



DEPARTMENT OF FAIR EMPLOYMENT & HOUSING
FAIR EMPLOYMENT & HOUSING COUNCIL
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DIRECTOR KEVIN KISH

FAIR EMPLOYMENT AND HOUSING COUNCIL

Meeting of March 30, 2017, 10:00am

Minutes

State Capitol
Room 127
Sacramento, CA 95814

Councilmembers Present

Chaya Mandelbaum, Chairperson
Dale Brodsky, Councilmember
Mark Harris, Councilmember
Tim Iglesias, Councilmember
Dara Schur, Councilmember
Kevin Kish, DFEH Director and Ex Officio member

DFEH Staff Present

Joan Keegan, DFEH Chief Deputy Director
Holly Thomas, DFEH Deputy Director of Executive Programs
Brian Sperber, DFEH Legislative and Regulatory Counsel
Paul Kennedy, DFEH Associate Business Management Analyst
Christopher Moores, DFEH Civil Rights Fellow

Others Present

Michelle Hill, Inland Fair Housing and Medical Board
Heidi Palutke, California Apartment Association
Whitney Prout, California Apartment Association
Sanjay Wagle, California Association of Realtors
Jonathan Young, California Association of Realtors
Christopher Ogata, Disability Rights California
Liza Cristol-Deman, Brancart & Brancart
Ely Cristol-Deman, Student
Noah Lebowitz, California Employment Lawyers Association
Ashley Werner, Leadership Council for Justice and Accountability
Patricia Leal, Leadership Council for Justice and Accountability
Birhanu Adenew, California Department of Corrections and Rehabilitation
Carl Borden, California Farm Bureau
Ilene Jacobs, California Rural Legal Assistance
Madeline Howard, Western Center for Law and Poverty
Jon Smock, Apartment Association of Orange County
Sarah Steinheimer, Legal Services of Northern California
Alan Moody

CHAYA MANDELBAUM
CHAIRPERSON

DALE BRODSKY
COUNCILMEMBER

MARK T HARRIS
COUNCILMEMBER

TIM IGLESIAS
COUNCILMEMBER

JOSEPH ORTIZ
COUNCILMEMBER

DARA L SCHUR
COUNCILMEMBER

Enedina Cardenas, Seyfarth Shaw
Dan Firestone, CICreports.com
Justin Paddock, California Association of Realtors
Emma Regidor, California Department of Corrections and Rehabilitation
Ron Kingston, California Political Consulting Group
Karen Challe, Atkinson Baker
Kevin Baker, American Civil Liberties Union
Marjorie Murray, Center for California Homeowner Association Law

I. Call to Order and Roll Call

Chair Mandelbaum called the meeting to order at 10:07 a.m. and Brian Sperber conducted roll call. All Councilmembers were present except Councilmember Ortiz.

II. Welcome and Introduction of Guests

Chair Mandelbaum introduced the Council and invited the guests in attendance to introduce themselves. Chair Mandelbaum stated that the Council meeting is livestreamed on the Council's website and reminded guests viewing remotely that they could participate in the meeting by emailing the Council and could find the Attachments on the website. Chair Mandelbaum introduced and welcomed new Councilmember Mark Harris. Chair Mandelbaum also thanked former Councilmember Schneiderman for his contributions to the Council. Chair Mandelbaum reminded the guests in attendance that hard copies of the Attachments were available in the meeting room.

III. Review of the Agenda

Chair Mandelbaum highlighted and reviewed the topics for the day's agenda.

Chair Mandelbaum reviewed the Agenda and invited the guests to comment on subjects addressed by the Council throughout the day.

IV. Approval of the Minutes

Attachment A: Minutes from the January 10, 2017 Meeting of the Fair Employment and Housing Council

Chair Mandelbaum reviewed the minutes of the January 10, 2017 meeting. During that meeting, the Council considered proposed Housing Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals; considered Additional Modifications to Text of Regulations Regarding Transgender Identity and Expression; heard a presentation by Councilmember Iglesias regarding residential occupancy standards; and considered Nonsubstantial Modifications to Text of Consideration of Criminal History in Employment Decisions Regulations. The Council approved the minutes unanimously, with Councilmember Harris abstaining from the vote.

V. Councilmembers' Reports

Chair Mandelbaum noted that the criminal history in employment decisions regulations were recently approved by the Office of Administrative Law and will become effective on July 1, 2017. Chair Mandelbaum then invited the Council to report on any updates.

