

ATTACHMENT G

Fair Employment & Housing Council Modifications to Proposed Text of Housing Regulations Regarding Discriminatory Effect, Discriminatory Land Use Practices, and Use of Criminal History Information

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 3. Discrimination in Housing

TEXT

[All sections are additions to the CA Code of Regulations]

Text proposed to be added for the 15-day comment period is displayed in underline type.

Text proposed to be deleted for the 15-day comment period is displayed in ~~striketrough~~ type.

Article 4. Discriminatory Effect

§ 11098.04.1. Definitions

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

(a) “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. For example, government bodies engaged in enacting legislation to implement governmental functions may not constitute “Business Establishments,” but they may be a “Business Establishment” if they operate a business such as a shop in a government building.

(b) “Substantial interest” means a core interest of the organization that has a direct relationship to the function of that organization.

(c) “Legitimate” means that a justification is genuine and not false.

(d) “Nondiscriminatory” means that the justification for a challenged practice does not itself discriminate based on a Protected Basis.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 24 C.F.R. sections 100.500 et seq.; Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al. (2015) 135 S.Ct. 2507; Keith v. Volpe (9th Cir. 1988) 858 F.2d 467; Harrison v. City of Rancho Mirage (2015) 243 Cal.App.4th 162, Qualified Patients Assn. v City of Anaheim (2010) 187 Cal.App.4th 734.

§ 11098.04.12. Practices with a Discriminatory Effect.

(a) Liability may be established under the Act based on a Practice's discriminatory effect, as defined in paragraph (b) of this section, even if the Practice was not motivated by a discriminatory intent. The Practice may still be lawful if supported by a legally sufficient justification, as defined in section 11098.04.3.

(b) A Practice has a discriminatory effect where it actually or predictably results in a disparate impact on ~~an individual or~~ 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.

~~(c) The burdens of proof for establishing a violation under this Article are set forth in section 11098.04.2.~~

~~(d) The Practice may still be lawful if supported by a legally sufficient justification, as defined in section 11098.04.3.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 24 C.F.R. § 100.500 et seq.; *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al.* (2015) 135 S.Ct. 2507; *Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467.

§ 11098.04.23. Burdens of Proof in Discriminatory Effect Cases.

(a) The plaintiff or complainant has the burden of proving that a challenged Practice caused or predictably will cause a discriminatory effect.

(b) ~~If~~ Once the plaintiff or complainant satisfies the burden of proof set forth in subdivision (a) of this section, the defendant or 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 11098.04.43.

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

(d) Types of evidence that may be relevant in establishing or rebutting the existence of a discriminatory effect include, but are not limited to:

- (1) National, state, and local statistics;
- (2) Applicant files or data;
- (3) Tenants/resident files or data;
- (4) Conviction statistics;
- (5) Demographic or census data;

- (6) Local agency data or records;
- (7) Police records and court records, including eviction data;
- (8) Survey data; and
- (9) Other relevant data.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 42 U.S.C. § ~~section~~ 3615; 24 C.F.R. § ~~sections~~ 100.500 et seq.; *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al.* (2015) 135 S.Ct. 2507; *DFEH v. Merribrook Apts.* (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99.

§ 11098.04.34. Legally Sufficient Justification.

(a) A ~~b~~Business ~~e~~Establishment ~~with whose 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 ~~b~~Business ~~e~~Establishment can establish that:

- (1) The ~~interest the~~ Practice is ~~intended~~designed to serve a substantial, legitimate, nondiscriminatory interest that is necessary to the operation of the business;
- (2) The Practice ~~is necessary to effectively carries~~ out the identified~~substantial, legitimate, nondiscriminatory~~ business interest ~~that it is alleged to serve~~; and
- (3) There is no feasible alternative ~~substantial, legitimate, nondiscriminatory business interest could not be served by another~~ Practice that would equally or better accomplish the identified business interest with has a less discriminatory effect.

(b) In cases that do not involve a ~~b~~Business ~~e~~Establishment, the Person ~~or Owner~~ whose Practice has a discriminatory effect shall not be considered to have committed an unlawful housing Practice in violation of the Act if the Person ~~or Owner~~ can establish that:

- (1) The ~~interest the~~ Practice is ~~designed to serve~~ is necessary to achieve a substantial, legitimate, nondiscriminatory purpose of the non-Business Establishment;
- (2) The Practice effectively carries out the identified purpose ~~is sufficiently compelling to override the discriminatory effect~~;
- (3) The identified purpose is sufficiently compelling to override the Practice ~~is necessary to effectively carry out the substantial, legitimate, nondiscriminatory effect~~ purpose that it is alleged to serve; and

(4) There is no feasible alternative Practice that would equally or better accomplish the identified purpose with substantial, legitimate, nondiscriminatory purpose could not be served by another Practice that has a less discriminatory effect.

