states that if the alteration is structural, it need not be restored. While not explicitly so stating in the guide, it would seem logical that common area alterations benefitting the entire housing project also would not need to be restored. However, other alterations could under the DOJ/HUD interpretive guide be compelled to be restored after the disabled person leaves the housing project. We urge the Council to add to the draft regulations a section which follows the DOJ/HUD interpretive guide on this point. This standard is already being followed by many legal practitioners in California, since it presently is the only available answer.

Council response: The current rulemaking action does not address reasonable modifications for people with disabilities (i.e. physical modifications to housing). The Council may consider including reasonable modifications for people with disabilities in future rulemaking actions.

Comment: The longstanding unwritten rule has been that a housing provider may limit occupancy to 2 persons per bedroom, plus one more. (So, a 2 bedroom would have a maximum of 5 occupants, a 3 bedroom 7 occupants, and so on). Many housing rights organizations have also related this general rule... a rule which is not written anywhere. An increasing number of common interest developments are adopting occupancy limitations in their CC&Rs relying upon this standard. The standard should be stated in the regulations, to remove any doubt regarding what is permissible, and what is familial status discrimination.

Council response: The current rulemaking does not address occupancy standards and their connection with familial status discrimination and discrimination against other protected classes. The Council will consider including occupancy standards for people with disabilities in future rulemaking.

Comment: California Health and Safety regulations require signs be posted on swimming pools requiring children 14 and under to be accompanied by a parent or guardian, but fair housing laws bar a housing provider from enforcing the language on that required sign. Similarly, associations with gyms or weight rooms may want to protect children from dangerous areas. The regulations should provide some guidance regarding what is a legitimate safety measure and what is illegal familial discrimination.

Council response: The current rulemaking does not address pool rules and their connection with familial status and age discrimination. The Council will consider including this topic in future rulemaking.

Comment: We incorporate herein by reference our prior comments from the 45-day comment period.

Council response: The Council has responded to the prior comments above, which are no longer responsive for this comment period unless noted below.

Article 1. General Matters

Section 12005. Definitions.

Section 12005(d)(1):

Comment: This subsection defines “service animals” as including service animals in training. While we recognize the law provides special protections related to trainers of service animals, those protections are not always co-extensive with the protections afforded to individuals with disabilities that use service animals. For example, Civil Code Section 54.1 and 54.2 allow trainers of guide dogs, signal dogs, and service dogs into housing accommodations, provided that “the dog is on a leash and tagged as a guide dog, signal dog, or service dog by an identification tag issued by the county clerk, animal control department, or other agency.” By contrast, a leash and tagging requirement would not apply to an already-trained service animal that is accompanying a disabled individual. Given that the protections applicable to service animals in training are not co-extensive with protections afforded already-trained service animals, we recommend the Council remove service animals in training from the definition of service animals. Otherwise, the regulations may conflict with statute.

Council response: The Council disagrees with the comment and declines the commenter’s suggestion to remove service animals in training from the definition of service animals. The Council has found that as regards the housing rights of persons with disabilities who qualify for service animals, the protections available to already-trained service animals and service animals in training are not so distinct as to require removing service animals in training from the definition of service animals. Moreover, the tagging and leash and authorization requirements in Civil Code section 54.1(c) cannot be reasonably interpreted as applying to a service animal in training in the home of an individual with a disability.

First, training of a service animal to meet the particular needs of an individual with a disability often is done by the individual with a disability, and therefore needs to be done in the home beginning when the dog is young. For example, learning to obey commands to pick up items and bring them to someone in a wheelchair.

Second, it is not reasonable to assume that an animal in one’s home needs to be leashed at all times. Also, in some instances, a leash requirement may interfere with the ability of the animal to assist an individual (for example, to fetch and return objects). Section 12185(d)(6) of the proposed regulations already provides that assistance animals must be under the control of the individual with a disability or an individual who may be assisting the individual with a disability, but acknowledges that the control may consist of voice control. This applies to animals in training as well as trained animals.

Third, and perhaps most importantly, as a practical matter there is no California or federal statutory scheme for “authorizing” someone to train service animals. The reference in Civil Code section 54.1(c) to persons licensed to train guide dogs under Business and Professions Code sections 7200 et seq. is no longer valid, as the entire statutory scheme was

repealed by Stats. 2017, c. 669 (A.B.1705), § 4, eff. Jan. 1, 2018. The only remaining provision is section 7200, which now prohibits advertising as a guide dog instructor without proper experience and imposes some requirements on Guide Dog schools. The Council is unaware of any statutory scheme that licenses or authorizes trainers of other types of service animals. Further, Civil Code sections 54.1 and 54.2 are explicit that services animals can be trained by “other individuals with a disability,” which includes the individual who owns the service animal. See DOJ guidance document: *Frequently Asked Questions about Service Animals and the ADA*, July 20, 2015, Question/Answer Q5. (People with disabilities have the right to train the dog themselves and are not required to use a professional service dog training program.) https://www.ada.gov/regs2010/service_animal_qa.html (September 12, 2018).

In light of the lack of any applicable statutory scheme for trainers or authorization, the reference to “authorization” for individuals to train service animals in Civil Code section 54.1(c) has to be read in context to imply persons authorized by the person with a disability.

Furthermore, as the comment acknowledges, leash and tagging requirements do not apply to an already-trained service animal. But the line between a “trained” animal and an animal in training is ambiguous. Young animals begin to provide services in the early stages of training, while more experienced animals learn new skills. It would be difficult to enforce the type of distinction being drawn by the comment.

It is also not possible to uniformly apply such a requirement. The state statutory scheme in Food and Agricultural Code Chapter 3.5 (which provides tags for assistance dogs based solely on an affidavit by the owner or trainer) is not mandatory, but voluntary. It does not apply to service animals other than dogs. Additionally, by its terms it cannot be construed to limit the access of any person in violation of the Americans with Disabilities Act (ADA). Food & Agric. Code section 30853. Nothing in the Americans with Disabilities Act requires any tagging or certification. DOJ guidance document: *Frequently Asked Questions about Service Animals and the ADA*, July 20, 2015, Question/Answer Q8. (The ADA does not require service animals to wear a vest, ID tag, or specific harness.) https://www.ada.gov/regs2010/service_animal_qa.html (September 12, 2018). Similarly, Civil Code section 54.1(d) provides: “A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section, and this section does not limit the access of any person in violation of that act.”

In light of all of these factors, the Council declines to modify the proposed regulations to remove service animals in training from the definition of service animals.

Section 12005(q)(2) (ultimately renumbered as Section 12005(o)(2)):

Comment: Replace “community associations, condominiums, townhomes, planned developments, community apartments and other common interest developments” with “common interest developments.” Community associations include voluntary neighborhood associations, and townhouse is an architectural term, not a real estate term. Neither is included in the definition of “common interest development” in the Davis-Stirling Common Interest Development Act, so both those terms should be removed.

Council response: The Council disagrees with the comment. This term is intended to be broad and extends beyond the definition of “common interest development” in the Davis-Stirling Common Interest Development Act. “Community association” is included because it is sometimes a colloquial term referring to a common interest development. “Townhouse” is included because while it is used as an architectural term it is also sometimes used to refer to small condominiums or certain attached multi-family housing developments.

Section 12005(r) (ultimately renumbered as Section 12005(p)):

Comment: The revised definition of "housing opportunity" now includes "the opportunity to obtain, use, or enjoy . . . public . . . land use practices" – but the definition of "public land use practices" refers circularly back to practices that, among other things, have an “effect on . . . housing opportunities.”

Council response: The Council disagrees with the comment. The two terms are distinct but related. They are not circular. “Housing opportunity” refers to that which the Act is protecting from discrimination. Housing opportunities have several dimensions (including the opportunity to obtain, use or enjoy) and can be experienced and created in many ways (including a dwelling, a residential real estate-related transaction, financial assistance in relation to dwellings or residential real estate, public or private land use practices in relation to dwellings or residential real estate, or other housing related privileges, services and facilities). Public land use practices have the potential to either increase or limit housing opportunities.

Section 12005(v)(1) (ultimately renumbered as Section 12005(t)(1)):

Comment: “Owner” should not include managing agents, at least not in the common interest development context. Managers carry out the instructions of the board of directors, and should not be confused with persons having ownership or control.

Council response: The Council disagrees with the comment. The Act’s definition of “owner” in Government Code section 12927(e) states: “‘Owner’ includes...managing agent....” The definition of “owner” is intended to be broad and applies to many housing contexts beyond the common interest development context.

Section 12005(v)(4) and (v)(5) (ultimately renumbered as Section 12005(t)(4) and 12005(t)(5)):

Comment: We previously noted that the term “governance” used in the definition of “owner” was ambiguous as applied to “[t]he state and any of its political subdivisions and any agency thereof.” We requested that language be added to this provision clarifying that such government agencies are the “owners” of housing accommodations (and thus responsible for discriminatory leasing practices, etc.) only when the agency itself has some right of ownership or possession over the property. However, rather than adding any such language to this subdivision, the modified regulations inexplicably *removed* a similar limitation from an adjacent

subdivision (applicable to a broader range of public agencies), thus rendering that provision ambiguous as well.

Council response: The Council ultimately agrees with the first part of this comment and has deleted the word “governance” in the definition. The word “governance” is unnecessary in the definition because the other parts of the definition (“legal or equitable right of ownership, possession or the right to rent or lease housing accommodations”) are sufficient.

The Council removed the limitation from former section 12005(v)(5) [ultimately renumbered as section 12005(t)(5)] because it was duplicative of the text at the beginning of the section (“having any legal or equitable right of ownership, governance, possession or the right to rent or lease housing accommodations”) that modifies all of the subsections. As it now reads, all persons or entities identified in each of the subsections come within the definition of “owner” so long as they have a “legal or equitable right of ownership, possession or the right to rent or lease housing accommodations.”

Section 12005(w)(5) (ultimately renumbered as Section 12005(u)(5)):

Comment: “Person” should be revised at subdiv. (5) to read “Common interest developments as defined in Civil Code Section 4100.”

Council response: The Council declines to make this revision. While Civil Code Section 4100 is the specific section that defines “common interest developments,” the phrase in the proposed regulation “including those defined in the Davis-Stirling Common Interest Development Act (Civil Code section 4000 et seq.)” is not exclusive, but is one of other similar entities included in the definition of “Person.”

Section 12005(bb) (ultimately renumbered as Section 12005(z)):

Comment: The proposed modifications explicitly disregard the statutory limitation that "discriminat[ion] through public or private land use practices" must "make housing opportunities unavailable" in order to be actionable. Specifically, the recent modifications to Section 12005, subdivision (bb)(3) [ultimately renumbered as section 12005(z)(3)] make it apparent that the Council itself understands that "availability" and "enjoyment" of housing opportunities are separate criteria – and is attempting to extend FEHA coverage to both. However, the state and federal cases have been unequivocal that the actual terms of FEHA and the FHA exclude such broader habitability concerns. The draft regulations represent a clear effort to expand "the boundaries of the FEHA's . . . discrimination prohibition" of the exact nature condemned in *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262. Such an effort disserves the Council's goals of providing clarity and meaningful guidance to the regulated community and the public.

Council response: The Council disagrees with the comment. The relevant provision, Government Code section 12955, subsection (l), provides that it shall be unlawful... “To discriminate through public or private land use practices, decisions, and authorizations because of [list of protected bases].” This first sentence is not limited to “making housing opportunities available.” The second sentence provides that: “Discrimination *includes, but is not limited to*, restrictive covenants, zoning laws, denials of use permits, and other actions authorized under the Planning and Zoning Law (Title 7 (commencing with Section 65000)), that make housing opportunities unavailable.” (Emphasis added.) The comment misinterprets the statutory provision because it ignores the phrase “includes, but is not limited to” in that provision. The phrase “make housing opportunities unavailable” does not modify the entire provision of section 12955, subsection (l). Rather, the second sentence, as well as the third sentence, exemplify some of the ways in which public or private land use practices, decisions, and authorizations can discriminate. The first sentence provides the operative non-discrimination prohibition and it is not limited.

The Council agrees that “availability” and “enjoyment” of housing opportunities are separate criteria, and both are included in the Act’s broad understanding of “discrimination” as provided in Government Code section 12927(c) and the Act’s definition of “unlawful practices” in Government Code section 12955. The comment fails to cite any relevant and authoritative cases that preclude the application of the Act to appropriate limitations of enjoyment of housing opportunities. Revising the regulation to limit liability to making housing opportunities unavailable would conflict with the Act’s broad remedial purposes and its much broader understanding of definition of housing opportunity. The Act provides in Government Code section 12921(b) “The opportunity to seek, obtain, *and hold housing* without discrimination...is hereby recognized as and declared to be a civil right.” (Emphasis added.) And Government Code section 12927(c)(1) defines “discrimination” to include...“refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use *and enjoy* a dwelling.”(Emphasis added.) Finally, by declaring it the public policy of the state to protect the right to be free from discrimination on enumerated bases, and declaring the rights protected by the Act to be “civil rights,” the legislature has made it clear that the Act’s provision must be broadly interpreted. See Government Code sections 12920 and 12921. Government Code section 12993(a) provides for the construction of the Act, both as to housing and employment: “(a) The provisions of this part shall be construed liberally for the accomplishment of the purposes thereof.” Courts have consistently held that the Act must be liberally construed. See, e.g. *Auburn Woods I Homeowners Assn. v. Fair Employment and Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 (stating the federal Fair Housing Act provides a minimum level of protection that the Act may exceed); *Brown v. Smith* (1997) 55 Cal.App.4th 767, 780–781 (same); *City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1157-1158; *Bagatti v. Dept. of Rehabilitation* (2002) 97 Cal.App.4th 344, 367-368; *State Personnel Board v. Fair Employment and Housing Com.* (1985) 39 Cal.3d 422. As one court stated, the legislature intended the Act “to amplify” the rights of victims of discrimination, *Rojo v. Kliger* (1990) 52 Cal.3d 65, 75.

For the reasons stated above, the Council disagrees that its definitions of “housing opportunity” and “public land use practices” go beyond its authority and declines to modify the regulation as requested.

Section 12005(gg) (ultimately renumbered as Section 12005(ee)):

Comment: This subsection defines the phrase “substantial interest.” However, the exact phrase “substantial interest” is not used anywhere in the regulations. The term apparently refers to the first prong of the legally sufficient justification test, which requires a “substantial, legitimate, nondiscriminatory business interest,” or, in the case of non-business establishments a “substantial, legitimate, nondiscriminatory purpose.” While we do not object to the substance of the definition, we would recommend: (1) making clear that the definition is intended to apply to the first prong of the legally sufficient justification tests found in sections 12062 and 12266, and (2) adding “substantial purpose” to the definition. In addition, we would recommend referring to “the business or non-business establishment,” rather than “entity or organization” in the definition, since the parties who may be required to show a substantial interest as part of proving a legally sufficient justification defense are not necessarily entities or organizations. For example, an individual who owns a rental home is not an entity or organization, but may be a business establishment. Likewise, not all entities or organizations are business or non-business establishments to which these regulations apply. We recommend the following amendment (Council’s own proposed additions in bold):

“Substantial interest’ or ‘substantial purpose,’ as those terms are used in sections 12062 and 12266, means a core interest of the ~~entity or organization~~ **business or non-business establishment** that has a direct relationship to the function of that ~~entity or organization~~ **business or non-business establishment**.

Council response: The Council disagrees with the comment’s suggestion that the proposed definition needs to be amended in order to provide sufficient guidance to persons covered by the Act and the public. As the comment suggests the term refers to the first prong of the legally sufficient justification test, which requires a “substantial, legitimate, nondiscriminatory business interest.” Similarly, it is clear from context that if a person who owns a rental home is charged with discrimination, the person will be operating the rental home either as a “business establishment” or a “non-business establishment,” and will be subject to the relevant standard.

Article 7. Discriminatory Effect

Section 12060. Practices with Discriminatory Effect.