Councilmember Iglesias mentioned that the City of Santa Monica adopted an ordinance banning source of income discrimination and the ordinance was approved by a court. He also noted that banking scandals associated with fair housing were still occurring, as Wells Fargo was reported to have engaged in a pattern of discriminatory practices and as a result had its CRA rating lowered.

Councilmember Schur discussed her upcoming speaking engagement at the state bar real property section symposium on fair housing and public accommodations on April 13. Director Kish will also be speaking at the same event as the keynote speaker.

Councilmember Harris introduced himself. He was the chief counsel and consultant to then chairman of the assembly judiciary committee Elihu Harris, who eventually became a two term mayor of Oakland. Since then, he has been appointed by President Bill Clinton as his deputy chief of staff at the Department of Commerce under the late Ron Brown. He was the Undersecretary of California's Business, Transportation and Housing Agency under Governor Gray Davis. For the past 16 years he has been teaching at universities in California and China. He also has a law practice headquartered in Sacramento that serves clients throughout the state.

VI. Department of Fair Employment and Housing Report

Director Kish reported that more than 40% of DFEH employees are currently eligible for retirement. This is a problem universal to state service. 62% of DFEH's employment investigators have been hired since Director Kish was appointed two years ago. 50% of those were hired within the last year. In the housing context, 37% were hired within the past year. As a side note, Director Kish noted that now is a great time to begin a career in state service. Additionally, DFEH has hired staff to fill its training unit since last year's budget contained two full time, ongoing training positions at the DFEH. They are conducting investigator academies for newly hired investigators as well as scheduling ongoing trainings on legal doctrines and investigative processes.

The DFEH has proposed updates to its procedural regulations. Those were noticed on March 10, 2017, and the public comment period closes on April 24, 2017. For anyone unfamiliar, this process is not done through the Council. Commenters must submit comments directly to the DFEH for consideration. Director Kish invited the public and the Council to comment on those practices.

The Department is also hosting two fair housing month events. Holly Thomas, Deputy Director of Executive Programs, provided an update on the Los Angeles event. On April 26, 2017, the DFEH will host an event covering (1) the housing laws that DFEH enforces, the complaint process, and settlement, mediation and dispute resolution services and (2) the Ralph Civil Rights Act. The event will be held at the California Endowment Center for Healthy Communities building. More information about that event can be found on the DFEH's website. On April 19, 2017, at the California Museum, DFEH is partnering with the Legislative Black Caucus for a screening of a documentary titled "Fair Legislation: The Byron Rumford Story."

Authority to enforce Gov. Code § 11135 et seq. was given to the DFEH on Jan 1, 2017. This statute prohibits discrimination in any state funded program or activity. DFEH has created complaint forms and has begun receiving complaints under this statute. DFEH has conducted a statewide survey on what state departments and agencies have done in the past to ensure compliance with section 11135. This new enforcement authority also creates some urgency on the Council to amend the section 11135 regulations.

The DFEH also filed a national origin lawsuit against Forever 21 in San Francisco based on an English only policy, a type of national origin discrimination being discussed by the Council in its regulations today.

VII. Public Hearing: Proposed Housing Regulations Regarding Discriminatory Effect; Discriminatory Land Use Practices; and Use of Criminal History Information

CHAYA MANDELBAUM
CHAIRPERSON

DALE BRODSKY
COUNCILMEMBER

MARK T HARRIS
COUNCILMEMBER

TIM IGLESIAS
COUNCILMEMBER

JOSEPH ORTIZ
COUNCILMEMBER

DARA L SCHUR
COUNCILMEMBER

Attachment B: Notice of Proposed Rulemaking

Attachment C: Initial Statement of Reasons

Attachment D: Proposed Housing Regulations Regarding Discriminatory Effect; Discriminatory Land Use Practices; and Use of Criminal History Information

A. Discussion

Chair Mandelbaum introduced the proposed regulations and stated that the purpose of the hearing is to receive public comments regarding Housing Regulations Regarding Discriminatory Effect, Discriminatory Land Use Practices, and Use of Criminal History Information. Pursuant to the notice provided more than 45 days ago, the Council invited the public to come and provide comments on the proposed regulations. The hearing is being transcribed by a court reporter and the transcript will be part of the Council's rulemaking record.

B. Public Comment

The Council heard public comment from:

Justin Paddock, California Association of Realtors: Mr. Paddock asked that the word "constraint" be changed to "condition" in section 11098.14.1(b) because it is a more common term used when discussing transactions related to title. Also, in the initial statement of reasons there is a reference to a David Thacher article. He requested that any information being materially relied upon in the regulations be made available with the proposed regulations.