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

(d) The determination of whether an interest or purpose is substantial, legitimate, and nondiscriminatory requires a case-specific, fact-based inquiry. There are no interests that are *per se* substantial, legitimate, and nondiscriminatory. ~~For purposes of this Article, the term “business establishment” shall have the same meaning as in section 51 of the Civil Code.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 24 C.F.R. § ~~sections~~ 100.500 et seq.; *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al.* (2015) 135 S.Ct. 2507; *Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467; *DFEH v. Merribrook Apts.* (Nov. 9, 1988) No. 88-19 FEHC Precedential Decs. 1988-99.

§ 11098.04.45. Relationship of Legally Sufficient Justification to Intentional Violations.

A demonstration that a Practice is supported by a legally sufficient justification, as defined in section 11098.04.34, may not be used as a defense against a claim of intentional ~~violations~~discrimination under section 12955.8(a) of the Act.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 24 C.F.R. § ~~sections~~ 100.500 et seq.; *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al.* (2015) 135 S.Ct. 2507; *Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467; *Johnson v. Macy* (C.D. Cal. Nov. 16, 2015) 145 F.Supp.3d 907; *Borja-Valdes v. City and Cnty. of San Francisco* (N.D. Cal. Sep. 18, 2015) 2015 WL 5522287; *Lowe v. City of Monrovia* (9th Cir. 1985) 775 F.2d 998.

§ 11098.04.56. Financial Assistance Practices with Discriminatory Effect

(a) Practices prohibited under this section in connection with loans and financial assistance include, but are not limited to, the following:

(1) Making available, or making unavailable, the provision of Financial Assistance that results in a discriminatory effect based on membership in a Protected Class;

(2) Establishing the terms or conditions of Financial Assistance in a manner that results in a discriminatory effect based on membership in a Protected Class;

(3) Failing or refusing to provide information regarding the availability of Financial Assistance, or failing or refusing to provide information regarding application requirements, procedures or standards for the review and approval of Financial

Assistance, or providing information which is inaccurate or different from that provided others, that results in a discriminatory effect based on membership in a Protected Class;

(4) Imposing different terms or conditions on the availability of Financial Assistance in a manner that results in a discriminatory effect based on membership in a Protected Class;

(5) Using Practices in evaluating or in determining creditworthiness of any Person in connection with the provision of Financial Assistance, in a manner that results in a discriminatory effect based on membership in a Protected Class;

(6) Determining the type of Financial Assistance to be provided or fixing the amount, interest rate, cost, duration, or other terms or conditions for Financial Assistance in a manner that result in a discriminatory effect based on membership in a Protected Class;

(7) Servicing of Financial Assistance, or providing such servicing with different terms or conditions, in a manner that results in a discriminatory effect based on membership in a Protected Class;

(8) Subjecting a Person to harassment in a manner that has the effect of imposing different terms or conditions for the availability of Financial Assistance that results in a discriminatory effect based on membership in a Protected Class; and

(9) Conditioning the availability of Financial Assistance, or the terms or conditions thereof, on a Person's response to harassment in a manner that results in a discriminatory effect based on membership in a Protected Class.

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

~~(a) Determining the type of loan or other financial assistance to be provided with respect to a Dwelling, or fixing the amount, interest rate, cost, duration, or other terms or conditions for a loan or other financial assistance for a Dwelling or which is secured by residential real estate that result in a discriminatory effect based on membership in a Protected Class; and~~

~~(b) Servicing of loans or other financial assistance with respect to Dwellings, servicing of loans or other financial assistance which is secured by residential real estate, or providing such loans or financial assistance with other terms or conditions that results in a discriminatory effect based on membership in a Protected Class.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 24 C.F.R. § sections 100.120 et seq.; 24 C.F.R. § sections 100.500 et seq.