Section 12060(b) and 12161(a)(3)(L):

Comment: New language in Section 12060, subdivision (b) and Section 12161, subdivision (a)(3)(L) endeavors to define an action (or inaction) that “[c]reates, increases, reinforces, or perpetuates segregated housing patterns” as an automatic FEHA violation “independently of

the extent to which it produces a disparate effect on protected classes." This attempt to incorporate "affirmatively furthering fair housing" principles into FEHA disregards both the limitations upon the Council's legal authority, and the ongoing legislative process addressing this precise issue. As noted in our prior comments, the applicable federal guidance explicitly acknowledges that the foregoing principles are separate from the "mandate to refrain from discrimination" – which places them beyond the scope of the FEHA provisions these regulations are supposed to implement. (The modified regulatory text would apparently require neither discriminatory intent nor disparate effect in order to sustain a violation under these provisions – placing this outside of any recognized FEHA analysis, and making it unclear what, if any, statutory provision the Council might be intending to rely upon for authority.) Moreover, the "affirmatively furthering fair housing" package currently under consideration by the Legislature, Assembly Bills 686 and 1771, was recently amended to explicitly remove these provisions from FEHA, and relocate them into a separate chapter of the Government Code. (Assem. Bill No. 686 (2017-2018 Reg. Sess.) as amended Jun 13, 2018, available at https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB686.) The conclusion that these provisions are not – and should not be – within the scope of FEHA coverage is unavoidable. (The draft regulations also omit important "guardrails" deliberately included in both the legislative package and HUD's Affirmatively Furthering Fair Housing Final Rule, such as the caveat that the duty to (among other things) "replac[e] segregated living patterns with truly integrated and balanced living patterns" "does not require a public agency to take, or prohibit a public agency from taking, any one particular action." (Assem. Bill No. 686, § 1 [Proposed Gov. Code, § 8899.50, subd. (d)]. See also 80 Fed.Reg. 42279 (Jul. 16, 2015) ["The duty to affirmatively further fair housing does not dictate or preclude particular investments or strategies as a matter of law"].) This is consistent with the genesis of these obligations under federal law as a *planning-level requirement* distinct from FHA's anti-discrimination provisions, rather than an individually actionable basis for challenging specific government actions or inactions. The new duty conceived by the draft regulations would ignore both these legal underpinnings and the associated concrete limitations contemplated by Congress, HUD, and our Legislature. This, of course, the Council cannot do.) As in other areas, the Council lacks the authority to expand FEHA's scope in this manner, and any attempt to do so will accomplish nothing but confusion.

Council response: The Council disagrees with the comment. The comment inaccurately assumes that prohibitions against housing segregation are identical to obligations to affirmatively further fair housing. Section 12060(b) states: "A practice that is proven under Section 12061 to create, increase, reinforce, or perpetuate segregated housing patterns is a violation of the Act independently of the extent to which it produces a disparate effect on protected classes." This provision identifies a type of discrimination that is explicitly covered in FEHA (Discrimination "includes the provision of segregated or separated housing accommodations," Government Code section 12927(c)(1)) and also ensures the regulation is at least as protective as federal law which recognizes segregative practices separately. See 24 C.F.R. § 100.500(a) (A practice has a discriminatory effect where it actually or predictably results in a disparate impact on a group of persons or creates, increases, reinforces, or perpetuates segregated housing patterns because

of a protected status.”) (Emphasis added.) This type of discrimination has also long been recognized in fair housing case law, e.g. *Metropolitan Housing Development Corp. v. Village of Arlington Heights* (7th Cir. 1977) 558 F.2d 1283, 1288; *Huntington Branch, NAACP v. Town of Huntington* (2d Cir. 1998) 844 F.2d 926, 937, aff’d, 488 U.S. 15 (1988) (per curiam); *Hallmark Developers, Inc. v. Fulton County* (N.D. Ga. 2005) 386 F.Supp.2d 1369, 1383; *Graoch Associates #33, L.P. v. Louisville/Jefferson County Metro Human Relations Com.* (6th Cir. 2007) 508 F.3d 366, 378; *Avenue 6E Investments, LLC v. City of Yuma, Ariz.* (9th Cir. 2016) 818 F.3d 493, 503, cert. denied 137 S.Ct. 295 (2016); *Mhany Management, Inc. v. County of Nassau* (2d Cir. 2016) 819 F.3d 581, 619-620.

Pursuant to Government Code section 12955.6, “Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and its implementing regulations (24 C.F.R. 100.1 et seq.).” Since this type of discrimination has long been recognized in statute and under the federal FHA, including housing segregation in regulations implementing the Act is well within the Council’s authority. Section 12061 includes the liability standard “that is proven under Section 12061” so it is not standardless as the comment suggests. The provision in section 12161(b)(12) (formerly numbered as section 12161(a)(3)(L)) parallels section 12060(b) and impliedly incorporates the same liability standard.

The proposed regulations are independent of and distinct from any legislative action with regard to the duty to affirmatively further fair housing, and no modifications are necessary.

Section 12061(d):

Comment: This subsection, which provides example of types of evidence – including statistics – that might be used in a discriminatory effect case, has been amended to state that the listed types of evidence may be relevant to “providing statistics” to establish or rebut the existence of a discriminatory effect. The subsection previously stated that the listed types of evidence may be relevant to proving or rebutting the existence of a discriminatory effect. The amendment is problematic for two reasons. First, the amendment creates a tautological statement. As amended, the section essentially states that providing statistical evidence may be relevant to providing statistics. Second, the amendment suggests that providing statistics is all that is needed to establish the existence of a discriminatory effect. The U.S. Supreme Court rejected this notion in *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507, 2523 (“disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant’s policy or policies causing that disparity”). We recommend that the Council delete the amendments to this subsection.

Council response: The Council disagrees with the comment. The subsection is not tautological; rather it lists various possible types of statistics and possible sources of statistics “that, depending upon the facts of the case, are relevant in providing statistics to establish or to rebut the existence of a discriminatory effect.” The subsection neither states nor implies that “providing statistics is all that is needed to establish the existence of a discriminatory effect.”

Rather, this subsection is part of section 12061 (Burdens of Proof in Discriminatory Effect Cases) in which subsection (a) provides “The complainant has the burden of proving that a challenged practice caused or predictably will cause a discriminatory effect.”

Article 12. Harassment and Retaliation

Section 12120. Harassment.

Section 12120(a)(2):

Comment: HUD regulations do not define what constitutes a hostile environment in the housing context. Would a homeowner telling dirty jokes to a neighbor create a hostile housing environment? How does the common interest development prevent that or sanction that conduct? In the workplace, an employee can be disciplined or even terminated. This would not be an option in a housing project. Perhaps the answer would be to augment 12120(a)(2)(A)(i) and add as a factor the issue of whether or not the housing provider has the ability to ban or prevent the conduct in question. This comes up in other contexts in the sexual harassment topic in housing providers. HUD in its official comments to the regulations in October 2016 acknowledged that a housing provider may not have the ability to prevent sexual harassment. Perhaps this should be added to the regulation, to clarify that a common interest development board, if it is unable to proscribe the conduct, is not violating the regulations.

Similarly, resident vs. resident sexual harassment may be completely outside the common interest development board’s ability to prevent. Common interest development associations cannot reassign a condominium owner to another unit in the complex, or ban them from the building – the owner has an interest in the residence, and under Civil Code 4510 an association or its board of directors cannot bar that owner from accessing their residence.

Council response: The Council disagrees with the comment. Section 12120(a)(2) defines “hostile environment harassment” and the various parts of section 12120 provide the liability rule for determining if “hostile environment harassment” has been created. The comment’s primary concern appears to be the scope of liability that common interest development associations have for third party conduct that might constitute hostile environment harassment. With regard to liability of persons for third parties’ conduct, Section 12010(a)(1)(C) ultimately provides: “Failing to take prompt action as determined on a case-by-case basis to correct and end a discriminatory practice by a third-party, where the person 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 person 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.” *See, e.g. Fahnbulleh v. GFZ Realty, LLC*, 795 F. Supp. 2d 360, 364 (D. Md. 2011); *Reeves v. Carrollsburg Condominium Unit Owners Ass’n*, 1997 WL 1877201, *7–8 (D.D.C. 1997). These provisions limit a person’s liability

to circumstances in which the person knew or should have known about the conduct, and, for third-parties, has the power to correct it or end it as defined in the section. The Council notes that barring an owner from their residence is not the only option available to common interest developments for enforcing compliance with applicable laws. Common interest development associations are not without authority or power to address harassment. They have the authority to adopt policies in their governing documents ensuring compliance with applicable law, which likely includes provisions regarding harassment under FEHA, and their authority includes imposing penalties for noncompliance with their policies. Common interest developments can also impose a variety of penalties for noncompliance with their policies. See, e.g., Civil Code Section 5850(a), Schedule of Monetary Penalties: “If an association adopts or has adopted a policy imposing any monetary penalty, including any fee, on any association member for a violation of the governing documents, including any monetary penalty relating to the activities of a guest or tenant of the member...”

Article 15. Discrimination in Land Use Practices

Section 12161(a)(3)(C):

Comment: The modified regulations now include among the examples of "Discrimination in Land Use Practices" any "*fail[ure] to enforce generally imposed requirements...*" that has a discriminatory effect (as broadly defined) on the enjoyment of housing opportunities (also broadly defined). Absent clear and express constraints – such as the “robust causality requirement” articulated by the United States Supreme Court – this will merely promote litigation seeking to second-guess elected officials’ policy choices regarding allocation of limited enforcement resources. (*Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.* (2015) 135 S.Ct. 2507. See also *Ellis v. City of Minneapolis* (8th Cir. 2017), 860 F.3d 1106, 1110.) This concern is exacerbated by the inappropriate shifting of the burden of proof in such cases, as discussed above. Among other negative consequences, this may perversely delay or discourage government agencies from making even limited investments in code enforcement, since the regulations would establish *uniform non-enforcement* as the least risky option.

Council response: The Council disagrees with the comment, and disagrees that a failure to act should be limited in some manner other than as set forth in the regulation. Government Code section 12955.8 provides that proof of an intentional violation and a violation causing a discriminatory effect both apply to “an act or failure to act” in connection with any practices covered by the Act, including violations of 12955(l) relating to land use. Furthermore, under subsections 12161(a)(1) and (2), a “failure to enforce generally imposed requirements” is only a violation if it rises to the level of either intentional discrimination or discriminatory effect. Whether a particular governmental failure to act rises to that level is a question of fact for determination by a court, based on the liability provisions set out in section 12010, Article 7, this article, and other provisions of the Act and regulations. The cases cited in the comment do not compel a different conclusion. The standards set out in Article 7 for discriminatory effect

liability are based on specific statutory authority in the Act, include a causality requirement, and are not inconsistent with *Inclusive Communities*. Nor is *Ellis* persuasive or controlling authority on this point. The Council has no reason to believe that public entities will simply refuse to carry out critical health and safety functions such as code enforcement simply because they are required to do so in a nondiscriminatory manner, and no legal authority is offered for that proposition. Rather, the proposed regulation will simply require that those functions be carried out in compliance with the Act. The “shifting of the burden of proof” part of the comment is addressed above in the responses to the 45-day comments, specifically in response to the third comment regarding proposed section 12061.

Article 18. Disability

Section 12176. Reasonable Accommodations.

Section 12176(c)(7):

Comment: This new section, allowing a resident to request financial accommodation, is disconnected from the disability, but would require the housing provider to make financial concessions which allegedly are necessitated because of the disability. We have twice this year seen residents ask the association board to delay or otherwise forbear on a member’s delinquent assessments, on the claim that the homeowner’s health problems created a financial hardship – the most recent such claim involved a landlord owner, who claimed they were, due to illness, unable to pay their assessments on the rented residence on time. While we absolutely are committed to the important public policy of accommodating physical disabilities, broadening the issue from physical accommodations to financial accommodations will harm associations. Accommodating a disability should not relieve the homeowner from paying their share of the association expenses, as to do so would actually harm all other assessment-paying residents.

Council response: The Council disagrees with the comment. Each request for a disability related reasonable accommodation in financial policies under subsection 12176(c)(7) must be considered on an individual basis pursuant to Section 12176 *et seq.*, including whether the request constitutes an undue burden or fundamental alteration under the standards in Section 12179. This is an individual, fact-specific inquiry. Reasonable accommodations are not limited to “physical accommodations,” but apply to rules, policies, practices and services when necessary to afford an individual with a disability an equal opportunity to use and enjoy a dwelling. This includes financial policies and policies that impose a financial burden. To the extent the comment refers to requests to waive generally applicable fees, it is also addressed above in in the Council’s response to the first comment under proposed section 12161(a) in the section responding to comments received during the initial 45-day comment period. To the extent it is not addressed above, requests to waive fees that are generally applicable to all residents or individuals may also constitute appropriate requests for reasonable accommodations under the provisions of Sections 12176 *et seq.*

Comment: The modified regulations include several new examples of "reasonable accommodation in . . . policies that impose a financial burden", including "waiving fees or providing additional time to pay fees for city clean-up of a property." As noted during oral discussions at the June 21st meeting, the reference to "waiving fees" goes beyond existing case law. (See *McGary v. City of Portland* (9th Cir. 2004) 386 F.3d 1259, 1261 ["McGary alleges that the City violated the FHAA by denying his request for a 'reasonable accommodation,' which would have allowed him additional time to clean up his yard."]) While this is indeed just an example of what reasonable accommodation "may include", the articulation of such examples creates expectations – and the Council has previously stated its intent to list examples that are actually supported by case law or similar authority. The Council is urged to remain consistent with that intention, and remove the unsupported reference to waiving fees from this example.

Council response: The Council disagrees with the comment. Each request for a disability related reasonable accommodation in financial policies under subsection 12176(c)(7) must be considered on an individual basis pursuant to sections 12176 *et seq.*, including whether the request constitutes an undue burden or fundamental alteration under the standards in section 12179. This is an individual fact-specific inquiry. Reasonable accommodations are not limited to "physical accommodations," but apply to rules, policies, practices and services when necessary to afford an individual with a disability an equal opportunity to use and enjoy a dwelling. This includes financial policies and policies that impose a financial burden.

To the extent the comment refers to requests to waive generally applicable fees, it is also addressed above in the Council's response to the first comment under proposed section 12161(a) in the section responding to comments received during the initial 45-day comment period. To the extent it is not addressed above, the Council disagrees with the commenter's characterization of the *McGary* case. *McGary* specifically addresses accommodations to financial policies. "[T]he 'imposition of burdensome policies, including financial policies, can interfere with disabled persons' right to use and enjoyment and their dwellings, thus necessitating accommodation." *McGary* at 1263; "[F]act that the City cleaned McGary's property and then placed a lien on it to compensate for this service, rather than charge him a daily or monthly fee up front as in *Mobile Home I*, is inapposite. The lien the City put on McGary's house prevents the full use and enjoyment of his property because it interferes with his use of the property as collateral to borrow money. A sick man whose earning ability is impaired by disability might well need the borrowing power that his real estate gives him, as well as his right of occupancy." *McGary* at 1264. "In *Mobile Home I*, we considered 'whether the duty imposed under the FHAA to make 'reasonable accommodations in rules' on behalf of handicapped persons may require a landlord to waive, in a given instance, fees generally applicable to all residents.' . . . We held that the refusal to waive this generally applicable fee for a disabled resident who required a home health care aide stated a claim for relief under § 3604(f)(3)(B)." *McGary* at 1263.

Section 12178. Establishing that a Reasonable Accommodation is Necessary.

Comment: This section does not address the duration of the disability. Some disabilities which merit accommodations are temporary in nature. Temporary disabilities should be so designated – such as after a surgery, to name one common example. The housing provider should be able to ascertain the duration of the disability, and therefore the duration of the accommodation necessary.

Council response: The Council agrees that the current draft regulations do not specifically address the issue of duration of disability or define “disability,” but declines to modify these regulations to address the issues. “Disability” is defined in the Act, including at Government Code sections 12926(j) (mental disability), 12926(m) (physical disability), 12926.1(b) (legislative findings and declarations) and 12955.3 (disability). The Council may consider the definition or duration issues in future rulemaking actions. However, the Council notes that both the Act and the federal Fair Housing Act refer to present handicaps. Government Code section 1226(j)(1) and m(1); (disability includes having a disability); 42 U.S.C. sections 3602(h) and 3604(f). Additionally, the determination of whether someone has a disability cannot be less protective than the Americans with Disabilities Act (ADA). Government Code section 12926(n). The ADA provides protections for disabilities that are episodic or in remission. 42 U.S.C. section 12102(4)(D). The duration of the disability may come into play as to the nature of the accommodation that is requested. Consideration of any reasonable accommodation request for a disability identified as short term still should follow the procedures set out in sections 12176 et seq. If the accommodation is necessary to afford the individual with a disability equal opportunity to use and enjoy a dwelling or housing opportunity, and if the accommodations are needed for only a specific period, the interactive process may be used to determine the appropriate duration of the accommodation.

Section 12178(f):

Comment: At the June 21st meeting, the Council made further revisions to this section. While we appreciate the Council's work at trying to refine the wording, we are still of the opinion that the Council should move to delete this section entirely as it too ambiguous and not helpful in practice. As we stated in our prior comments, it is hard to conceive a situation where a disabled person with a non-obvious disability could establish their disability by words alone without actually disclosing their disability, which the fair housing law is meant to prevent.

Council response: The Council disagrees with the comment, and declines to delete the section. The Council has, however, provided a great deal of additional specificity in section 12178, including revisions for clarity to subsection 12178(f), and ultimately splitting original section 12178(f) into two parts by adding subsection 12178(g). There are numerous instances in which an individual with a disability could establish their disability through self-certification. For example, an individual may be able to describe that they have a vision disability as part of asking for an accommodation relating to provision of documents in a particular format, and

that description could be seen as credible based on available information. The Council has clarified the language of this provision in order to address these concerns. Language has been added regarding self-certification methods and clarifying that “credible statement” in this context refers to a credible statement by the person with the disability. Furthermore, the comment conflates the general legal prohibition against inquiring whether a person has a disability with the obligation of a person requesting an accommodation to disclose that they have a disability, although they need not disclose a specific diagnosis or medical information. See proposed section 12178(e).