Mr. Paddock said that the regulations relating to the discriminatory effects test exceeds the federal guidance on the subject. In section 11098.18.3(b) with regard to a plaintiff's burden to demonstrate disparate impact there is a presumption that national statistics are presumed to be sufficient. According to the federal guidelines, Mr. Paddock believed adjudicators should evaluate a plaintiff's evidence on a case by case basis. Mr. Paddock also said that in section 11098.18.4, the Council should have further discussion on drug manufacturing and distribution offenses since those are carved out in the federal law. In section 11098.18.6, Mr. Paddock requested further clarification about when restitution has been ordered, whether it is appropriate for a landlord to evaluate how they are doing on payments in order to ensure they are meeting the requirements of the court. Mr. Paddock said further discussion is necessary with regard to whether a 7 year time limit for the rebuttable presumption is the appropriate length of time for which a tenant no longer presents a danger to other residents.

Whitney Prout, California Apartment Association: Ms. Prout thanked the Council for trying to clarify the area of law covering discriminatory effect but said that the proposed regulations do not provide enough clarification. In section 11098.04.1(b), she asked that the word "individual" be stricken. Moreover, section 11098.04.2(b) states that the defendant has the burden of proof for all prongs of a legally sufficient justification defense, including showing that there is no less discriminatory alternative. The relevant HUD regulation and the FEHA employment regulations both shift that burden back to the plaintiff, and the Association recommended that the Council take the same action here and regarding less discriminatory alternatives, to use the standard contained in the FEHA.

The Association has always encouraged its members to apply a narrowly tailored screening criteria that can be applied objectively and consistently. So with regard to the proposed criminal history regulations, because individualized assessments are inherently subjective and inconsistent, Ms. Prout recommended that the Council craft the regulations in such a way that housing providers can come up with an objective screening criteria in order to avoid liability.

In section 11098.18.1, the Association requested that the Council clarify or provide a definition of the phrase “criminal history information” or use a different term. They believed this phrase could be broadly interpreted to include information about prior unlawful conduct that did not result in an arrest or conviction but may have been obtained from a prior landlord, such as a previous eviction.

Ms. Prout said that section 11098.18.2 makes it a violation to make statements that conflict with this article or article 4, but neither of those articles provide guidance on how to make lawful statements. So there is ambiguity as to what housing providers can say or do. She also pointed out that section conflicts with a later suggestion that housing providers provide copies of what they screen for with respect to criminal history information.

In section 11098.18.3(a), Ms. Prout asked that the Council conform the regulations to Supreme Court authority requiring that the statistical disparity be caused by the practice being challenged. She argued that the presumption for national statistics is inconsistent with the HUD guidance, which actually states a preference for local statistics when available. There is also nothing in the HUD guidance or FEHA which supports creating a presumption for national statistics.

Ms. Prout said that she was concerned that section 11098.18.4 could be interpreted to require a housing provider to show anything beyond a rational relationship between a qualifying offense and a tenancy obligation. She stated that she was unclear how the housing provider would make that showing.

Ron Kingston, California Political Consulting Group:

Mr. Kingston said housing providers are subject to asset forfeiture, nuisance abatement of criminal activity, and habitability laws. Overall, the written comments provided by California Political Consulting Group provide statistics showing what the recidivism rate is in CA. The rate they found in their research is 65% overall, and for repeat offenders, it is 73.5% within one year. Mr. Kingston pointed out that over 20% of Californians have been convicted of a crime. Mr. Kingston noted that these statistics came from the CDCR risk assessment reports. In highlighting these statistics, Mr. Kingston noted that housing providers have the duty to keep their properties safe and provide safe living spaces for tenants.

In section 11098.18.4, Mr. Kingston questioned how owners are meant to prove that their practice meets the legal standards, and requested clarification on the standard here. He noted that the proposed regulations state that the type of conviction is related to fulfilling a housing obligation, because the regulations specifically identify arson and possession of illegal weapons as convictions that can be used directly in relation to a tenancy obligation. But Mr. Kingston stated that the regulations do not provide guidance on why these crimes are specifically highlighted. Given the regulations in their current state, Mr. Kingston was unsure how to infer what other crimes could be related to tenancy obligations.

In section 11098.3(a) Mr. Kingston also requested a definition for the term “overbroad and arbitrary.” Mr. Kingston noted that in many instances, the proposed regulations deviate from the HUD standards. He suggested merging the standard in the regulations with the HUD standard to avoid having conflicting standards. In section 11098.704(b)(3), Mr. Kingston stated that he did not know how to assess a person’s capacity to fulfill leasor obligations based on a criminal record.