Section 12178(g):

Comment: This subsection describes the persons who can document a disability and need for accommodation. Subparts 1 and 2 should designate a medical professional or health care provider practicing in the area of the disability alleged. Otherwise, if a resident has a friend who is an anesthesiologist, would that friend be able to write a letter regarding the resident’s allergies, or need for a support animal?

Similarly, subparts 3 and 5, which, respectively, allow verification to include members of the requestor’s peer group, or “any other reliable third party,” throw the door wide open to illegitimate disability claims. There is no limitation and no negative sanction for a false statement of disability.

The lack of reasonable limitations and qualifications upon those who would confirm a disability and need for accommodation is unintentionally disrespecting the tens of thousands of legitimately disabled persons who need the Fair Housing Act’s protections.

The most common example of this is the rampant abuse of handicapped parking placards. Disabled persons often find a shortage of handicapped parking, due to the tens of thousands of persons who use someone else’s DMV handicapped placard, or who keep the placard long after a temporary disability has ended.

Council response: The Council disagrees with the comment, and declines to restrict third party information to medical professionals. The Council has provided a great deal of specificity in section 12178, and disagrees that there is no limitation on third party information. The determination about whether third-party information is needed, and whether a particular third party can provide reliable information, is an individualized fact-specific inquiry. The Council declines to respond to the hypothetical question in the first paragraph because there are many other possible facts that could determine the proper application of the regulation. Whether a reliable third party can provide appropriate information is detailed in subsection 12178(g)(5). The individual must be “in a position to know about the individual’s disability or disability-related need for an accommodation.” Further, subsection 12178(h) provides guidance as to whether a third party is reliable. The Council does not find the reference to abuse of parking placards to be relevant or persuasive, and the commenter failed to provide any reliable evidence for its factual assertion.

Additionally, as stated in the ISOR, medical professionals are not the only persons who can provide adequate information, for numerous reasons, including the following reasons. First,

individuals with disabilities are often in the best position to understand and explain their disability-related need. Second, disabilities are not the same as diseases, and not all individuals with disabilities are under the current care of a medical provider with relevant information. For example, an individual who is blind may not need ongoing vision treatment. Third, many low income individuals with disabilities, including those without medical insurance, do not have ongoing relationships with health care providers who can document a particular disability. They may seek health care only in emergencies. Fourth, many health care practitioners, including those who are paid by Medi-Cal (Medicaid), charge to complete paperwork, and completion of that paperwork may be accompanied by significant delays, which puts a significant and unnecessary burden on individuals with disabilities. Fifth, while medical professionals are experienced at treating diseases, the inquiry under the Act is not a medical one and may not be understood by them. Sixth, an individual with disabilities may interact with a number of other reliable sources who are better equipped to understand the nature of the accommodations they need, such as some of the persons identified in subsection (f)(3)-(5).

In addition, requiring verification only from medical providers under this subsection would provide fewer rights than the federal Fair Housing Act in violation of Government Code 12955.6. *See Question/Answer No. 18 in Joint Statement of the Department of Housing and Urban Development and the Department of Justice on "Reasonable Accommodations Under the Fair Housing Act," (HUD/DOJ Statement on Reasonable Accommodations) May 17, 2004, available at <http://www.justice.gov/crt/about/hce> or https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/joint_statement_ra.pdf.* As noted in the Initial Statement of Reasons, and as required by Government Code section 12955.6, the proposed section is based on California statutes and common law, but also provides rights and remedies that are equal to or greater than those provided in the federal Fair Housing Act, specifically 42 U.S.C. sections 3604-3606, and particularly 42 U.S.C. section 3604, subsections (f)(1), (f)(2), and (f)(3)(B), and their implementing regulations, 24 C.F.R. sections 100.204, 100.202(c), and case law interpreting those provisions. Further, the proposed section provides rights and remedies that are equal to or greater than the equivalent American with Disabilities Act provisions related to reasonable accommodations, pursuant to Government Code section 12926.1(a). The proposed section also provides rights and remedies that are equal to or greater than those provided by the *HUD/DOJ Statement on Reasonable Accommodations, supra*.

Section 12179. Denial of Reasonable Accommodation.

Comment: A subsection (a)(7) should be added. An accommodation which would create a nuisance for other residents would not be reasonable. The most common example perhaps would be the accommodation of allergies by allowing a hard floor in a multi-story residential structure. A hard floor (such as tile, planking, or ceramic), if significant buffering of vibration is not installed, will create a substantial noise nuisance for the lower neighbor. The current draft regulations do not cover this general issue.

Council response: The Council disagrees and declines to adopt this suggestion. A reasonable accommodation can only be denied for the reasons set out in section 12179. The circumstances described would have to be evaluated on an individualized fact specific basis to determine if the requested accommodation constitutes an undue burden, and, if so, whether an alternative accommodation could meet the need (for example, such as additional soundproofing in the ceiling of the lower unit or additional buffering of vibrations).

Sections 12179(b)(2) and (b)(5):

Comment: Sections 12179(b)(2) and (b)(5) relate to looking at the resources of the person who has been asked to grant the accommodation, including a consideration of the resources of larger entities. The Council amended subsection (b)(2) to make clear that the financial resources considered in determining whether an accommodation poses an undue financial burden are the financial resources of the person with the duty under the law to provide the accommodation. We appreciate the Council's amendment to subsection (b)(2), and requests that the same amendment be made to subsection (b)(5) (which also relates to financial resources).

(b)(5) Where ~~the entity being asked to make~~ a person who has a duty under the Act to provide 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

Council response: The Council disagrees with the comment. Subsection (b)(2) has been revised to refer to "the financial resources of the person or persons who have a duty under the Act to provide the accommodation" in order to provide greater clarity as to the scope of the determination. The person being asked to provide the accommodation is, or acts for, the person or persons who have a duty to provide the accommodation. The determination of which person or persons has such a duty and must bear the cost of the requested accommodation is a factual case-by-case determination. In any given situation, depending on a variety of circumstances including statutory and contractual obligations, there may be more than one party responsible for contributing to or providing the accommodation. However, individuals with a legal obligation to provide the accommodation cannot contractually abrogate the obligation to provide the accommodation by agreeing that someone else must bear the cost.

The Council declines to make the requested change to subsection (b)(5). The change in subsection (b)(2) is sufficient because it identifies as a factor whose financial resources are to be considered, but the factor identified in (b)(5) concerns a distinct issue.

Section 12185. Assistance Animals.

Comment: This proposed regulation provides less scrutiny on service animals than on support animals. A service dog owner need not present a letter or any documentation, but under subpart (b) only need orally state that the owner has a disability and the animal (dog or miniature horse) is trained to perform a task. At the same time, support animals must be documented with a letter from a qualified person. It would seem logical to require that a qualified person also document the special training and need for a service animal.

Council response: The Council disagrees with the comment and declines to revise the proposed regulation as suggested by the comment. Service animals and support animals are treated differently under the applicable laws. This comment is addressed above in in the Council's response to the first comment under proposed section 12185(b) in the section responding to comments received during the initial 45-day comment period.

Section 12185(b):

Comment: We remain extremely concerned about this subsection's elimination of a housing provider's ability to verify that a purported service animal is, in fact, a service animal. As discussed in previous comments. We recognize that the California law (Civil Code Sections 54.1 and 54.2) provides a right for individuals with disabilities who utilize guide dogs, signal dogs, and service dogs to have those animals in housing accommodations, and that this right is separate from the right to request a reasonable accommodation in that a guide dog, signal dog, or service dog may not be denied due to an administrative or financial burden. However, case law does not support the contention that rights granted under Civil Code Sections 54.1 and 54.2 are *entirely* distinct from the right to be reasonably accommodated.

In *Sullivan By and Through Sullivan v. Vallejo City Unified School Dist.* (E.D. Cal. 1990) 731 F.Supp. 947, the court appears to have considered the right to have a service animal under Civil Code Sections 54.1 and 54.2 as a reasonable accommodation, but one which cannot be denied based on undue financial or administrative burden. See *Sullivan* at 959 (“[A] facility covered by Civil Code §§ 54.1 and 54.2 may not claim that it cannot reasonably accommodate a disabled person's choice to use a service, guide or signal dog under section 504 on grounds that to do so would impose an undue administrative or financial burden on the institution.”). While the *Sullivan* case dealt with the right of a disabled child to have a service dog in school, the reasoning of the case makes clear that the court does not view the right to have a service animal under Civil Code sections 54.1 and 54.2 as entirely distinct from reasonable accommodation law. *Sullivan* did not specifically address the issue of whether verification can be requested when the disability and/or disability related need for the alleged service animal is not obvious or known. We are aware of no case which holds that a housing provider is prohibited from requesting verification that a service animal is, in fact, a service animal when the disability and/or disability related need for the animal is not obvious or known. Sullivan's linkage of the right to have a service animal under Civil Code sections 54.1 and 54.2 with reasonable accommodations suggests that it is appropriate to request verification (as allowed by reasonable accommodation laws) of a non-obvious disability and/or disability related need.

In addition to our general objection to the regulation's prohibition on any verification process for service animals, we are also concerned that the failure to limit the application of this section to guide dogs, signal dogs, and service dogs is inconsistent with the Council's intent and beyond the Council's authority.

Section 12005(d)(1) defines "service animals" as "animals that are trained to perform specific tasks to assist individuals with disabilities...." The definition states that service animals include, but are not limited to, guide dogs, signals dogs, service dogs, and miniature horses. Because the definition is not limited to the enumerated examples, the definition appears to permit a cat, bird, fish, or other animal to potentially be considered a service animal. At a previous Council meeting on September 6, 2017 councilmember Schur stated in oral comments that the limitation on the inquiries which can be made about service animals only applies to dogs and miniature horses. That statement is consistent with the definition of service animals under the ADA, but is not consistent with the definition of service animals in these regulations. As such, it appears that the section 12185(b)'s limitation on the inquiries that can be made about service animals applies more broadly than the Council intended.

In addition to our other objections and the inconsistency with the Council's apparent intent, the application of the subsection to animals other than guide dogs, signal dogs, and service dogs also exceeds the Council's authority since the right under Civil Code Sections 54.1 and 54.2 related to service animals are specifically limited to guide dogs, signal dogs, and service dogs.

We recommend that the subsection be revised as follows (Council's own proposed additions in bold):

(b) Persons, including tenants, occupants, invitees, owners, and others, are permitted to have guide dogs, signal dogs, service dogs as defined in section 12005(e)(1)(d)(1)(A)-(C) ~~service animals in all dwellings (including common use and public use areas), residential real estate, and other buildings involved in residential real estate transactions, without the requirement to utilize a reasonable accommodation process,~~ subject to the following 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.~~

(1) The Owner may request that the person with the purported guide dog, signal dog, or service dog provide reliable information (as described in section 12178(f)-(g)) that:

(A) Is necessary to establish that the individual has a disability, and;

(B) Describes the disability-related task the guide dog, signal dog, or service dog has been trained to perform.

(2) It is not permitted to ask the individual with a disability to demonstrate the task described in paragraph (1)(B).

(3) The Owner may not request the information described in paragraph (1) if the information is apparent or already known to the Owner.

(4) The Owner must permit the person a reasonable opportunity to provide the information requested pursuant to paragraph (1), during this time the Owner may not refuse to permit the person to keep the purported guide dog, signal dog, or service dog on the premises.

(5) There may be other legal obligations relating to assistance animals, such as the Americans with Disabilities Act, which may further restrict the nature and type of inquiry that may be made concerning assistance animals. For example, 28 CFR 35.136 and 28 CFR 36.302 limit the inquiry that public entities and public accommodations can make to determine if an animal is a service animal to the following two questions: 1) "Are you an individual with a disability?" and 2) "What is the disability-related task the animal has been trained to perform?"

Council response: The Council disagrees with the comment and declines to revise the proposed regulation as suggested by the comment. This comment is addressed above in in the Council's response to the first comment under proposed section 12185(b) in the section responding to comments received during the initial 45- day comment period. To the extent it is not addressed above, the Council declines to adopt the specific proposed addition numbered (b)(4), the Council does concur with the substance of the proposed addition in so far as it bars even the two identified questions if the disability and need for the service animal are known or apparent. Generally, persons "may not make the two permissible inquiries set out above when it is readily apparent that the animal is trained to do work or perform tasks for an individual with a disability (e.g., the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability)." *FHEO Notice* at 5; 28 C.F.R. section 36.302(c)(6); 28 C.F.R. section 35.136(f). Similarly, the Council agrees with the substance of the comments in the proposed addition numbered (b)(5), but no change in the proposed regulation is needed because these points are already covered by proposed subsection 12185(d)(1). Although individuals with service animals may not be asked additional questions, they still must provide appropriate control over their service animal. As required by Civil Code section 54.1(b)(6)(B), reasonable conditions can be placed on both service animals and support animals., For example, the provisions applicable to all assistance animals in subsections 12185(d)(3) and (d)(6) allow owners to impose reasonable conditions on service animals and recover for any damage. Therefore, any problems created by a particular service animal can be addressed. Similarly, no assistance animal, including a service animal, need be allowed if it constitutes a direct threat under the provisions of proposed subsection 12185(d)(9). A number of other provisions apply equally to service animals and support animals, as set out in proposed subsection 12185(d).

The right to a service animal in housing in Civil Code sections 54.1 and 54.2 does not require any reasonable accommodation analysis. Nothing in the *Sullivan* case holds to the contrary. Rather, the court in *Sullivan* found that: "California Civil Code § 54.1 mandates that "physically disabled persons shall be entitled to full and equal access, as other members of the general public ... to places to which the general public is invited." The equal access mandate of section 54.1 is implemented, in part, by California Civil Code section 54.2, which requires that

“[e]very ... physically handicapped person *shall* have the right to be accompanied by a guide dog, signal dog, or service dog, especially trained for that purpose, in any of the places specified in Section 54.1” (emphasis supplied). The only limitations which may be imposed on this broad right are “those established by law, or state or federal regulation, and applicable alike to all persons.” Cal. Civ. Code section 54.1(a). The mandatory language employed indicates a clear legislative purpose to ensure that persons such as plaintiff shall not be denied access to public facilities while accompanied by their service dogs. Through these provisions, the California Legislature has determined that in the absence of legal authority to the contrary, there are no circumstances in which it would be reasonable to exclude a service dog from a public facility. *See* Cal. Civ. Code § 54.1.” *Sullivan* at 959. The Court goes on to say: “It is therefore clear that plaintiff has a near absolute right under state law to be accompanied by her service dog at school.” *Id.* The same standards apply to the application of Civil Code section 54.1 in housing. The quote from *Sullivan* cited by the comment makes it explicit. In *Sullivan*, the court was interpreting both Civil Code sections 54.1 and section 504 of the Rehabilitation Act, and concluded that where Civil Code section 54.1 requires admission of a service dog, a party may not claim an undue burden defense to a reasonable accommodation request under section 504.

The Council also rejects the other suggestions in the comment and declines to modify the term “includes.” The proposed definition of service animals includes animals (dogs) covered by Civil Code 54.1 and 54.2 It also includes miniature horses in order to ensure that the Act is no less protective than federal law, under the analysis above, but requires that miniature horses meet the requirements of 28 C.F.R. sections 35.136(i) and 36.302(c)(9). Under that same rationale, there could be situations where other animals could appropriately be considered service animals under federal law. *See* U.S. Dept. of Transportation regulations regarding transportation services for individuals with disabilities, 49 C.F.R. section 37.3 (“Service animal means any guide dog, signal dog *or other animal* individually trained to do work or perform tasks for the benefit of an individual with a disability.”) (Emphasis added.); 14 C.F.R. section 382.117(f) (Non-foreign air carriers must evaluate some service animals other than dogs on an individual basis.) The Council sees no reason to distinguish among types of service animals, given the broad remedial purposes of the Act.

Article 24. Consideration of Criminal History Information in Housing

Section 12265. Prohibited Uses of Criminal History Information.

Section 12265(b):

Comment: This subsection, which provided that a person could establish a practice of using a “bright line” policy, individualized assessment, or combination “bright line” and individualized assessment policy, has been deleted. We believe it is very important for the regulations to make clear that a “bright line” policy is not per se prohibited. We request that the Council restore the subsection.

Council response: The Council disagrees with the comment. The Council concludes that the proposed regulation section 12265(b) was not clear and not likely to assist parties in understanding their respective rights and duties, so the Council has deleted this subsection.

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

Section 12266(e)(1):

Comment: Subsection (e)(1) as amended, provides that an individual's status as a "minor or young adult" at the time of the criminal conduct is mitigating information. This amendment is problematic for several reasons. First, there is no definition of "young adult." Second, as we have previously commented, there is evidence that young adults are actually *more* likely to reoffend. (*See Reducing Recidivism and Improving Other Outcomes for Young Adults in the Juvenile and Adult Criminal Justice Systems*, Council on State Government Justice Center, ("[M]ore often than not, when a violent crime is committed, it involves someone between the ages of 18 and 24. And it is people in this same age group that law enforcement officials say are especially likely to be repeat offenders.")

<https://csgjusticecenter.org/youth/publications/reducing-recidivism-and-improving-other-outcomes-for-youngadults-in-the-juvenile-and-adult-criminal-justice-systems-2/>.) Finally, to the extent the intent of this subsection is prevent juvenile records from being used (as was suggested at the June 21, 2018 Council meeting), section 12269(a)(4) already prohibits the use of juvenile justice system adjudications. We recommend that the amendments to subsection (e)(1) be deleted.

Council response: The Council disagrees with the comment. The comment misunderstands the proposed regulation and its context. Section 12266(e) states: "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." The proposed regulation does not provide that the mere provision of such information in itself will constitute "mitigating information." Whether any of the types of information listed in the proposed regulation will in a given case be credible and actually suggest that the individual is not likely to pose a demonstrable risk to the achievement of the identified interest--in other words constitute "mitigating information"--is a fact-specific and case-specific determination. An individual who was a minor or young adult at the time of the criminal conduct who is now much older might provide information about the circumstances of the conviction related to the individual's age that would constitute credible and relevant information suggesting that the individual is not likely to pose a demonstrable risk to the achievement of the identified interest. Because of the purpose and meaning of this proposed regulation, it is not necessary to define "young adult."

Comment: While the Council's definition of "mitigating information" in subdivision (e) is well defined, the use of "young adult" when referencing the mitigating factor of youthfulness is vague and should be refined to state an age range. For example, the Young Adult Court in the County of San Francisco was established in 2015 to serve eligible youth ages 18-24. (<https://www.sfsuperiorcourt.org/divisions/collaborative/yac>.) Using a specific range that coincides with how other agencies define "young adult" in this context creates consistency and clarity that is needed for both landlords and tenants.

Council response: The Council disagrees with the comment. Whether any of the types of information listed in the proposed regulation section 12266(e) will in a given case be credible and actually suggest that the individual is not likely to pose a demonstrable risk to the achievement of the identified interest – in other words constitute “mitigating information” – is a fact-specific and case-specific determination. An individual who was a minor or young adult at the time of the criminal conduct but who is now much older might provide information about the circumstances of the conviction related to the individual’s age that would constitute credible and relevant information suggesting that the individual is not likely to pose a demonstrable risk to the achievement of the identified interest. Because of the purpose and meaning of this proposed regulation, it is not necessary to define “young adult.”

Section 12266(e)(2):

Comment: We also continue to object to the inclusion of “the amount of time that has passed since the date of conviction” in subsection (e)(2) as a form of mitigating information, since the amount of time that has passed since the criminal conduct occurred must already be considered in determining whether a conviction is directly related. It is unclear how the amount of time that has passed since the time of the conviction would be considered differently for the purposes of providing mitigating information, as opposed to determining whether the conviction is directly related.

Council response: The Council disagrees with the comment. The potential role of “the amount of time that has passed since the date of conviction” is different when used in the initial screening and when it might be used as a form of mitigating information. If it is used in designing a criminal history practice, the use of “the amount of time that has passed since the date of conviction” may operate as a categorical rule to disqualify an individual from a housing opportunity. In contrast, if it is used as possibly mitigating information, the information is used to determine if the lapse of time means the specific individual under consideration is no longer likely to pose a demonstrable risk to the achievement of the identified interest. The commenter’s concern about whether and how “the amount of time that has passed since the date of conviction” could be a form of “mitigating information” is addressed more completely in the response immediately above.

Section 12269. Specific Practices Related to Criminal History Information.

Comment: We request that the Council add a subsection to this section to clarify that merely using a consumer criminal background report which may (or may not) include the information otherwise prohibited by this section is not considered to be “seeking, considering, or using” prohibited information, so long as the housing provider does not specifically request or actually consider or use any prohibited information that may appear on a such a report. The vast majority of criminal history practices involve using a criminal background report from a consumer reporting agency (as opposed to conducting a personal investigation). We are not aware of a method for housing providers to have information about certain types of criminal records masked from consumer criminal background reports they order from a consumer reporting agency. Accordingly, if the mere act of requesting a consumer report is considered a violation because such a report may include information described in this section, then the effect will be to essentially prohibit all criminal background checks.

Council response: The Council disagrees with the comment. If a person elects to use a criminal history information practice, the practice must comply with all of the Article 24 requirements. Under the regulations a person seeking third party criminal history information should request only information that is allowed under Article 24. In the absence of other relevant facts, if a person has requested only information allowed under Article 24 and takes no adverse action, then the person will not have violated the Act.

COMMENTS RECEIVED DURING SECOND 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

General

Comment: The numerous points of unclarity and confusion that the Council has not chosen to address warrant comment. "A regulation shall be presumed not to comply with the 'clarity' standard if," among other things, "the language of the regulation conflicts with the agency's description of the effect of the regulation" or "the regulation presents information in a format that is not readily understandable by persons "directly affected.'" As noted in our prior correspondence, a number of the proposed regulations fail this test, including those pertaining to allocation of burden of proof, affirmatively furthering fair housing, the definition of land use practices, and the references to “use” and “enjoyment” of housing. The Council – and if not the Council, OAL – are encouraged to review these provisions carefully, and consider both whether they meet statutory clarity standards, and are also functionally clear enough to be understood and implemented by the regulated community without years of needless and fruitless litigation.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period and is addressed above. No further response is required as per Government Code section 11346.9(a)(3).

Article 1. General Matters

Section 12005. Definitions.

Section 12005(t)

Comment: The revisions to Section 12005, subdivision (t) endeavor to clarify that the various entities listed in that subdivision are “owners,” for purposes of these regulations, only if they actually hold a “legal or equitable right of ownership, *governance*, possession or the right to rent or lease housing accommodations.” This change is generally beneficial, but the revised regulation continues to use the ambiguous term “governance” in the definition of “owner.” The previously prepared Final Statement of Reasons attempts to remedy this ambiguity:

“‘Governance’ in this context refers to the right to rent or lease housing accommodations or any of a bundle of legal or equitable rights related to ownership. It is commonly used to refer to the obligations of common interest developments in relationship to the housing units over which they exercise authority. It could include, for example, a government agency that controls specified operations of a housing accommodation through a regulatory agreement. In this context, it is not intended to refer to the general legislative functions of a governmental entity within in its territorial jurisdiction.”
(FSOR, p. 116.)

Unfortunately this limited definition of “governance” is contained only in the FSOR, and is not found anywhere in the regulatory text – a practice against which OAL has repeatedly cautioned. The Council is urged to include the foregoing limitations within the regulation itself, so that they will be understood by the regulated community and the public.

Council response: The Council agrees with the concern raised by this comment and has ultimately deleted the word “governance” in the definition. The word “governance” is unnecessary in the definition because the other parts of the definition (“legal or equitable right of ownership, possession or the right to rent or lease housing accommodations”) are sufficient. Specifically, it is not necessary to include the word *governance*, as the text was ultimately modified, to clarify that all persons or entities identified in each of the subsections to subsection (t) come within the definition so long as they have a “legal or equitable right of ownership, possession or the right to rent or lease housing accommodations.”

Section 12010(b)

Comment: This section defines vicarious liability. However, while the definition concedes the constraints on vicarious liability of agency law, it omits those explicit constraints which could lead to readers thinking that there is some new standard of vicarious liability being established. We propose the section should be amended as follows:

“Vicarious liability is a form of responsibility that makes a person liable for the discriminatory housing practice of a third party, regardless of whether the person knew or should have known of the conduct by the third party that resulted in the discriminatory housing practice. A person covered by these regulations is vicariously liable for discriminatory practices by their agent or employee when that agent or employee is acting within the scope of their

agency or employment, regardless of whether they knew or should have known about the conduct, unless California agency law requires a different outcome and that outcome is not in conflict with the federal Fair Housing Act.”

Section (b)2 references the issue of the agent or employee acting within the scope of agency or employment, so the inclusion of the suggested language is also consistent with the overall section.

Council response: The Council disagrees that the proposed language is necessary to clarify the definition of vicarious liability. The proposed language is redundant. The reference to compliance with California agency law and the federal Fair Housing Act already allows consideration of whether someone is acting within the scope of their agency or employment to the extent required by those laws.

Article 7. Discriminatory Effect

Section 12060(b)

Comment: The revised text amends proposed Section 12060, subdivision (b) to define when a practice “predictably results” in a disparate impact. Clarification of this issue is welcome, but the proposed trigger – “*there is evidence* that the practice will result in a disparate impact” – injects an element of uncertainty. To avoid confusion over the quantum of evidence required, and prevent conflict within the regulations, the nebulous term “evidence” should be replaced with a clear reference to the burden of proof assigned to this issue under Section 12061,3 as follows:

“A practice predictably results in a disparate impact when there is evidence the complainant satisfies their burden under Section 12061 to demonstrate that the practice will result in a disparate impact even though the practice has not yet been implemented.

Council response: The Council disagrees with the comment and declines to make the suggested revision. As the commenter recognizes, section 12061 provides the burdens of proof that parties in discriminatory effects cases must meet. There is no need to add the proposed cross-reference in section 12060(b).

Section 12061(d)

Comment: In Section 12061, subdivision (d), the Council proposes to change “Types of evidence that *may be* relevant...” to “Types of evidence that *depending on the facts of the case are* relevant...” “*May be*” and “*depending on the facts of the case are*” are materially indistinguishable for practitioners, courts, and the public, and the latter is no more clear than the former.

Council response: The Council disagrees with the comment. The ultimate addition of the language “depending upon the facts of the case,” and substitution of “are” for “may be,” does

add clarity to the prior version because it specifies more clearly the basis upon which any type of evidence will be relevant, thereby adding a criterion for a court to determine relevance.

Comment: This regulation's ambiguity is compounded by the inclusion of an apparent tautology – several of the examples of evidence that are “relevant in providing statistics” are themselves statistics – and by the catch-all category of “other relevant evidence,” which robs the preceding detailed list of much meaning. The regulation is clear that statistics and other relevant evidence may be relevant in providing statistics – but the purpose and effect of such a superfluous provision are unclear, and add nothing to the regulations but confusion.

Council response: This comment is not responsive to the text noticed for the 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Section 12062(c)

Comment: What is the intent of the provision in proposed Section 12062(c) that a legally sufficient justification must be “supported by evidence” and not be hypothetical or speculative? Is the intended requirement that each instance where a negative decision is being made about one with a criminal history must refer to the specific likelihood that the individual will return to his or her criminal behavior? What kind of evidence would suffice for that degree of certainty? This reg seems to require of rental property owners and managers that they have an advanced degree in criminal psychology in addition to a law degree. Only individuals with that amount of education and experience are likely to be able to establish the necessary evidence apparently required by this provision. If this provision is interpreted and enforced literally, aren't rental property owners and managers always going to be at risk of having decisions based on criminal history information scrutinized or open to attack?

Council response: The Council disagrees with the comment. The changes made to section 12062(c) during the second 15-day comment period were non-substantive and intended to increase the clarity of the language without changing the legal standard. This provision makes clear that a purported justification must be grounded in fact and supported by admissible evidence.

Article 12. Harassment and Retaliation

Section 12130(c)

Comment: This section cites various types of protected activity including a tenant “*meeting or assembling with other persons in order to address potential or actual violations of fair housing rights...*” Examples of such “meeting or assembling” are provided in parentheses “*for example by joining, supporting or organizing a tenant organization that advances or protects fair housing rights.*” We believe that simply “joining” or “supporting” such activity is not enough under current law, absent further elaboration, to constitute protected activity. Conceivably a tenant

simply clicking “Like” on a tenant group’s Facebook post could be considered as supporting such a group and following a tenant rights Facebook page could be “joining” a tenant group. Such de minimus activity would suddenly create a series of rights and protections for tenants which is not supported by existing law. The language in the parenthesis regarding “joining” and “supporting” groups should be struck.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Article 15. Discrimination in Land Use Practices

Section 12161(a)(3)(H) (ultimately renumbered as Section 12161(b)(8))

Comment: Revised Section 12161, subdivision (a)(3)(H) proposes to prohibit public agencies from “using land use permitting processes for variances, conditional use permits, or other land use approvals ... to respond to a request for a reasonable accommodation if the variance or conditional use process ... uses different procedures than those required by this article...” This language is no clearer than the prior version. The reference to a “process” that uses different “procedures” remains circular, and expanding the prohibition to include “other land use approvals” makes this language unclear and unworkable in practice. Reasonable accommodation requests in public land use practices will almost invariably involve some sort of approval – even if only a building permit – and the proposed language leaves considerable ambiguity regarding how reasonable accommodation requests may be integrated with existing (often statutorily mandated) processes for issuing such approvals. The revised text perhaps underscores the Council’s lack of statutory authority for this provision – but otherwise does little to address the significant concerns.

Council response: The Council disagrees with the comment regarding the subsection ultimately numbered 12161(b)(8). First, the Council notes that the excerpts in the comment from the proposed regulatory language omit significant language and are not consistent with the ultimate text, as clarified. The relevant portion of the subsection now reads: *“Refuses or fails to make reasonable accommodations in public or private land use practices or services . . . including . . . or using land use permitting processes for variances, conditional use permits, or other land use approvals rather than a reasonable accommodation process to respond to a request for a reasonable accommodation if the variance or conditional use process takes into consideration different criteria or uses different procedures than those required by this article for considering requests for a reasonable accommodation.”* [Emphasis added regarding omitted language.] As can be seen by the full text, public agencies are only prohibited from using their existing procedures without change when those procedures conflict with the requirements of fair housing law *for consideration of a reasonable accommodation request*, not under any other circumstances. Second, the addition of the language under consideration during the second 15-day comment period does clarify the section because it specifies that variances and conditional

use permits are examples of the types of land use processes that governments use that sometimes conflict with the requirements for considering a reasonable accommodation request. There is no circularity in the use of the phrase “variance or conditional use process” that “uses different procedures than those required by this article for considering requests for reasonable accommodations” because many, but not all, variance or conditional use processes use different procedures than are provided for in Article 18. Expanding the prohibition to include “other land use approvals” does not make this provision unclear and unworkable in practice, but rather is necessary to be inclusive because this issue may arise in a wide range of situations (such as a building permit approval as the commenter mentions) and is not limited to the enumerated examples of variances and conditional use permits. The proposed language is not intended to dictate to local governments precisely how they must integrate the regulatory requirement for reasonable accommodation requests with existing processes for issuing land use approvals, but only to clarify that they are required to do so. Since local ordinances and processes vary widely, local governments must have discretion to integrate them appropriately with their statutory obligations. This does not create ambiguity.

As noted above, the regulation allows public entities to use their variance, conditional use permit, and other land use permitting processes *so long as* those processes otherwise comply with the standards for reasonable accommodations set out in Sections 12176 et seq., including such provisions as maintaining confidentiality, using the interactive process, and using only permissible grounds for denial. This is consistent with the case law and the Attorney General opinion. While some of these processes may be consistent with Section 12176, many conditional use permit and variance processes use standards and procedures that may be inconsistent with the requirements under the Act for considering and acting upon a request for a reasonable accommodation. Public entities need to be cognizant of these differences and ensure that whatever process they use meet the legal requirements for consideration of reasonable accommodation requests. Discriminatory or burdensome permit processes may even give rise to municipal liability. *See Pacific Shores Properties, LLC v. City of Newport Beach* (9th Cir. 2013) 730 F.3d 1142, 1148 (“[T]he costs borne by the Plaintiffs to present their permit applications” were compensable.)

Finally, the Council has the authority under Government Code section 12935(a)(1) to: “adopt, promulgate, amend, and rescind suitable rules, regulations, and standards that ... [i]nterpret, implement, and apply” FEHA, including the statutory obligation to provide reasonable accommodations. *See, e.g.,* “‘Discrimination’ includes . . . refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.” Gov. Code, section 12927(c)(1).

Article 18. Disability

Section 12176(c)(7)

Comment: The current language in this section, possibly unintentionally, suggests a significant and legally unsupported expansion of state and federal law on reasonable accommodation. The law does not require a landlord to subsidize a tenant due to the tenant having a disability. For example, there is case law to allow a tenant who otherwise had good credit to have a co-signer. However, in that example, a landlord is not subsidizing the tenant. Also, where there are expenses incurred by landlord in accommodating a disability, that expense has been directly correlated to accommodating the disability and is not simply a subsidy because the tenant is disabled and requires help with a “financial burden.”

In this section, examples of financial accommodations include “*waiving guest fees or other fees; waiving fees or providing additional time to pay fees for city clean-up of a property.*” These examples appear to be unrelated to the tenant’s disability and are saying a landlord needs to waive fees for disabled tenants because they are disabled, in effect mandating a subsidy. This would be different for example, and would not be a subsidy, if the guest fees were being waived for an individual because the tenant required that person to assist with his or her care. In that case such a waiver would be directly related to a reasonable accommodation of the tenant’s disability and would not be due to the cost of the guest fee. This section needs to be more carefully drafted to follow existing law.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. Further, the comment is addressed above, and the examples are related to the tenant’s disability and are supported by case law. No further response is required as per Government Code section 11346.9(a)(3).