John Smock, Apartment Association of Orange County: Mr. Smock stated that the proposed regulations do not appropriately distinguish between a housing provider’s discretion and discrimination. Because of this, he believed that the regulations burden housing providers by forcing them to conduct their rental businesses in a way that has negative impacts on their employees and tenants. He also believed that the way the regulations shift the burden to the owner to disprove an activity that they do not in fact engage in is inappropriate.

Sarah Steinheimer, Legal Services of Northern California (LSNC): LSNC is a legal aid agency for 23 counties in California. LSNC provides free legal assistance to low income families and individuals. In their housing work, they represent tenants who are dealing with general landlord tenant issues and fair housing issues. At LSNC, they have seen tenant screening policies be an obstacle for family reunification for people trying to stabilize and find gainful employment and provide for their family. LSNC has observed how these types of policies have hindered those efforts in the past. In one case, LSNC encountered a housing provider denying applicants with any felony conviction from any time of any nature, and all misdemeanors within 3 years regardless of the nature of the criminal activity. Another case involved a housing provider who rejected applicants with any felony or misdemeanor no matter the nature of the activity. That same company even prohibited current tenants from having guests with criminal records. In one egregious case, LSNC had a client who was denied admission to HUD housing for a misdemeanor loitering conviction for sleeping while homeless. LSNC believes these regulations are vital to ensuring that these policies are addressed and considered to be discriminatory.

Chair Mandelbaum noted there is some tension in the debate between blanket bans that remove subjectivity that alleviates some discrimination and more nuanced policies like an individualized assessment, which sometimes provides an opportunity for more targeted discrimination. Chair Mandelbaum asked whether Ms. Steinheimer was generally more concerned by bright line policies that lack nuance or individualized assessments. She believes that bright line policies are certainly the worse problem. She said it is important to know what happened, when, and what has happened since. Those are important indicators in assessing risk and that there is a balance between accessibility of housing and maintaining safety for current tenants. From Ms. Steinheimer's experience, she stated that she believes the individualized assessment achieves both sides of the balancing.

Patricia Leal, Leadership Council for Justice and Accountability: The Leadership Council works to eliminate barriers based on wealth, income, and race. Ms. Leal thanked the Council for their thoughtfulness in these proposed regulations. The Leadership Council worked with LSNC, National Housing Law Project, and Western Center on Law and Poverty to submit written comments.

Ms. Leal stated that due to decades of public and private neglect and discrimination, many communities lack the basic infrastructure present in other communities. Despite ongoing advocacy, local jurisdictions have refused to provide the resources necessary to allow communities to develop their infrastructure, all the while supporting development that disproportionately benefits higher class and Caucasian residents. Ms. Leal believes these examples show why the term "infrastructure" should be included in section 11098.14.2(d).

Ashley Werner, Leadership Council for Justice and Accountability: Ms. Werner highlighted the portion of their comments relating to environmental justice. The Leadership Council proposes that the regulations include an additional section to address adverse impacts to environmental quality and public health. The Leadership Council made more elaborate suggestions in the written comments. Many communities of color are among the most burdened in California by pollution.

Madeline Howard, Western Center on Law and Poverty: Ms. Howard stated that discriminatory effect is such an important way of enforcing antidiscrimination laws and thanked the Council for proposing the current regulations. Ms. Howard noted that the Apartment Association, while commenting on section 11098.4.1, requested that the term "individual" be removed because discriminatory effect only applies to groups. The Center believes that comment is incorrect and that the case law supports this position. When analyzing whether a particular policy has a discriminatory effect, the appropriate inquiry is into the makeup of the group, but when considering a particular case, the appropriate inquiry is to look at the individual. Because of this, Ms. Howard said the Council's original language is correct and should not be changed.

The Council is free to be more protective than federal law, and the Center supports the Council's effort to do so with regard to the burden shifting analysis here. It also makes sense to put the burden on the housing provider because the housing provider is in a much better position to understand how certain practices work and they are much more practiced in selecting tenants.

In Article 18, the Center agrees with prior comments that were made on the usefulness of definitions. The comments submitted jointly by the Center and LSNC suggested some definitions. There were also comments made about recidivism and safety concerns. The Center represents people with and without criminal records. One of the big reasons that people end up being incarcerated again is due to an inability to find housing. Many cities have even outlawed homelessness so someone can be arrested just for being homeless. So the issue of being able to find housing is integral to lowering the recidivism rate. Because of that, the Center supports changing the recidivism rate to 3 years instead of 7 years to be in line with the HUD guidance.