Section 12176 (c)(8)(B)(i)

Comment: We continue to object to the use of this example. The example suggests a tenant can remain silent and not request a reasonable accommodation until trial and states the landlord must just treat that request as if it were made at another time. The fact that the tenant delay resulted in the landlord having to institute and pay for legal proceedings that could have been forestalled by the tenant raising this issue prior to the filing of the unlawful detainer, or at least before trial, is not addressed nor is any guidance given as to how that issue is to be handled. Also, what happens at the trial? Presumably this issue was not raised at the pleading stage by the tenant. Is the whole court procedure simply mooted by the tenant raising this issue at trial? If this example is going to continue to be used, more clarification is needed.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period and is addressed above. No further response is required as per Government Code section 11346.9(a)(3).

Article 24. Consideration of Criminal History Information in Housing

Comment: In addition to specific concerns discussed below, we wish to state a general concern about the lack of clear direction in the regulations for landlords in this area. In essence landlords are being called upon to evaluate various factors to assess whether a person, based on their criminal history, should be allowed to be or remain a tenant. This places the landlord in a very difficult position in the absence of clear rules, faced with possible liability from tenants who may sue the landlord for not adequately screening potentially dangerous tenants if they suffer a loss created by the tenant with a criminal history and possible lawsuit by tenants and prospective tenants with a criminal history for denying a tenancy.

Need for Detailed Examples and Fact Patterns

In the absence of bright line rules, the regulations must provide more comprehensive examples for landlords. The following sections help illustrate the need for more clarity.

Section 12266(b)(2) provides one extreme example, a recent conviction for residential arson as a possible ground to reject a prospective tenant. It also provides an easy example for where a conviction appears not to have relevancy to a being a proper tenant.

Section 12266(e) discusses mitigating information including in subsection (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.*" Without an example, how is a landlord supposed to apply this? If a person is convicted of a crime, say of felony battery, clearly the D.A., judge and possibly jury did not accept any defense based on one of the enumerated statutes to drop or reduce the charges. Yet, now a landlord looking at a conviction is supposed to evaluate if that conviction should be mitigated by that party's claim to that status?

The problem with these regulations for landlords is not the easy cases. The guidance provided by the regulations is very open-ended general which leaves a lot of uncertainty. Section 12180 on reasonable accommodation earlier in the regulations provide seven detailed hypothetical scenarios which help guide the application of the regulations. A similar section should be created in this criminal history section to illustrate how a landlord should balance various factors in applying the regulations.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Comment: All of these organizations and their members support efforts to reasonably make rental housing available to all persons without prejudice or bias. The organizations and their members also support well-established law regarding the duty to provide safe and secure premises. Our clients' concerns with the pending regulations focus on the inherent potential conflict between those two goals. To the extent the regulations potentially put at risk the safety and security of the residents and properties they own and manage, our clients oppose the regulations as proposed.

As currently drafted (referring to the modifications posted on Friday evening, December 7, 2018), the regulations create an implicit presumption that denial of rental housing to anyone with a criminal history is discriminatory and unlawful. The regulations do not expressly so state, but the clear purpose of the regulations is to create a new protected class of individuals: convicted criminals. And the regulations essentially guarantee that class of individuals equal treatment in seeking rental housing with the onus continually put on the rental property owner and manager to establish the legality of how criminal history information is used in a decision-making process that results in the denial of rental housing to members of this newly identified protected class.

As the proposed regulations make clear in several provisions (detailed specifically below), each instance of decisions adverse to a person with a criminal history is subject to a “fact-based, case-by-case” review. And precious little substantive guidance, let alone bright-line rules, is provided to assist the rental property owner and manager in making those decisions.

The proposed system envisioned by the regulations would cause tenancy decisions regarding individuals with criminal history to be made without reliance on anything akin to uniformly applied rules. Those decisions would then be subject to post-hoc judgments on complaints against property owners and managers without reference to precedent. That kind of system may have worked well in the days of King Solomon, but it has been long rejected in a nation governed by the rule of law. And, from the perspective of our clients, establishing such a system to enforce laudable, if ill-considered, goals opens the door to a “damned-if-you-do, damned-if-you-don’t” nightmare that works against the interests of all concerned.

Specifically, such a system will work against the interests of those with criminal history seeking housing. It will work against the interests of existing tenants who seek and expect safe and secure housing. And it will work against the interests of those seeking to provide safe and secure conditions for their tenants and for their property while remaining free of liability for damages suffered by those tenants through the actions of other tenants.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Comment: Taken as a whole, and with respect to every specified requirement, the regs appear to put rental property owners and managers at risk whenever they request criminal history information and at great risk whenever they make a decision adverse to an applicant or tenant based on criminal history information.

Will a hotline be available to rental property owners and managers where they can receive a direction as to whether a pending decision would be in violation of the regs? If not, are rental property owners and managers expected to comply with the regs without on-site legal counsel? Or are rental property owners and managers expected to have in-house legal counsel or other professional staff available to assess each instance relating to a criminal history decision? Even if they did have an attorney, would that attorney, or any attorney, have a sufficient body of law available to rely upon so as to provide meaningful guidance to the owner and manager? Will the ultimate impact of the regs be to discourage having property made

available for rental housing? That result could occur if the regs are adopted in their current form since rental property owners and managers would then be at risk of liability either from damages suffered by existing tenants at the hands of criminal history tenants or from charges brought by criminal history individuals seeking redress for alleged discrimination.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Comment: HUD prohibits occupancy in federally-assisted housing to anyone who has been evicted from fed-assisted housing due to drug-related activity and to anyone subject to a lifetime registered sex offender ban (24 CFR 982.553). These prohibitions appear to make inquiry into criminal history essential.

How are rental property owners and managers expected to comply with HUD requirements on criminal history when they appear to conflict with the new state regs?

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. Conflicts between federal and state laws are addressed below in regards to Sections 12269 and 12270. Further, 24 C.F.R. 982.553 is inapplicable to private landlords. No further response is required as per Government Code section 11346.9(a)(3).

Comment: HUD allows public housing agencies and owners of federally-assisted housing to exercise discretion on all decisions regarding applicants for housing with a criminal history (24 CFR 982.553). As a result, all such agencies and owners and managers must require all rental-housing applicants to answer criminal history questions as part of the application process.

How are rental property owners and managers expected to comply with those HUD requirements when they appear to conflict with the new state regs?

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. Conflicts between federal and state laws are addressed below in connection with Sections 12269 and 12270. Further, 24 C.F.R. 982.553 is inapplicable to private landlords. No further response is required as per Government Code section 11346.9(a)(3).

Comment: The Legislature will be considering a newly introduced bill (AB 53 – Jones- Sawyer) that seeks to impose by law the same protections for unlawful discrimination against individuals with criminal history as are addressed in the modified regulations.

With legislation pending to address the issue of criminal history information in rental housing decisions, are the regs premature? Shouldn't the regs follow the legislation, instead of anticipating it, as appears to have been the case?

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Comment: The regs essentially create a new legally protected class—criminally convicted individuals. That new class of individuals, unlike any other legally protected class, contains individuals who, by virtue of being in that class, present a potential risk to other protected classes and individuals. That statement is not a reflection of bias against the class; it is a recognition of reality. Individuals who have violated criminal laws are more suspect to violate criminal laws again than are individuals who have not. Providing protection for those individuals against discrimination in housing is a laudable goal, but it may create more problems than it solves, especially because of the second point of concern.

And that point is that the regs, as drafted, instruct rental property owners and managers to refrain from discriminating against a class of individuals who may put the safety and security of their other residents at risk without providing clear guidelines or bright-line rules to avoid claims of discrimination. The negative consequences are likely to be multiple. First, rental property owners and managers will be put in the position of fashioning their own rules for assessing those risks. Some may be too lenient in terms of potential risk to existing tenants, thereby subjecting those tenants to risk of harm. Some may be too rigid in terms of denying rental housing to convicted criminals, thereby leaving those individuals with lessened housing opportunities. And some, certainly, may be accidental and strike a balance thereby creating no additional risk to existing tenants while providing housing for this newly created class of individuals, although this fortuitous result is highly unlikely due to the lack of specificity in the manner by which the newly-created class of individuals are to be treated in the content of the proposed regulations.

Is it wise policy to leave the decisions required by these regulations in the hands of individuals who are not prepared, by training and profession, to make them, especially when those individuals will never have sufficient evaluative tools to make a legally sound judgment? Whether a convicted criminal is an undue risk to a rental housing structure should be a decision made by trained professionals, at least if liability can be attached to a “wrong” decision. Rental property owners and managers will, if required by law, make these decisions but they must be provided with the legal means to do so. In their current form, the regs do not provide those means.

The regs do not provide enough direction for all concerned. The hope will be that most of the decisions required by these regs will be made successfully with the “right” convicted criminals getting or keeping their rental housing, and no harm being felt by others. But when decisions err on the side of insufficient caution, with harm to residents and property as a result, it will be little solace that they were made in an effort to avoid a charge of discrimination.

Rental property owners serve an important function in our society. They provide housing. They do so at their peril in terms of possible liability. The proposed regulations increase the potential for liability, and they thus serve as a deterrent to rental property ownership and to rented units by other tenants. And without rental property owners and managers, the amount of available housing for those in need will be diminished.

Problems exist throughout society. Some are easily remedied by law (e.g., laws banning discrimination based on immutable characteristics: race, gender, sexual orientation); others are endemic to the human condition (e.g., unavoidable accidents, criminal acts). The proposed

regulations seek to prevent discrimination against a class of people who fall into the second, not the first, category of problems.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Section 12264: Definitions.

Comment: We also want to address one issued raised by the California Apartment Association in its December 28, 2018 letter regarding the proposed regulations. The Association expresses concern that the “criminal history information” definition in section 12264 will be interpreted to include information acquired from private individuals. Although the first sentence of section 12264 refers to “any record” the last sentence of section 12264 states that: “Criminal history information includes both records from any jurisdiction and records not prepared strictly for law enforcement purposes, such as investigative consumer records” This language makes it clear that the word “record” as used in this definition means an official public record from a court or law enforcement agency, or a compilation of such records by a private consumer credit reporting agency, and does not include a reference form or other informational document prepared by a private landlord. As such there is no need for changing this definition; it is reasonably interpreted to refer only to public records.

Council response: We agree with the commenter that under Section 12264, “criminal history information” does not include a reference form or other informational document prepared by a private landlord, unless such documents identify both an individual and the individual’s arrest or other contacts with a law enforcement agency. Information that identifies both an individual and the individual’s arrest or other contacts with a law enforcement agency is included in the definition of “criminal history” under Section 12264, regardless of whether it is in the police records themselves, compilations from investigative credit reporting agencies, or is referenced in otherwise lawfully permitted communications.

Sections 12264 and 12269(a)(1)

Comment: The revisions to these two sections are both the result of moving the definitions from the general definition section in Article 1 to Article 24. Section 12264 includes the revised definition of “criminal history information.” Section 12269(a)(1) has had an additional clause added that is intended to replace the definition of “arrest” that was deleted from Article 1. The commentator has no objection to the definitions being moved to Article 24 but does have concerns about the substantive revisions of the definitions.

Specifically, the definitions of criminal history information and arrest are no longer limited to information derived from public records. The previous version of the “criminal history information” definition specifically referenced federal, state, or local public records, and other compilations based on information in public records. The revised definition broadens the

definition of criminal history information to “any record” that contains information about “an individual’s criminal history or contacts with any law enforcement agency.” Likewise, the previous definition of “arrest” referenced “a record from any jurisdiction” – i.e., a public record. Yet, the provision added to Section 12269(a)(1) to replace the definition of “arrest” speaks of “information indicating that 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,” without any limitation as to the source of that information.

The broadening of the definitions is extremely problematic, as it brings a whole host of situations that were previously outside the scope of Article 24 into the scope of Article 24. For example, rental housing providers often contact the previous landlords of an applicant to determine key facts about the applicant’s past conduct as a tenant, such as whether they paid the rent on time and complied with the terms of the lease. If the previous landlord discloses on the reference form that the tenant frequently engaged in violent behavior and was arrested at the property several times as a result, that could be considered a record that “contains individually identifiable information and describes any aspect of an individual’s criminal history or contacts with any law enforcement agency.” Simply considering this information would be a per se violation of Section 12269(a)(1)’s prohibition on seeking, considering, using, or taking an adverse action based on “criminal history information about any arrest that has not resulted in conviction.” In this example, by considering “evidence that the individual has maintained a good tenant history” the housing provider is engaging in an activity that is actually encouraged under Section 12266(e)(3). Yet by seeking out such information, the rental housing provider is at risk of violating Section 12269(a)(1). Surely it was not the Council’s intention for a rental housing provider to only be permitted to seek, consider, and use positive information in an applicant’s rental history.

Council response: The Council disagrees with the comment. The revised definition of “criminal history information” in Section 12264 does include public records, as well as records derived from public records, and other records, that contain information about individuals’ interactions with law enforcement that did not lead to a conviction. However, Section 12269(a) does not prohibit landlords from considering conduct by prospective tenants or from considering statements by landlords about a former tenant’s conduct. The Council does not intend for rental housing providers to be permitted to seek, consider, and use only positive information in an applicant’s rental history.

In response to the example described in the comment, a landlord is permitted to consider reports of a prior landlord that a tenant engaged in violent behavior at the property, and to consider actions taken by a prior landlord, such as evictions that are otherwise legally permissible to report. Subject to the limitations of Article 24, a landlord can inquire further from a tenant or other individuals about the conduct that was alleged. However, it is not permissible to ask about or consider the *arrest records or reports of arrests* for the reasons set out below in this response.

Section 12269(a) does prohibit landlords from considering criminal history information as defined in Section 12264 regarding an arrest or an individual’s interaction with law enforcement. This prohibition is based upon the traditional principle that a person is innocent

until proven guilty, and that contact with law enforcement, including an arrest, does not in itself constitute any evidence that a person is guilty of committing a crime. (This issue is addressed in response to the comment immediately below.) Therefore, the use of such criminal history information should not be the basis for any adverse action.

Comment: An even clearer example of the problems posed by the broadening of the definition is exemplified by a situation in which a tenant engages in criminal activity during their tenancy and faces eviction as a result. Consider a situation in which a tenant engages in racially-motivated violence towards another tenant and is arrested as a result. The victim-tenant and other tenants of the property are likely to complain to the landlord and – rightfully – expect the landlord to take action to evict the tenant who committed the assault. In this situation, the landlord’s eviction action would not be based simply on the fact that the tenant was arrested, it would be based on the accounts of the victim and other witnesses, as well as any other potentially relevant evidence, such as security camera footage. Yet, by taking an adverse action against the tenant who committed the assault, the landlord would violate Section 12269(a)(1) by taking an adverse action based on “information indicating that 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.” Is it the Council’s position that in such a situation the landlord must wait for the district attorney to prosecute the crime, and then only take action in the event of conviction, which could take months or even years?

These examples show that the revisions to Sections 12264 and 12269 are not only bad policy, they are also unsupported by the reasoning provided by the Council to justify the regulation. The Updated Initial Statement of Reasons does not include any reasoning to support Section 12264, but it does cite to three cases to support Section 12269(a)(1). The three cases cited are *Schware v. Bd. of Bar Examiners* (1957) 353 U.S. 232; *U.S. v. Berry* (3rd Cir. 2009) 553 F.3d 273; and *U.S. v. Zapete-Barcia* [sic] (1st Cir. 2004) 447 F.3d 57. These three cases can be cited to support the contention that a mere arrest, without more, proves little to nothing, but cannot be stretched to support the contention that an arrest together with other supporting evidence has no value. To the contrary, in both *Zapete-Barcia* and *Berry* the court recognized that an arrest together with other evidence does have probative value. In *Zapete-Barcia* the court stated: “a series of past arrests might legitimately suggest a pattern of unlawful behavior even in the absence of any convictions.” *Zapete-Barcia* at 61. In *Berry*, the court held: “appellate courts do permit consideration of the underlying conduct where reliable evidence of that conduct is proffered....” *Berry* at 284.

Council response: The Council disagrees with the comment. The comment misconstrues the proposed regulation because it fails to distinguish between information about a person’s conduct that preceded interaction with law enforcement and information concerning a person’s interaction with law enforcement.

In the comment’s hypothetical, the landlord could base an eviction action on “the accounts of the victim and other witnesses, as well as any other potentially relevant evidence, such as security camera footage.” The only effect of Section 12269 in this hypothetical is that the landlord’s eviction action could not be based upon “information indicating that 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.”

All of the cases cited in the Updated Initial Statement of Reasons regarding Section 12269(a)(1) and referenced in the comment acknowledged this commonly recognized principle, and refused in the cases before them to allow consideration of arrest records.

“An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated.”

Schware v. Board of Bar Examiners of State of N.M. (1957) 353 U.S. 232, 241 [Citing in a footnote to Wigmore, Evidence, s 980a.]

“[A] mere arrest, especially a lone arrest, is not evidence that the person arrested actually committed any criminal conduct. This is because arrest ‘happens to the innocent as well as the guilty.’ *Michelson v. United States*, 335 U.S. 469, 482, 69 S.Ct. 213, 93 L.Ed. 168 (1948); cf. *61 *Cheek v. Bates*, 615 F.2d 559, 563 (1st Cir.1980) “‘mere arrest’ without conviction ‘clearly inadmissible to show lack of credibility’.”

U. S. v. Zapete-Garcia (1st Cir. 2006) 447 F.3d 57, 60–61. (Erroneously cited by the commenter as *U. S. v. Zapete-Barcia* (1st Cir. 2004).)

“A defendant cannot be deprived of liberty based upon mere speculation. We therefore follow the reasoning of the majority of our sister appellate courts and hold that a bare arrest record—without more—does not justify an assumption that a defendant has committed other crimes and it therefore can not support increasing his/her sentence in the absence of adequate proof of criminal activity.”

U.S. v. Berry (3d Cir. 2009) 553 F.3d 273, 284

To the extent *dicta* in these criminal cases suggests that possibly multiple arrest records can be considered by trial courts *in conjunction* with other evidence in criminal matters, the Council declines to adopt that standard here. Trial courts have significantly more ability to ascertain the circumstances surrounding prior arrests than do individuals in a civil context. In a civil context, reliance on actual conduct and evidence is appropriate, but not arrest records.

Comment: The commenter is also concerned that the revisions to Sections 12264 and 12269 will result in rental housing providers being put in situations in which they will be in violation of other applicable laws – including the Council’s own regulations – if they comply with Section 12269(a)(1)’s strict prohibition. The following scenarios exemplify several common scenarios in which a rental housing provider would violate Section 12269 by complying with other legal obligations:

- i. Civil Code Section 1946.7 requires rental housing providers to allow a tenant to terminate their lease on 14 days’ notice if that the tenant provides certain documentation – including a police report – indicating that he or she has been a victim of domestic violence, sexual assault, stalking, human trafficking, elder or dependent abuse. By considering the police report, which may contain information that the a co-tenant of the victim

was arrested, questioned, apprehended, taken into custody, detained, or held for investigation by law enforcement, the landlord will have violated Section 12269(a)(1), even though the landlord is required by law to consider such information when presented with a request by a tenant to be let out of their lease.

- ii. Civil Code Section 1941.6 requires rental housing providers to change the locks on a dwelling to exclude a tenant from their unit within 24 hours of being provided a copy of a restraining or protective order that excludes the restrained person from the unit. This protection is most often invoked by victims of domestic violence to exclude their abusers – who reside in the same unit – from the unit. In this situation, a criminal protective order issued pursuant to Penal Code Section 136.2 could be considered “information indicating that an individual has been questioned, apprehended, taken into custody or detained, or held for investigation.” Thus, by considering and taking an adverse action (changing the locks) as required by Civil Code Section 1941.6 a rental housing provider would violate Section 12269(a)(1).
- iii. Section 12010(a)(1)(C) of this regulatory package subjects rental housing providers to liability for failing to take prompt action to end a discriminatory housing practice by a third-party where the housing provider knew or should have known of the discriminatory conduct and had the power to correct it. In a circumstance like the example used above of a tenant committing racially- motivated violence against another tenant, the landlord could be subjected to liability under Section 12010(a)(1)(C) if they failed to take prompt action against the tenant who committed the racially-motivated violence. But in doing so, the rental housing provider would likely violate Section 12269(a)(1) by seeking, considering, using, and taking an adverse action based on criminal history information about an arrest that has not yet resulted in conviction.

Council response: The Council disagrees with the comment and its conclusion that under the hypotheticals raised a housing provider would necessarily violate section 12269(a). Proposed section 12270(a) makes explicit that compliance 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. Further, the proposed regulations cannot reasonably be interpreted to require violation of other relevant laws. They supersede only discriminatory state laws or regulations. See Government Code section 19255.6.

As regards to the first hypothetical from the commenter, a landlord is only required by Civil Code section 1946.7 to allow the tenant who is the victim of domestic violence to be let out of their lease. The landlord may also choose to act against the alleged perpetrator based on

the information provided directly by the complaining tenant about the alleged conduct, but not on a police report filed that did not lead to a conviction.

As regards to the second hypothetical from the commenter, a landlord can (and must) act in accord with Civil Code section 1941.6 and in accord with a protective order issued under Penal Code section 136.2 or similar statutes referenced in section 1941.6. A protective order is not an arrest record. It is an order from a court, based on a factual showing of good cause, which demonstrates that the court has considered the relevant facts and has made a legal determination. Furthermore, Civil Code section 1941.6(d) exonerates a landlord from liability if the landlord acts in accord with the protective order.

As regards to the third hypothetical from the commenter, regarding a purported violation of section 12010(a)(1)(C), the commenter again misconstrues section 12269(a) by failing to distinguish between information about a person's conduct that preceded interaction with law enforcement and information concerning a person's interaction with law enforcement. A landlord is free to act upon information received from tenants and witnesses about the conduct of other tenants, such as racially motivated violence. A landlord cannot rely on arrest records or reports of arrests.

Comment: The Commenter believes that the revisions to Sections 12264 and 12269 are extremely problematic and inconsistent with existing law and strongly encourages the Council to reject the changes and instead limit the scope of Article 24 to information solely obtained from or based on public records.

Council response: The Council disagrees with the comment and declines to revise the proposed regulations as suggested. In order to fulfill the goals of FEHA, the scope of criminal history information must extend beyond "information solely obtained from or based on public records." Otherwise, it would be assumed that housing providers could rely on any third party source for "criminal history information" and members of protected classes could suffer discrimination as a result.

Comment: The commenter has concerns about the blanket prohibition in this section prohibiting any use of criminal history information "*about any arrest that has not resulted in a criminal conviction, or based on 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.*"

An existing tenant or even prospective tenant could engage in conduct on an apartment premises warranting eviction or to prevent them from becoming a tenant, both "adverse actions." For example, a tenant or a visitor who was hoping to become a tenant could have been accused of stealing an Amazon package from the hallway by other tenants. The eviction or decision not to rent could be based on the testimony of residents, however, in evaluating whether there is cause to evict or to reject an application to rent, the landlord may wish to review a police report to see if the statements made to the police correspond with those being made by the residents to the landlord. This section would appear to prohibit such review. This

result could be addressed by permitting such consideration when it pertains to conduct that has occurred on the premises at issue.

In addition to conduct occurring on the property, the conduct could pertain to a resident of a property. For example, a tenant may state to a person applying for a tenancy committed battery on them offsite and that charges are now pending. Is the landlord limited solely to the testimony of the tenant? This language would appear to prohibit the landlord from looking at the criminal history to verify the statement of the tenant.

We would suggest adding the following language:

“(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, or based on 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; Such criminal history information may be used to seek, consider, use or take an adverse action for conduct by a tenant or prospective tenant which occurred on the property which the tenant resides or is applying to reside on or for conduct relating to an existing tenant on the property on which the tenant resides or is applying to reside.”

Council response: The Council disagrees with the comment and declines to add the proposed language. The provision does not prohibit landlords from considering conduct by current or prospective tenants (whether on or off the premises) or from considering statements by current residents, former landlords, employees or other witnesses. However, it does prohibit landlords from considering criminal history information as defined in section 12264 regarding an arrest or an individual’s interaction with law enforcement. This prohibition is based upon the traditional principle that a person is innocent until proven guilty, and that contact with law enforcement, including an arrest, does not in itself constitute any evidence that a person is guilty of committing a crime. Therefore the use of such criminal history information should not be the basis for any adverse action. See *Schwartz v. Bd. of Bar Examiners* (1957) 353 U.S. 232, 241; *United States v. Berry* (3rd Cir. 2009) 553 F.3d 273, 282; *United States v. Zapete-Garcia* (1st Cir. 2006) 447 F.3d 57, 60.

Comment: A question was raised during the December 10 FEHC meeting about whether section 12269(a)(1) of the regulations should distinguish an arrest that is pending disposition with one that led to a conviction. The short answer is no.

The point of this section is to clarify information for which it is unlawful for housing providers to consider in the application process. Importantly, *any* arrest has no bearing on whether an individual committed a crime. A conviction can be considered under the regulations if an arrest led to a crime. A housing provider also can look to the underlying criminal activity when making a housing decision according the regulations. The housing provider is prohibited, however, from considering an arrest alone (no matter whether the arrest leads to a charge or conviction), without additional evidence of behavior that will impact the individual’s tenancy. This position is consistent with HUD guidance on the use of arrests:

Q8: If, during an applicant’s admissions screening process, the applicant is arrested for violent or other disqualifying criminal activity, must a PHA or owner wait until the arrest

disposition to determine the applicant's eligibility for housing? A8: No. While it may be advisable to wait until the arrest disposition—especially if the disposition is imminent—PHAs and owners have discretion to go ahead and use the available evidence to make an eligibility determination according to the standards in the applicable written admissions policies of the PHA or owner. [footnote omitted]

Landlords should be prohibited from taking an adverse action based on any arrest, no matter the disposition, although under the regulations they may consider certain evidence related to the arrest.

Council response: The Council concurs with the comment that landlords and others are prohibited from taking an adverse action based on any arrest or other criminal history information. The Council also concurs that evidence *underlying* the arrest, i.e. the conduct leading to the arrest, can be considered. The HUD Guidance document referenced by the comment (“FAQ’s: Excluding the Use of Arrest Records in Housing Decisions,”) is not directly relevant or authoritative for the regulations under consideration because it only concerns some properties regulated by HUD. However, the Council agrees with the comment that the document is consistent with the proposed regulations to the extent it prohibits consideration of arrests. As noted in the HUD document, an arrest does not prove that the person engaged in criminal activity or that the person poses a threat to the health or safety of residents or staff.

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

Comment: The new regulations (hereinafter “regs”) allow inquiries regarding criminal history information when a “legally sufficient justification” exists to make the inquiry (CCR 12266). The regs identify a legally sufficient justification as existing when three requirements are met. Those requirements are that the inquiry is necessary to achieve a substantial, legitimate, nondiscriminatory business interest, that the inquiry effectively carries out the business interest, and that *no* feasible alternative practice exists that would address the business interest as effectively (CCR 12266).

How are rental property owners and managers to gauge when a feasible alternative practice exists that would address the business interest as well as when no feasible alternative practice exists? The condition appears to set up the rental property owner and manager for post-hoc review without providing guidance in the decision-making process. It appears to be an impossible standard to meet, especially since any decision to deny or terminate tenancy could be legally challenged.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Section 12266(b)(1)

Comment: The regs identify the “safety of residents, employees or property” as the only specifically noted substantial, legitimate, nondiscriminatory business interest (CCR 12266(b)(1)).

What criteria will be used to judge, after a decision has been made, whether the claimed “safety” interest was substantial or legitimate? Given our current legal and moral duties, we respectfully request clarification and direction so we can make, a decision to deny or terminate tenancy. We do not seek to be challenged based on a charge that the claimed safety interest wasn’t substantial or legitimate or was insufficient or invalid. How would such a challenge then be judged? What rules would control the judgment? Is it the intent of the Council for us to acquire addition liability?

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Section 12266(b)(2)

Comment: This section states that when assessing whether a criminal conviction is directly related, a practice should include consideration of “*the amount of time passed since the criminal conduct occurred as provided in the criminal history information.*” However, there should be language which permits that factor to have less importance depending on the nature and severity of the crime. For example, a criminal act may have been particularly severe. The severity of the crime would likely result in a long incarceration with the result that when a tenant applies to rent a property, the conviction may have taken a long time ago, but the prospective tenant may well have been incarcerated that whole period.

We would suggest adding the following language:

“...the amount of time passed since the criminal conduct occurred as provided in the criminal history information. The passage of time since the criminal conduct occurred may be of less relevance in crimes of a serious and severe nature, as such, crimes are likely to have resulted in longer periods of incarceration and hence the gap between conviction date may not be as probative as the amount of time passed from the date the person was released from custody.”

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Comment: The regs specify that any permitted inquiry regarding criminal history information must be limited to “directly-related convictions” (CCR 12266(b)(2)). The regs define a “directly-related conviction” as a criminal conviction that has a “direct and specific negative bearing on the identified interest or purpose” of the business (CCR 12005(k)).

How will reviews of decisions made on “directly- related convictions” and “direct and specific negative bearing” be made? Will guidelines be available or will each case be decided on a case-by-case basis? Will decisions that have been reviewed establish the precedent for all

similarly circumstanced decisions or will rental property owners be at risk of violation each time a decision adverse to a specific applicant/tenant is made? Again, the concern is whether rules or guidelines will control the review of tenancy decisions as opposed to ad hoc “judgments of Solomon.” Our owners, managers and attorneys will face tremendous uncertainty. Furthermore, it is unreasonable to think our owners and managers retain attorneys for each decision they must make concerning the rental of real property.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Comment: The regs specify that whether a conviction has a “direct and specific negative bearing” will be determined by considering the nature and severity of the crime and the amount of time that has passed since the criminal conduct occurred (CCR 12266(b)(2)). The regs provide one example of a conviction that could have a direct and specific negative bearing. That example is a “recent conviction of residential arson” (CCR 12266(b)(2)).

If a “recent conviction of residential arson” is only offered as an example that could meet the requirement of a “direct and specific negative bearing” how difficult is it likely to be to identify less obviously related criminal convictions? How, for example would a recent conviction of attempted arson be viewed in a post-hoc review of a rental property owner’s or manager’s decision? How should the rental property owner view such a conviction, given the example of a conviction that could meet the requirement? And how, for that matter, is “recent conviction” to be determined? Without clear guidelines or bright-line rules, rental property owners and managers will not be able to easily determine the nexus between when a particular crime was committed and whether the commission of that crime poses a safety concern. And, for that matter, neither will attorneys for our clients’ owners and managers be able to provide guidance based on the proposed regs.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Section 12266(d)

Comment: In determining whether “no feasible alternative practice” with a “less discriminatory effect” exists, the regs specify that a number of factors must be considered (CCR 12266(d)). Principal among those factors is the right to present mitigating information that must then be considered (CCR 12266(d)(1) and (3)). Mitigating information is defined by the regs to mean “credible information” that suggests an individual is “not likely to pose a demonstrable risk” to an identified business interest (CCR 12266(e)). The regs list a number of acceptable types of mitigating information that include a wide array of possible claims (CCR 12266(e)(1-7)).

How is any and all mitigating information to be weighed fairly and effectively by rental property owners and managers who do not have legal training or a set of examples on which to

base their decisions? How will the attorneys for owners and managers be able to provide direction for each rental application where an applicant has been convicted of a crime? Will any criteria or bright-line rules on the value and significance of offered mitigating information be provided to rental property owners? The value of certain mitigating information may be apparent (e.g., entering the priesthood or a monastery), but most offered mitigating information is more likely to be a lot less persuasive. How, for example, should completion of an anger-management course be assessed when offered in mitigation of a criminal conviction for voluntary manslaughter (committed in the heat of passion)? Would documentation of completion of the course make it more meaningful? Could such documentation be required? How will the owner and manager know whether a course (or several courses), or for that matter any “mitigating” information, would be sufficient or insufficient? Requiring that mitigating information be considered only opens another possible door to liability for the rental property owner and manager unless the regs include specific guidelines as to how the information is to be weighed.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Section 12268: Discriminatory Statements Regarding Criminal History Information.

Comment: With respect to advertising (covered in CCR 12268), the regs prohibit any statement regarding criminal history information that violates the anti-discrimination provisions of these regs and related regulations and statutes on illegal discrimination.

Can/must any advertisement include a non-discrimination statement as to individuals with criminal history? As written, this provision puts the rental property owner and manager at risk for any mention of criminal history, but the regs don't specifically prohibit mention where it may be desirable to include a statement to provide assurances to prospective tenants of the safety and security of the units and property.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Section 12269(b)

Comment: The regs note that the Civil Code (CA Civ. Code 1785.13(a)(6)) allows the reporting of certain criminal history information for up to seven years from the date of disposition, but the regs indicate that shorter “look-back periods” may be appropriate (CCR 12269(b)).

How are permissible look-back periods to be determined? If a “look-back period identifies the maximum amount of time since conviction versus date of release that the conviction may be legally considered, the rental property owner and manager may be acting illegally by considering certain criminal convictions from five years ago and others from only

one year ago. How will owners and managers base their decisions? What is the basis for starting the look-back period from the date of conviction versus the date of release?

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

Sections 12269 and 12270: Specific Practices Related to Criminal History Information and Compliance with Federal or State Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History.

Comment: The commenter requests that the Council expressly exempt from liability under Section 12269 actions taken to comply with a federal or state law. The protection currently included in Section 12270 is insufficient as it only applies to charges of discriminatory effect.

Council response: The Council disagrees with the comment and declines to revise the proposed regulations as suggested. The proposed regulations cannot reasonably be interpreted to require violation of other relevant laws. They supersede only discriminatory state laws or regulations. *See* Government Code section 19255.6. However, there may be circumstances where compliance with other laws is not a complete defense if there is evidence of discriminatory intent, pursuant to proposed section 12267.