Marjorie Murray, Center for California Homeowner Association Law: Ms. Murray and the Center for California Homeowners Association Law represent homeowners who live in the state's many common interest developments. Ms. Murray explained that not only do CID/HOAs have a long history of discrimination, in fact that was one of their original purposes. The cloud of discrimination still hangs over CID/HOAs and expresses itself in many different ways. Ms. Murray highlighted a specific business practice of HOAs: HOAs often foreclose when homeowners fall behind on assessments or homeowner dues. Recently there have been fights in the Capitol on the threshold for HOAs to initiate foreclosures; however in research done by the Center, it has become clear that Hispanic households were foreclosed on far beyond their relative numbers in the census. The Center would like to see debt collection and foreclosure called out as a discriminatory practice. Often, the HOA itself does not manage the debt collection process. HOAs contract that duty out to professional debt collection firms. There is nothing in the law requiring that these collection firms provide any sort of notice in the native language of the person receiving them. Because of this, Ms. Murray concluded that it makes sense that the Center has found a demonstrable accelerated foreclosure rate among monolingual Asian and Hispanic households. Ms. Murray said these people need to be informed of their rights in their native language.

Liza Crystal Deman, Brancart and Brancart: Ms. Deman introduced her firm, Brancart and Brancart. They bring FHA cases in California as well as nationwide. Ms. Deman expressed support for the comment letter submitted by the Center for Western Law and Poverty.

C. Action by Council

Chair Mandelbaum thanked the public for providing comments and reminded people that the Council will accept comments until 5pm. With that, Chair Mandelbaum declared that the public comment hearing was adjourned.

VIII. Consideration of Nonsubstantial Modifications of Text of Proposed Regulations Regarding Transgender Identity and Expression

Attachment E: Nonsubstantial Modifications to Text of Proposed Regulations Regarding Transgender Identity and Expression

A. Discussion

Councilmember Brodsky mentioned that this draft was developed through efforts by her and former Councilmember Perez and is now being presented to the Council for approval, however there was a comment submitted yesterday that she believes the Council needs to hear from. With that, she invited the representative from the California Farm Bureau Federation to provide comments.

B. Public Comment

Carl Borden, California Farm Bureau Federation: Mr. Borden introduced himself and the California Farm Bureau Federation. He stated that the day before the meeting, the Federation submitted a written comment dealing with one specific issue that he believes conflicts with the proposed regulations. Mr. Borden explained that Cal/OSHA Standards Board promulgated a regulation called the Field Sanitation Standard in 1991 that required employers with field employees in agriculture to provide separate toilet facilities for members of each sex. The requirement that would be imposed in 2 CCR 11034 for gender neutral signage would be in conflict with the employer's requirement to provide separate toilet facilities for each sex. The Federation did not realize that this was a conflicting regulation until last week because recently enacted legislation in the Health and Safety Code seemed to resolve the conflict by requiring that business establishments and other entities that have single user toilet facilities sign them with gender neutral signage. They had been wrongfully assuming that that requirement trumped the Cal/OSHA regulation and therefore despite the requirement for separate toilet facilities for each gender, did not comment earlier. Mr. Borden suggested narrowing the definition of "facility" in the current regulations to exclude portable chemical toilets that are typically provided in order to comply with the field sanitation standards. He suggested that another option would be to add language stating "except where a law or provision requires separate facilities for each sex."

Councilmember Schur asked whether OSHA has been questioned about the new statute. Mr. Borden mentioned that he had communicated briefly with both Cal/OSHA chief Julian Shum and Assistant Chief Counsel Nathan Schmidt who concluded that agricultural fields are business establishments, and that the statute does override the requirement to have separate gendered facilities for each sex. Schmidt actually referred to another statute and that the result would be the same. The statute does cover field sanitation facilities as well.

Councilmember Schur stated that she is reluctant to withhold the protection of this statute from farmworkers because OSHA may not have updated its regulations to be in accordance with the statute. She understands the problem, but doesn't see any practical barrier to farmworkers having the same protections as everyone else, which is aimed at protecting gender identity. This conflict could be solved if Cal/OSHA decides to update their regulations.

Mr. Borden then mentioned that he had just received an email stating that the Cal/OSHA FAQ from the website states that OSHA will not enforce gender signage statutes, even though the standard states that there must be separate gendered facilities, so the issue he was identifying was resolved for practical purposes.

Noah Lebowitz, California Employment Lawyers Association: On the transgender regulations, CELA thanked the Council for their work on these regulations.

Ilene Jacobs, California Rural Legal Assistance: Ms. Jacobs stated that since CRLA represents farmworkers throughout the state, she thinks the Council is correct that there is no conflict. The farmworker population requires the protection afforded by this regulation and many farmworkers don't conform to either male or female genders.

C. Action by Council

The Council unanimously approved the text, authorized DFEH staff to submit it to the Office of Administrative Law, and authorized DFEH staff to make non-substantial changes if required by the Office of Administrative Law.

Break for lunch at 12:37pm. Reconvened at 1:38pm.

CHAYA MANDELBAUM
CHAIRPERSON

DALE BRODSKY
COUNCILMEMBER

MARK T HARRIS
COUNCILMEMBER

TIM IGLESIAS
COUNCILMEMBER

JOSEPH ORTIZ
COUNCILMEMBER

DARA L SCHUR
COUNCILMEMBER

IX. Consideration of Draft Proposed Regulations Regarding National Origin Discrimination

Attachment F: Draft Proposed Regulations Regarding National Origin Discrimination

A. Discussion by Council

Chair Mandelbaum and Councilmember Brodsky incorporated some of the comments and input from the last meeting, particularly the ones dealing with federal immigration law preemption issues. They also added clarification that an employee's immigration status is irrelevant in the initial liability phase of a FEHA lawsuit and employment application. They also incorporated the Ninth Circuit's accent discrimination decision.

B. Public Comment

The Council heard public comment from:

Noah Lebowitz, California Employment Lawyers Association: Mr. Lebowitz stated that normally CELA addresses the Council through its taskforce. Because these regulations are still in the pre-notice phase, CELA had its subject matter experts submit a redlined version the day before the meeting. CELA seeks to ensure that language restriction policies are part of the public comment process.

Marisa Diaz, Legal Aid at Work: Ms. Diaz thanked the Council for these regulations and for considering Legal Aid at Work's comments at the previous meeting. Ms. Diaz emphasized that there is a relation between hostile work environment and language restriction policies. There are cases in the Ninth and Tenth Circuits, and 29 CFR 1606.7a talks about how broad English only policies can create an atmosphere of inferiority based on national origin and a hostile work environment. So for these reasons, Legal Aid at Work thinks it is important that the Council create regulations on these issues.

Ms. Diaz also suggested deleting section 11028(f)(1) because it seems to assume that at the time of liability, the status of the worker is known. She stated that this is usually not the case. Ms. Diaz also suggested that the issue of immigration status should be irrelevant at the liability phase. Further, section 11028(f)(2) includes this issue but in clearer language.

C. Action by Council

Hearing no further public comments, the Council made technical corrections and unanimously voted to approve a motion to adopt and allow the Department to prepare the rulemaking package.

X. Discussion Regarding Potential Public Hearings and Outreach to Civil Rights Groups

Chair Mandelbaum turned the discussion over to Councilmember Iglesias to lead this discussion. Because the Council's regulations have significant impact state-wide, and in order to make the Council more known throughout the Central Valley, the Council is considering holding public hearings in order to get information from members of the public who don't typically attend Council meetings.

Director Kish mentioned that Deputy Director Holly Thomas recently hired a staff member specifically for outreach. Director Kish suggested that the Department hold a public hearing in Fresno and hear about the civil rights issues facing that region. Councilmember Harris said that he also has contacts in that area.

Councilmember Harris stated that UC Merced would be happy to help set up a meeting in Merced. He strongly believes the Council should reach out to the Central Valley as effectively as possible.

A. Public Comment

Alan Moody: Mr. Moody is homeless and lives in Humboldt County. Humboldt is having issues with the federal government and a consent decree. He said it is hard for somebody like himself, who is on social security, to get by. Fees, like parking tickets are set at rates that are out of reach of most low income individuals. Mr. Moody stated that there is a need to scrutinize the use of taxpayer money and where it is being spent or given to advocacy organizations. He also raised issues regarding the accessibility of Council meetings to those that are hearing impaired.

Director Kish responded that he agrees with Mr. Moody as to disability access that there is a lot of progress to be made, and that the Department's staff is listening closely to him.

XI. Report from Government Code Section 11135 Exploratory Subcommittee

Councilmembers Schur and Brodsky reviewed the regulations and considered how best to amend the existing regulations. Within the regulations, there are a lot of cross-references so they aren't easy to divide up. For that reason, they recommend one subcommittee revise all the regulations rather than divide them up amongst multiple subcommittees.

A. Public Comment:

Kevin Baker, American Civil Liberties Union: Mr. Baker praised the Council for their impressive work product, as seen in the proposed regulations discussed during the public hearing today. The ACLU has started looking at the regulations to suggest revisions and will be submitting comments during the public comment period. He noted that there is a substantial body of law under Title VI and that Deputy Director Holly Thomas is also a valuable resource in this endeavor. Mr. Baker stated that the ACLU is committed to working with the Council on this issue.