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

Comment: The regs (CCR 12270) provide an affirmative defense against a charge of unlawful use of criminal history information where state or federal law requires the inquiry.

Why isn't the state or federal law an absolute defense? The impact of controlling state or federal law should be fully recognized in the regs as a complete defense and a bar to any claim of discrimination as opposed to requiring the rental property owner and manager to assert controlling law as an affirmative defense.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. The comment is addressed above. No further response is required as per Government Code section 11346.9(a)(3).

Section 12271: Local Laws or Ordinances.

Comment: The regs (CCR 12271) can be read as either providing further protection for the newly created protected class (criminals) if local law so provides or of restricting protections for that class when the local law adversely affects "protected classes."

In what ways may local laws supersede the regs? As written, the new regs can be read to allow for both alternatives, to wit: either a stronger protection against discrimination for those with criminal history or as a stronger protection for non-criminal residents.

Council response: This comment is not responsive to the text noticed for the second 15-day comment period. No further response is required as per Government Code section 11346.9(a)(3).

COMMENTS RECEIVED DURING THIRD 15-DAY COMMENT PERIOD [Government Code Section 11346.9(a)(3)].

General

Comment: The regulatory text and Supplement to the Initial Statement of Reasons do not comply with the APA's "necessity" and "clarity" standards. Necessity must be demonstrated *for each provision*. As will appear, the revised regulatory text and ISOR Supplement fail to meet these standards in a number of respects.

Council Response: The Council disagrees with these nonspecific comments, has demonstrated necessity for each provision of the regulations, and has addressed all of OAL's stated concerns. Specific concerns of this commenter about the relevant changes in the modified text for the third 15-day comment period, or about or the Supplement to the Initial Statement of Reasons, are addressed below in regard to each regulatory section or subsection that was mentioned. No further response is required as per Government Code section 11346.9(a)(3).

Comment: "Moreover, throughout the regulations, wherever there is a split of authority in the case law or other authorities, the Council invariably fails to explain *why* it chose one set of authorities over the other. . . . As noted, this particular necessity flaw is pervasive throughout many of the regulations' provisions. Where case law conflicts, the Council usually chooses to follow the most protective cases, often without acknowledgement of the others, and without explanation for their choice. The goals of such an approach may be laudable, but the APA obligates the Council to acknowledge and explain these choices - not to simply disregard other alternatives."

Council response: The Council disagrees with these nonspecific comments, has demonstrated necessity for each provision of the regulations, and has addressed all of OAL's known concerns. Specific concerns of this commenter about the relevant changes in the modified text for the third 15-day comment period, or about or the Supplement to the Initial Statement of Reasons, are addressed where appropriate in regard to each regulatory section or subsection that was mentioned. The Council is obligated to enforce the requirements of the Act that its provisions be broadly interpreted for the purposes specified in the statute and be at least as protective of protected classes as the FHA and its regulations, and the ADA and its regulations, as noted where relevant.

Comment: Many of the other legal flaws identified in our prior comments remain unresolved. Those prior comments will not be reiterated at length, but they are nonetheless commended to the Council's attention.

Council response: The Council disagrees with the comment and declines to revise the proposed regulations or the Supplement to the Initial Statement of Reasons. This comment, and the general reference to prior comments and letters, are not responsive to the text noticed for the third 15-day comment period nor are they responsive to the Supplement to the Initial Statement of Reasons. Prior comments and letters which were submitted during previous comment periods are responded to in the responses in above sections relevant to those comment periods.

Comment: The commenters thanked the Council for their continued work on the fair housing regulations. They expressed their strong support for the adoption of the regulations without further amendments. They commented that the fair housing regulations are necessary to ensure that tenants, homeowners, advocates, housing providers, lending institutions, and government entities have clear guidance about the Fair Employment and Housing Act's prohibition on discriminatory housing practices, and that the entire community will benefit when these regulations are finalized.

Council response: The Council thanks these commenters for their input.

Article 1. General Matters

Section 12005. Definitions.

Section 12005(f) (Definition of "Business establishment"):

Comment: As noted in prior comments, the definitional statement that "[g]overnment bodies engaged in enacting legislation to implement governmental functions *may* not constitute business establishments" is inaccurate. The case law is unanimously and perfectly clear that "a city enacting legislation *is not* functioning as a 'business establishment'."

Counsel response: The Council disagrees with the comment and declines to revise the proposed regulations. The comment is not responsive to the text noticed for the third 15-day comment period and is responded to above.

Comment: The ISOR Supplement persists in suggesting that there is some ambiguity or situational component to the law on this subject, apparently to be litigated on a case-by-case basis. The Council's refusal to correct this potentially litigious error has never been explained – but in any event, the Council has failed to remedy the actual flaw identified by OAL. While the ISOR Supplement cites three cases on the subject of government

bodies as business establishments, only one even mentions this particular issue (*Qualified Patients*) – and it quite clearly disclaims any ambiguity on this point. "Mere reference" to statutes or cases does not fulfill the necessity standard, if those authorities do not actually support the assertions made in the ISOR and the regulatory text to which they relate.

Council response: The Council disagrees with the comment and declines to revise the Supplemental ISOR. Contrary to the comment's assertion, the ISOR Supplement did add additional legal authority to demonstrate the necessity of this proposed regulation, specifically emphasizing the California Supreme Court's holding that the term "business establishment" must be understood "in the broadest sense reasonably possible." See, e.g. *Isbister v. Boys' Club of Santa Cruz, Inc.* (1985) 40 Cal.3d 72, 78 (citing *Burks v. Poppy Const. Co.*, (1962) 57 Cal. 2d 463, 468). However, the comment cites the same cases as it cited in its March 29, 2018 letter, and merely repeats arguments made in previous comments and does not provide any additional or new legal authority to support it. No decision cited in the comment extends as far as saying that a local government enacting legislation can *never* be acting as a business establishment. The *Harrison* case (cited in the footnote of the comment) states: "The determination of what constitutes a 'business establishment' under the Unruh Civil Rights Act is an oft-litigated issue." *Harrison v. City of Rancho Mirage*, 243 Cal. App. 4th 162, 173 (2015). *Qualified Patients* is not controlling. It involved medical marijuana, not zoning and planning, and only addressed "the city's legislative action *here*" *Id.* at 764. (Emphasis added.) Similarly, while both *Burnett* and *Harrison* held that the city in that instance was not a "business establishment" on the facts presented in those cases, neither court held that a city could *never* be considered a "business establishment" under the Unruh Act. *Carter* addressed provision of sidewalks and curb cuts, and the court discussed conflicting cases on the issue of whether the City was covered by Unruh and declined to determine the issue definitively. *Id.* at 825. Finally, *Harper v. Luginbaur*, cited in the ISOR Supplement states: "As a threshold matter, although Defendant San Francisco does not raise this as an issue, the Court considers whether Defendant San Francisco qualifies as a 'business establishment' pursuant to the Unruh Act, such that Plaintiff may bring a claim under that Act against it. The Court finds that there is a paucity of authority addressing the issue of whether a city government may constitute a 'business establishment' under the Unruh Act. On the one hand, a number of federal and state courts have found that certain local government entities, under certain circumstances, are not 'business establishments' under the Unruh Act. However, courts have also found that other local government entities, under differing circumstances, may be sued under the Act. In the absence of clear authority as to this issue, and in light of the California Supreme Court's statement that the term 'business establishment' under the Unruh Act is to be used in the 'broadest sense reasonably possible,' the Court—for the purposes of this Motion only, and in order to address the merits of Plaintiff's claim—assumes *arguendo* that Defendant San Francisco can be considered as a business establishment under the Unruh Act." *Harper v. Luginbaur*, No. C 11-01306 JW, 2012 WL 1029996, at *5 (N.D. Cal. Mar. 15, 2012), *aff'd*, 709 F. App'x 849 (9th Cir. 2017), and *aff'd*, 709 F. App'x 849 (9th Cir. 2017) (footnotes omitted). Based

upon the totality of the case law, the Council declines to predict how courts will interpret this provision of the Unruh Act in the future.

Section 12005(o) (Definition of “Housing Accommodation”):

Comment: The ISOR Supplement supports the inclusion of "rooms used for sleeping purposes" within the definition of "housing accommodation" based solely upon "HUD's regulations prohibiting discrimination on the basis of disability. 24 C.F.R. section 100.201, revised October 24, 2008." However, as noted during the earlier comment process, there is contrary authority squarely on point. The reason for choosing to incorporate the HUD regulation, rather than case law, is unexplained and unsupported by substantial evidence.

Council response: The Council disagrees with the comment and declines to revise the proposed Supplemental ISOR Supplement. Furthermore, to the extent that the comment goes to the text of the regulations as well as the Supplemental ISOR, the comment is not responsive to the text noticed for the third 15-day comment period.

The comment quotes selectively from the ISOR Supplement ignoring the other authorities and reasons the Council provided for the necessity of including this phrase in the definition. The complete explanation of the necessity offered in the ISOR Supplement states: “This language is taken directly from HUD’s regulations prohibiting discrimination on the basis of disability. 24 C.F.R. section 100.201, revised October 24, 2008. Because Government Code section 12955.6 provides that FEHA must be at least as protective as the FHA, ‘housing accommodation’ must be interpreted to include this type of accommodation. This language is also necessary to clarify that housing accommodations can include, for example, the types of homes or apartment buildings that business establishments rent to tenants who sleep in separate rooms while sharing cooking, living, and other facilities, which is a growing trend in California’s tight housing market. Finally, this language is also necessary to distinguish which rooms FEHA would apply to in a building that contained both commercial office space and residential spaces. See, e.g. *Home Quest Mortg. LLC v. American Family Mut. Ins. Co.* (D.Kan.2004) 340 F.Supp.2d 1177, 1184-85 (portion of building that contained commercial office space was not a ‘dwelling’ under FHA).” Furthermore, the *Roommates.com* case relied upon by the comment is distinguishable because it concerned whether a renter could discriminate in their selection of a potential roommate in the commercial market. *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1218 (9th Cir. 2012). The court did not define the scope or types of “shared living situations” to which it applied, and therefore did not decide whether "rooms used for sleeping purposes" are included within the FEHA’s definition of "housing accommodation" in the case of housing for persons with disabilities, which is the subject of the HUD regulation cited in the ISOR Supplement. Importantly, since the *Roommates.com* case was decided in 2012, a California district court and the Ninth Circuit have decided cases applying the federal Fair Housing Act to “shared living situations” for persons with disabilities: *Sharon v. New Directions Inc.* (C.D. Cal. Jan. 12, 2016) No. 2:15-CV-04239-SVW-E, 2016 WL 158223 (supportive housing resident alleging hostile living environment) and *Pacific Shores Properties, LLC v. City of Newport Beach* (9th Cir.2013) 730 F.3d 1142, 1156-1157 (sober living home challenging zoning

restriction). Finally, the distinction between a “definition” and a “liability rule” is not “cryptic,” as the comment suggests, but is a fundamental legal concept in regulatory law. For the reasons stated, the *definition* of “housing accommodation” must include “rooms used for sleeping purposes,” but whether or not in any case a person could be held *liable* for violating FEHA in a situation involving “rooms used for sleeping purposes” is a fact-specific application of the Act in which the plaintiff would need to prove violation of one of the Act’s liability rules, e.g. Govt. Code Sections 12955 or 12955.8

Section 12005(p) (Definition of “Housing Opportunity”):

Comment: The ISOR Supplement wholly fails to support the necessity for “each provision” of the expansive, overlapping, and confusing definition of “housing opportunities,” or for the definition as a whole. “Generally stating that a regulation is needed to clarify existing law is an insufficient necessity rationale, as it fails to describe any rationale or policy reason for the regulation.” Further, while the Supplement cites statutory provisions prohibiting discrimination in various activities (e.g., land use practices), that does not explain the inclusion of these activities within the definition of “housing opportunity.” Including an *activity* (“land use practices,” or “real estate-related transaction”) within the definition of the *thing affected by that activity* (“housing opportunities”) is circular – and the necessity for doing so is not supported by any of the statutes cited in the Supplement (or other competent evidence).

Moreover, the cited provisions fail to support several of the specific assertions made in the ISOR Supplement (and the regulatory text to which those assertions relate). Specifically, the Supplement asserts that “section 12927, subd. (c)(1) of the Act...specifically protects the ‘enjoyment of housing accommodations.’ In this context, ‘enjoy’ means to possess and derive the benefit of the housing accommodation without discrimination.” However, the cited code section simply does not say that. The word “enjoy” appears in this statute *only* in connection with describing reasonable accommodations for disabled persons – and the statement that “[i]n this context, ‘enjoy’ means to possess and derive the benefit of the housing accommodation without discrimination” is purely conclusory. The absence of an actual statutory requirement to include an expansive concept of “enjoyment” within the definition of “housing opportunity” – or any of the other provisions where it has been incorporated – indicates that the Council was attempting to exercise its own discretion in making this addition. Thus, “the APA requires the need for this adoption to be supported by substantial evidence in the record” – which the Council has not done.

Council response: The Council disagrees with the comment and declines to revise the proposed Supplemental ISOR. Furthermore, to the extent that the comment goes to the text of the regulations as well as the Supplemental ISOR, the comment is not responsive to the text noticed for the third 15-day comment period. The comment repeats arguments made in previous comments and does not provide any additional or new legal authority to support it. Contrary to the comment’s assertion, the definition is not circular. “Housing opportunity” refers to that which the Act is protecting from discrimination. Housing opportunities have several

dimensions (including the opportunity to obtain, use, or enjoy) and can be experienced and created in many ways (including a dwelling, a residential real estate-related transaction, financial assistance in relation to dwellings or residential real estate, public or private land use practices in relation to dwellings or residential real estate, or other housing related privileges, services, and facilities). Public land use practices have the potential to either increase or limit housing opportunities, so their inclusion in the definition of “housing opportunity” is not circular. To the landowner who seeks a zoning change from commercial to residential use, the city’s consideration of whether or not to approve the zoning change (a public land use decision) is a “housing opportunity.”

Further, the comment misconstrues the statutory provisions cited in the ISOR Supplement. The comment’s unnecessarily narrow interpretation of section 12927(c)(1) is that the Act protects only the right of a person with a disability to “enjoy” her housing accommodations, but no other individuals who have housing rights protected under the Act. The comment ignores additional legal authority cited in the ISOR Supplement, e.g. *The Committee Concerning Community Improvement v. City of Modesto* (9th Cir. 2009) 583 F.3d 690, 713–714 (holding that Section 3604(b) of the federal FHA applies to discrimination in the “terms, condition or privileges of the sale or rental of a dwelling” and that the use of word privileges “implicates continuing rights such as the *privilege of quiet enjoyment of the dwelling*”) (emphasis added.) Section 12927(c)(1) of the Act similarly protects “privileges” in housing accommodations. Finally, the comment fails to acknowledge the Act’s broad remedial purposes and its broad understanding of definition of housing opportunity. The Act provides in Government Code section 12921(b) “The opportunity to seek, obtain, *and hold housing* without discrimination...is hereby recognized as and declared to be a civil right.” (Emphasis added.)

Section 12005(v) (Definition of “Practice”):

Comment: The ISOR Supplement's explanation for the definition of "practice" does not demonstrate support for one critical provision within that definition; rather, it demonstrates just the opposite. As noted in prior comments, the blanket inclusion of *any* "failure to act" within the definition of "practice" is legally problematic, since the applicable statute expressly refers to "an act or failure to act *that is otherwise covered by this part.*" The Supplement attempts to avoid this issue by simply misquoting the statute, and omitting the problematic clause. Suffice it to say that a misquoted statute does not fulfil OAL's injunction to support the necessity of each provision with substantial evidence. If the Council possessed authority to expand "failure to act *that is otherwise covered by this part*" to include *any* "failure to act" (which is disputable), that would still not excuse the failure to explain *why* that choice was made. The necessity standard is not satisfied by asserting that the underlying statute requires certain provisions, when the statute, in fact, does not do so.

Council response: The Council disagrees with the comment and declines to revise the proposed Supplemental ISOR. Furthermore, to the extent that the comment goes to the text of the regulations as well as the Supplemental ISOR, the comment is not responsive to the text noticed for the third 15-day comment period. The comment repeats arguments made in

previous comments and does not provide any additional or new legal authority to support it. The comment is correct that sections 12955.8(a) and (b) of the Act state: “an act or failure to act that is otherwise covered by this part.” However, the ISOR Supplement was not “misquoting” the Act because the additional language in the Act mentioned by the comment does not support the comment’s argument. Section 12005(v) is merely a *definition* of the types of practices that are subject to the Act, it is not a *liability standard*. In any given case, if a complainant alleged that person’s “failure to act” was a violation of the Act, the complainant would be required to prove that such a failure to act violated some specific liability rule of the Act, e.g. sections 12955.8(a) and (b). In that case, the court would need to determine whether the “failure to act” at issue was “an act that is otherwise covered by this part.” If the Council were to delete the term “failure to act” from the definition of “practice,” the definition would be statutorily deficient for lack of the phrase because of its specific inclusion in sections 12955.8(a) and (b).