XII. Consideration of Modifications of Text of Proposed Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals

Attachment G: Modified Text of Proposed Regulations Regarding Harassment; Liability for Harassment; Retaliation; and Select Disability Sections, Including Assistive Animals

A. Discussion

Councilmember Schur stated that these regulations have a long history as there was a lot of work done by the predecessor subcommittee to develop them. Councilmember Schneiderman was extremely helpful in composing Attachment G. The comments received from the public were substantial. To resolve those comments, the subcommittee substantially rewrote part of the regulations. The subcommittee added many additional definitions in section 11098.3 to help flesh out the subsequent regulations. There appeared to be many comments on the term "housing provider" and "owner" and "person." Councilmember Schur thought "Housing provider" was confusing because it applied to a lot of people who did not provide housing like lenders and real estate brokers. So the subcommittee replaced that term with "person" so that it could more clearly apply to parties who are covered by the FEHA but do not necessarily directly provide housing to anyone. The regulations now refer to complainants and plaintiffs as individuals and not people in order clarify ambiguities arising from the change of the term "housing provider."

Councilmember Schur mentioned that there were a number of comments regarding liability for discriminatory housing practices, particularly with regard to liability for acts of third parties. The Council considered the HUD regulations in clarifying this area. The subcommittee tried to clarify when there are obligations to third parties. The subcommittee also added some examples of harassing conduct, including examples pulled from HUD regulations. The assistive animals section has been clarified too. The section on reasonable accommodations has been significantly rewritten. The subcommittee attempted to cover a number of examples where reasonable accommodations are appropriate, including outside the landlord tenant context.

The section on assistive animals is somewhat different from federal law because there are specific statutory provisions in California providing a higher level of protection.

B. Public Comment

Marjorie Murray, Center for California Homeowner Association Law: Ms. Murray stated that the Central Valley would applaud a public hearing by the Council and that she supports an outreach effort there. On section 11098.4, on the liability issue, she stated that this is a troubling section because where subdivision (c) used to formally refer to CID/HOA documents, that language has been removed. The Association is not aware of the specific reasons for excising that language, but urges that the language be restored. The restoration of “governing documents” would also be useful because it includes bylaws and operating rules.

The other issue is whether the HOA has power to prevent a practice by a third party. HOAs would like to limit themselves from liability for when they believe there is some third party discrimination taking place. Their argument is that they don’t have authority to intervene in this kind of activity. However the Association believes that they have authority to intervene in many disputes. CID/HOAs are quasi-governmental entities who have a huge stake in these kinds of disputes, and as housing providers, they have a larger mission to create or provide a peaceful environment.

Ron Kingston, California Political Consulting Group: Mr. Kingston commented specifically on the example about Abigail, the individual who earns social security income, in section 11098.26. Mr. Kingston stated that equating disability with income qualification is inappropriate. On section 11098.26(b)(1), there is reference to the fact that an accommodation may impose a cost on one of the parties. Mr. Kingston believes it is unusual to consider the net worth of the property owner when determining whether the cost of an accommodation is appropriate. Also, Mr. Kingston believes that a reliable third party who is in a position to know about the individual’s disability may not have training or qualifications, which raises substantial problems.

Councilmember Schur commented that subdivision (b)(2) is a requirement from HUD guidance.

Sanjay Wagle, California Association of Realtors: Mr. Wagle stated that in section 11098.23, the proposed regulation uses the term “assistive animals,” though it was changed to “assistance animals.” He believes this term leads to unnecessary confusion by conflating service animals with animals allowed as a reasonable accommodation. He suggested that the regulations provide different definitions for service animals and animals allowed as a reasonable accommodation, just as federal law does. Mr. Wagle continued that in section 11098.23(a)(2), the regulation states that “assistive animals” do not need to be trained or certified. However, service dogs do need to be trained. He believes that this is a significant distinction between the two classifications that merits having separate definitions.

Mr. Wagle also referenced section 11098.26 where the regulations list a number of examples to provide guidance. He believes one of these examples needs to be clarified. In subdivision (a)(1)(E), the example talks about how a landlord must accommodate a tenant who has a guest with a support animal, even if the complex

has a no pets policy. While the Association believes that is generally true, the regulation should be modified to state whether the visitor has a non-apparent disability. Mr. Wagle pointed out that if the disability is not apparent, the landlord could still ask for some sort of documentation. So this example needs to clarify whether the visitor has a visible disability.