Article 15. Discrimination in Land Use Practices

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

Section 12161(b)(8):

Comment: Similarly, the Council has never supplied substantial evidence supporting the necessity of the provision purporting to prohibit cities and counties from using "land use permitting processes" to consider reasonable accommodation requests. The Original ISOR's asserts that this provision is "due to the more detailed language" in various statutes, but none of the cited statutes includes such a prohibition either directly or by necessary implication. Further, the cited Attorney General guidance makes it clear that local agencies are encouraged *but not required* to utilize alternative reasonable accommodation processes - and there are copious similar statements in authorities relied upon elsewhere by the Council, and contained in the rulemaking file. As noted above, even if the Council has the authority to adopt this provision, that does not excuse the failure to explain and support that choice - a void not filled by merely referencing statutes that do not impose the requirement in question. More broadly, the Council has never explained *why* this is a problem that needs to be addressed, or how current practices actually violate FEHA, which likewise fails to fulfil the necessity standard.

Council response: The Council disagrees with the comment and declines to revise the proposed Supplemental ISOR. Furthermore, to the extent that the comment goes to the text of the regulations as well as alleged deficiencies in the Supplemental ISOR, the comment is not responsive to the text noticed for the third 15-day comment period. As set forth above in response to comments on this subsection during the 45 day comment period and the second 15-day comment period, the regulation allows public entities to use their variance, conditional use permit, and other land use permitting processes *so long as* those processes otherwise comply with the standards for reasonable accommodations set out in Sections 12176 et seq., including such provisions as maintaining confidentiality, using the interactive process, and using

only permissible grounds for denial. As explained in the Original ISOR on page 55, “This subdivision is necessary in order to assist the public in the interpretation and implementation of Government Code section 12955, subd. (l) and Government Code section 12927, subd. (c)(1) (defining ‘discrimination’ as including the refusal to permit reasonable accommodations). It is also necessary to ensure consistency with proposed sections 12176 - 12180 and 12185.” This regulation is necessary to provide clarity regarding the obligation that cities and counties fully implement the requirements to provide reasonable accommodations in their land use practices. The regulation is consistent with the commenter’s footnoted case law and the Attorney General opinion, none of which exempt land use requirements from compliance with FEHA. Further, this is necessary because, while some of these processes may be consistent with Section 12176, many conditional use permit and variance processes use standards and procedures that may be inconsistent with the requirements under the Act for considering and acting upon a request for a reasonable accommodation. Public entities need to be cognizant of these differences and ensure that whatever process they use meet the legal requirements for consideration of reasonable accommodation requests. Discriminatory or burdensome permit processes may even give rise to municipal liability. *See Pacific Shores Properties, LLC v. City of Newport Beach* (9th Cir. 2013) 730 F.3d 1142, 1148 (“[T]he costs borne by the Plaintiffs to present their permit applications” were compensable.)

Additionally, the Council has the authority under Government Code section 12935(a)(1) to: “adopt, promulgate, amend, and rescind suitable rules, regulations, and standards that ... [i]nterpret, implement, and apply” FEHA, including the statutory obligation to provide reasonable accommodations. The statute covers reasonable accommodations in land use, and the Council has authority to interpret the interaction of the land use and reasonable accommodations requirements. *See, e.g., “‘Discrimination’ includes . . . refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.”* Gov. Code, section 12927(c)(1). This includes land use. “The act amending the Fair Employment and Housing Act, provides, in describing the legislative intent ‘[i]t is the Legislature’s intent to make the following findings and declarations regarding unlawful housing practices prohibited by this act: [¶] (a) That public and private land use practices, decisions, and authorizations have restricted, in residentially zoned areas, the establishment and operation of group housing.... [¶] (b) That persons with disabilities ... are significantly more likely than other persons to live with unrelated persons in group housing. [¶] (c) That this act covers unlawful discriminatory restrictions against group housing for these persons.’ (Stats. 1993, ch. 1277, § 18; 12 West Cal. Legis. Services, 6038).” *Broadmoor San Clemente Homeowners Assn. v. Nelson* (1994) 25 Cal.App.4th 1, 6. Ensuring that land use practices are consistent with FEHA’s requirement to provide reasonable accommodations carries out this legislative intent. We note that group homes for people with disabilities often seek reasonable accommodations.

Further, as required by Government Code section 12955.6 and noted in the Original ISOR, the proposed section is based on California statutes, but also provides rights and remedies that are equal to or greater than those provided in federal law. *See, for example, the Joint Statement of the Dept. of Justice and the Dept. of Housing and Urban Development, State and Local Land Use Laws and Practices and the Application of the Fair Housing Act* (November

10, 2016), referenced in the Supp. ISOR, Questions 10, 20-24, which provides that local governments may use local land use procedures to respond to requests for reasonable accommodations *so long as they otherwise comply with their FHA obligations, including those described in Questions 10, 20-24, and so long as they are not "otherwise unreasonably burdensome or intrusive or involves significant delays."* Question 22 [emphasis added.] This includes engaging in the interactive process (Question 21); limited reasons for denial of the request (Question 20); that the request need not be made in a particular manner or at a particular time (Question 22), and that the procedures cannot be onerous or require information beyond what is necessary to show that the individual has a disability and that the requested accommodation is related to that disability, including not usually requiring medical records (Question 23); that the procedures are flexible enough to accommodate the needs of individuals making a request, including accepting and considering requests that are not made through the official procedure (Question 23); and that a request for accommodation in zoning ordinances may be made at any time (Question 25.)

Article 16. Disability

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

Section 12180(a)(1) (comment on Supplemental ISOR):

Comment: The ISOR Supplement's discussion of fees in the context of reasonable accommodation requests likewise contains a number of conclusory statements, but no substantial evidentiary support for the blanket prohibition of *any* processing fee for *any* reasonable accommodation request, by *any* party, *regardless* of the circumstances. The HUD/DOJ Guidance cited in the Supplement (and the one cited case applying it) concerned only "housing providers"- not the many other entities subject to these regulations, *to whom it is well-established that this Guidance is inapplicable*. Expanding the requirements of this Guidance to these other entities must be accompanied by an adequate explanation and supporting evidence, which the Council has not provided. Moreover, the rationale for this expansion is not self-evident. While charging - and refusing to waive - fees for *low-income tenants* to request reasonable accommodation *from the landlord* might well be a *per se* violation of FEHA, this has little legal or practical relevance to the question of whether *a city* may charge an affluent landowner to process an application for an exception to generally applicable zoning rules, or an encroachment into the public right-of-way. As above, the Council has an obligation to explain and support *each provision* of the proposed regulation - not merely selected applications of the proposed regulatory text.

Council response: The Council disagrees with the comment and declines to revise the proposed Supplemental ISOR. Furthermore, to the extent that the comment goes to the text of the regulations as well as the Supplemental ISOR, the comment is not responsive to the text noticed for the third 15-day comment period. Cities and counties are indisputably covered by

FEHA and there is no exemption saying that reasonable accommodations requirements don't apply to them. Therefore, they must comply with the same reasonable accommodation requirements as other individuals and entities, including the prohibition on charging fees to process a reasonable accommodation request. See also Original Statement of Reasons. The case cited in the Supp. ISOR supports the principle that fees may not be charged to process a reasonable accommodation request. "Plaintiffs have presented sufficient evidence to demonstrate that Goldmark has implemented a policy [charging a \$30 processing fee to obtain permission to have an assistance animal] that may be facially neutral, but has resulted in an adverse impact on protected members of a minority group. Plaintiffs have met their prima facie case for disparate impact . . ." *Fair Housing of the Dakotas, Inc. v. Goldmark Property Management, Inc.* (D.N.D. 2011) 778 F.Supp.2d 1028, 1038.

Further, although the specific Guidance referenced by the comment may be limited to housing providers, the FHA is not so limited and there are many other HUD Guidances that explicitly describe the obligations of public entities under FHA to provide reasonable accommodations in their land use policies. See Original ISOR, pp. 54-55, 59; 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 (HUD/DOJ Joint Statement Land Use Laws and Practices)* (Nov. 10, 2016) (Questions 10, 20-24); Joint Statement of the Dept. of Justice and the Dept. of Housing and Urban Development, *Group Homes, Local Land Use, and the Fair Housing Act, August 18, 1999 (DOJ/HUD Statement on Group Homes, Local Land Use and the Fair Housing Act and Related Q&A)*, and Related Questions and Answers (*HUD/DOJ Updated Related Q&A re Group Homes, Local Land Use*), Updated August 6, 2015. In addition, as noted in numerous places and as required by Government Code section 12955.6, the proposed section is based on California statutes, but also provides rights and remedies that are equal to or greater than those provided in federal law, so even if it were true that the no-fee obligation is limited to providers (for which the comment provides no authority), that would not be controlling here.

Section 12180(b)(6)) (comment on Supplemental ISOR):

Comment: The explanation for this provision in the ISOR Supplement consists only of a string citation, with no actual explanatory text. Remarkably, not a single one of the cited cases involves facts resembling the supposedly "fairly common" situation hypothesized in this example. None involved constructing ramps in the public right-of-way (or any ramps at all), or even hinted that the public entity was prohibited from charging application fees for these requests. The cited cases wholly fail to provide substantial evidence for the necessity for the specific example given, which isn't drawn from any of them.

Council response: The Council disagrees with the comment and declines to revise the proposed Supplemental ISOR. Furthermore, to the extent that the comment goes to the text of the regulations as well as the Supplemental ISOR, the comment is not responsive to the text noticed for the third 15-day comment period. General necessity for the examples is addressed in the Original ISOR, pp. 80-81, and Supp. ISOR introduction to Section 12180(b), p. 31-32 ("The

proposed subdivision (B) is necessary to provide examples of common situations involving reasonable accommodations, to provide further guidance in areas that create confusion or are often misunderstood.”) In the example in 12180(b)(6), the issue is raised as to whether reasonable accommodations may be available if the ramp extends into the public right of way. To the extent the comment addresses the issue of ramps in the public right of way, the cases cited in the Supplemental ISOR demonstrate that public entities have the ability to provide reasonable accommodations in public rights of way. While the cases cited may not involve ramps, they do address similar accommodations in the public right of way and costs to the public entity. *Dadian v. Village of Wilmette* (7th Cir. 2001) 269 F.3d 831, 839 (Jury verdict sustained even if there was a possibility that 'the Village's permanent loss of property outweighed the Dadians' needs . . .); *Bassilios v. Torrance* (C.D.Cal. 2015) 166 F.Supp.3d 1061 (Reasonable accommodation to provide disabled parking spot in a public street in front of home.) The third case cited illustrates the principle (illustrated by the example) that reasonable accommodations must be provided in zoning and land use ordinances, such as the set-back requirements discussed in the example. “The reasonable accommodation requirement of the FHAA clearly can apply to zoning ordinances. See *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252, 257 n. 6 (1st Cir.1993). ‘Courts interpreting the reasonable accommodation provision of the [FHAA] have ruled that municipalities ... must change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities.’ *Hovsons, Inc. v. Township of Brick*, 89 F.3d 1096, 1103 (3rd Cir.1996)(quotations omitted)(requiring that township grant variance in order to accommodate needs of elderly disabled who hoped to live in nursing home in residential zone). See also *Smith & Lee Assocs.*, 102 F.3d at 796 (holding under similar facts that city had to accommodate disabled residents, despite restrictions imposed by neutral zoning code); *Moyer v. Lower Oxford Township*, 1993 WL 5489, at *2 (E.D.Pa. January 6, 1993).” *Trovato v. City of Manchester*, N.H. (D.N.H. 1997) 992 F.Supp. 493, 497.

See also response to comment on this subsection in response to comments received during the 45-day comment period.

PUBLIC HEARING COMMENTS MADE APRIL 4, 2018 [Government Code Section 11346.9(a)(3)]

Whitney Prout of the California Apartment Association; Sanjay Wagle of the California Association of Realtors; Janet Powers of Fiore, Racobs & Powers; Diann Dumas; Denise McGranahan of the Legal Aid Foundation of Los Angeles; and Scott Chang of the Housing Rights Center submitted written comments that included all of their oral comments and additional comments, which are summarized and responded to above.

Sri Panchalam of Disability Rights California, Diana Prado of the Eviction Defense Network, and Adrienna Wong of the ACLU of Southern California made oral comments that were covered in the written comments that were submitted to the Council by other commenters which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE JUNE 21, 2018 [Government Code Section 11346.9(a)(3)]

Whitney Prout of the California Apartment Association, Anna Buck of the California Association of Realtors, Deborah Thrope of the National Housing Law Project, Melissa Morris of the Public Interest Law Project, Deborah Gettleman of Disability Rights California, Lauren DiMartini of Bay Area Legal Aid, Renee Williams of the National Housing Law Project, Arthur Wylene of Rural County Representatives of California, and Madeline Howard of the Western Center on Law and Poverty made oral comments that were covered in the written comments that were submitted to the Council by their own organizations or by other commenters which are summarized and responded to above.

Comment: Eva DeLair of Legal Services for Prisoners with Children expressed her appreciation for the Council's work, and stated that she had three specific comments. First, Ms. DeLair stated that the definition section defines a "criminal conviction" as either a felony or a misdemeanor. However, the example in section 12266(b)(2), on page 37, includes a traffic conviction not related to alcohol even though such a conviction would typically be an infraction. For section 12269(a)(3), on page 41, Ms. DeLair asked that infractions also be excluded from the type of record that can be considered. Finally, Ms. DeLair expressed her appreciation that certificates of rehabilitation were included in that section, and requested that the Council also include gubernatorial and presidential pardons.

Council response: The Council agrees with Ms. DeLair's suggestions and amended section 12269(a)(3) to include "pardoned."

Comment: Whitney Prout of the California Apartment Association commented on the discussion between the Council and Ms. DeLair regarding the example language on felony or misdemeanor driving convictions in section 12266(b)(2), on page 38. Ms. Prout expressed concern about the adoption of the example language at this meeting, as there may be circumstances under which a misdemeanor driving offense is a directly related conviction. Ms. Prout asked for additional discussion on the matter before the Council incorporates the language.

Council Response: The Council declines Ms. Prout's suggestion to discuss or revise the provision further because the text only provides an example and does not articulate a rule.

PUBLIC HEARING COMMENTS MADE AUGUST 17, 2018 [Government Code Section 11346.9(a)(3)]

Whitney Prout of the California Apartment Association, Arthur Wylene of the Rural County Representatives of California, Renee Williams of the National Housing Law Project, Pamela Cohen of Disability Rights California, Ashley Werner of Leadership Counsel for Justice and Accountability, and Alexander Harnden of Western Center on Law & Poverty made oral comments that were covered in the written comments that were submitted to the Council by

their own organizations or by other commenters which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE DECEMBER 10, 2018 [Government Code Section 11346.9(a)(3)]

Kara Brodfuehrer of the National Housing Law Project, Madeline Howard of the Western Center on Law and Poverty, Christopher Ogata of Disability Rights California, Whitney Prout of the California Apartment Association, Naomi Young of Bay Area Legal Aid, and Zeenat Hassan of the AIDS Legal Referral Panel made oral comments that were covered in the written comments that were submitted to the Council by their own organizations or by other commenters which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE JANUARY 28, 2019 [Government Code Section 11346.9(a)(3)]

Edward H. Telfeyan of California Strategic Advisors, Madeline Howard of the Western Center on Law and Poverty, and Julia Jordan of the Leadership Council for Justice and Accountability made oral comments that were covered in the written comments submitted to the Council by their own organizations or by other commenters which are summarized and responded to above.

Yitzhak Kedmi emailed the Council about the specifics of his complaints filed with the DFEH. His comment was not relevant to the rulemaking action.

Heidi Palutke of the California Apartment Association emailed the Council with a comment that was covered in the written comments submitted to the Council by her organization which are summarized and responded to above.

PUBLIC HEARING COMMENTS MADE JULY 3, 2019 [Government Code Section 11346.9(a)(3)]

Sahar Durali of Neighborhood Legal Services of Los Angeles, Navneet Grewal of the Western Center on Law & Poverty, and Ben Conway from Disability Rights California all thanked the Council for the work on the regulations and urged the Council to adopt the regulations as drafted.

PUBLIC HEARING COMMENTS MADE JULY 31, 2019 [Government Code Section 11346.9(a)(3)]

Kara Brodfuehrer of the National Housing Law Project and Matthew Warner of the Western Center on Law & Poverty both thanked the Council for the work on the regulations and urged the Council to adopt the regulations as drafted.

There is not a subsequent notice of modifications or another 15-day public comment period because no textual changes were presented at this meeting, and the Council voted 5-0 to submit this draft to the Office of Administrative Law as the final version of the regulations.

Updates to the Initial Statement of Reasons

The Supplement to the Initial Statement of Reasons has a typo on page 13. It references subsection 12005(o)(3), but it actually discusses 12005(n)(3) and the “(o)” should say “(n).”

Incorporation by Reference Statement [1 CCR 20]

Publication of the Code of Federal Regulation sections in full in the California Code of Regulations would be cumbersome, unduly expensive, and otherwise impractical because the federal regulations are lengthy and easy to find.