Section 11098.27(e) states that a tenant can self-certify by providing a credible statement. Mr. Wagle believes this self-certification process requires clarification.

Whitney Prout, California Apartment Association: In section 11098.4(a)(2), the Association previously requested clarification in this section that when a housing provider is bringing an unlawful detainer action completely unrelated to the alleged discriminatory housing practice, that they not be prohibited from evicting the tenant. The Association appreciates the inclusion of language to address that concern, however the language added appears to be copied from the retaliation context. The Association is concerned that the retaliation language may not be appropriate here because there is already a nexus requirement in the retaliation context. That language is not appropriate here because there is no clear nexus requirement. So Ms. Prout requested an amendment to read “nothing in here is intended to cause or permit the delay of, or impact a plaintiff’s ability to prevail on the merits in an unlawful detainer action otherwise permitted by law.”

In section 11098.6, the Association is concerned that the standard was amended to lower it beyond the statutory dominant purpose standard. They understand that this section seems to have been revised in response to comments from HUD. So the Association asks that the Council provide authority for that standard and where it came from.

Madeline Howard, Western Center on Law and Poverty: In section 11098.3, Ms. Howard recommended that the terms “owner” and “person” include cities, including charter cities. Cities often engage in discriminatory practices. Currently, cities appear to be absent from the definitions. Ms. Howard also encouraged to clarify that a single act can be discriminatory. Ms. Howard also expressed concern regarding section 11098.4(a)(2), because oftentimes the entire issue is whether the unlawful detainer is related to someone’s disability or request for reasonable accommodation.

In section 11098.29, Ms. Howard stated that it would be helpful to clarify the interactive process language to make it clear that if a tenant makes a request late in the unlawful detainer process, the interactive process is still required.

Allen Moody: Mr. Moody asked how to file a grievance against the Governor for not appointing an ADA coordinator. He then questioned how it is possible that the DFEH has live broadcasting but no closed captioning. On marijuana, a violation of the ADA is a violation of California law. But if someone violates federal law, they lose protections under the federal law. So if someone smokes marijuana, the federal government can then do whatever they want to you. Mr. Moody also said that numerous government agencies do not have clear policies on who to complain to with disability access grievances.

Ilene Jacobs, California Rural Legal Assistance: Ms. Jacobs commented on the issue of interaction between free speech and anti-discrimination laws. CRLA has concerns that retaliatory or discriminatory conduct has been considered protected speech when it violates the FEHA. CRLA is not sure that advocates would have complete agreement with HUD, particularly with regard to threats of deportation and immigrant rights.

C. Action by Council

Chair Mandelbaum listed technical changes and the Council unanimously voted to adopt the modified Attachment G for a 15-day comment period.

CHAYA MANDELBAUM
CHAIRPERSON

DALE BRODSKY
COUNCILMEMBER

MARK T HARRIS
COUNCILMEMBER

TIM IGLESIAS
COUNCILMEMBER

JOSEPH ORTIZ
COUNCILMEMBER

DARA L SCHUR
COUNCILMEMBER

XIII. Discussion Regarding Additional Subcommittee Assignments

A. Discussion

Chair Mandelbaum stated that there some subcommittees have vacancies: Government Code section 11135 subcommittee, housing subcommittee #1, and the public outreach subcommittee. Councilmember Schur suggested that the existing housing committee take on both sets of current housing regulations. Councilmembers Harris and Iglesias agreed to work on the public outreach and hearing committee.

B. Public Comment

None.

C. Action by Council

Chair Mandelbaum stated that the course of action appears to be to assign Councilmembers Harris and Iglesias to public outreach. Councilmembers Iglesias and Schur will work on both sets of housing regulations. And Councilmembers Schur and Brodsky will address Government Code section 11135. The Council unanimously voted on the subcommittee assignments.

XIV. Further Public Comment

Michelle Hill, Inland Fair Housing and Mediation Board: Ms. Hill questioned why age discrimination was not part of the housing characteristics.

Councilmember Iglesias responded that there is an exemption for housing for elderly in the federal law.

Director Kish stated that it is contained in the Civil Code. The Department understands age to be a protected basis except for housing designed specifically for the elderly.

Ms. Hill specified that her question was not regarding housing designed specifically for the elderly, she was more concerned with predatory lending practices targeting the elderly.

Director Kish stated that the Department would currently investigate that type of complaint.

XV. Adjournment

Chair Mandelbaum adjourned the meeting at 4:29 p.m.

Date: April 12, 2017

CHAYA MANDELBAUM

Chair

CHRISTOPHER MOORES

DFEH Civil Rights Fellow