§ 11098.04.67. Residential Real Estate-Related Practices with Discriminatory Effect

(a) Practices prohibited under this section in connection with a residential real estate-related transaction include, but are not limited to, the following:

(1) Making available, or making unavailable, a Residential Real Estate-related transaction in a manner that results in a discriminatory effect based on membership in a Protected Class;

(2) Establishing the terms or conditions of a Residential Real Estate-related transaction in a manner that results in a discriminatory effect based on membership in a Protected Class;

(3) Failing or refusing to provide information regarding a Residential Real Estate-related transaction or the availability of Financial Assistance in connection therewith, or failing or refusing to provide information regarding application requirements, procedures or standards for the review and approval of the Residential Real Estate-related transaction or Financial Assistance in connection therewith, or providing information which is inaccurate or different from that provided others, that results in a discriminatory effect based on membership in a Protected Class;

(4) Imposing different terms or conditions on the availability of a Residential Real Estate-related transaction in a manner that results in a discriminatory effect based on membership in a Protected Class;

(5) Using Practices in evaluating or in determining creditworthiness in connection a Residential Real Estate-related transaction in a manner that results in a discriminatory effect based on membership in a Protected Class;

(6) Determining the price or other terms or conditions in connection with a Residential Real Estate-related transaction in a manner that results in a discriminatory effect based on membership in a Protected Class;

(7) Providing, failing to provide, or discouraging the receipt of Financial Assistance in connection with a Residential Real Estate-related transaction~~s~~ in a manner that results in a discriminatory effect based on membership in a Protected Class;

(8) Subjecting a Person to harassment that affects a Residential Real Estate-related transaction, in a manner that results in a discriminatory effect based on membership in a Protected Class; and

(9) Conditioning the availability of a Residential Real Estate-related transaction, or the terms or conditions thereof, on a Person's response to harassment in a manner that results in a discriminatory effect based on membership in a Protected Class.

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

~~(a) Failing or refusing to provide to any individual information regarding the availability of loans or other financial assistance, application requirements, procedures or standards for the review and approval of loans or financial assistance, or providing information which is inaccurate or different from that provided others, that result in a discriminatory effect based on membership in a Protected Class; and~~

~~(b) Providing, failing to provide, or discouraging the receipt of loans or other financial assistance in a manner that discriminates in their cost, rate of denial, or terms and conditions, or otherwise discriminates in their availability, that result in a discriminatory effect based on membership in a Protected Class.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, and 12955.8, Government Code; 24 C.F.R. § sections 100.120 et seq.; 24 C.F.R. sections § 100.500 et seq.

Article 14. Discrimination in Land Use Practices

§ 11098.14.1. Definitions.

(a) “Public Land Use Practices” include all government ~~Practices~~regulation of land use in connection with Residential Real Estate or existing or proposed Dwellings~~housing~~, including, but not limited to:

(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 facilities or services;

(2) Other actions authorized under the California Planning and Zoning Law (Title 7 commencing with section 65000)), California Redevelopment Law (Health & Safety Code Sec.33320 et seq.), “Redevelopment Dissolution Law” (Division 24, Parts 1.8, 1.85 and 1.87), the Ellis Act (Gov’t Code §7060), the Mobilehome Residency Law (Civ. Code §798 et seq.), the Mobilehome Parks Act (Health and Safety Code §18200 et seq.), the California Relocation Assistance Act (Gov’t Code §7260 et seq.), the Surplus Lands Act (Gov’t Code §54220 et seq.), State Housing Law (Health and Safety Code §17910 et seq., Gov’t Code §65580, et seq.) and other federal and state laws regulating the development, transfer, disposition, demolition, and regulation of Residential Real Estate or existing or proposed Dwellings, and the provision of public facilities and services and other Practices that affect infrastructure, municipal services and community amenities in connection with Residential Real Estate and existing or proposed dwelling;

(3) All regulation that could affect the feasibility, affordability, or the condition of Residential Real Estate or existing or proposed Dwellings;

(4) Allocation or provision of municipal services in connection with Residential Real Estate or existing or proposed Dwellings, such as water, sewer, and emergency services, and other services;

(5) Permitting of facilities or services that affect Residential Real Estate or existing or proposed Dwellings;

(6) Adoption, modification or implementation of housing-related programs, which include but are not limited to 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 ~~for~~, or on behalf of, a governmental entity, directly or through contractual, licensing, or other arrangements; and

(7) Other Practices related to regulation of land use.

~~(1) Ordinances, resolutions, actions, policies, decisions, authorizations, denials, approvals, zoning, use permits, variances, and other actions authorized under the California Planning and Zoning Law (Title 7 (commencing with section 65000)), the California Redevelopment Law (Health & Safety Code Sec.33320 et seq.), and other federal and state laws regulating the development and transfer of property;~~

~~(2) Other Practices related to regulation of land use; and~~

~~(3) Adoption or implementation of housing programs.~~

(b) “Private Land Use Practices” include all non-governmental Practices in connection with development and land use related to Residential Real Estate and existing and proposed Dwellings, including, but not limited to: all private contractual regulation of property, including covenants, deed restrictions, and other constraints on transfer or use of property, whether or not recorded with a county.

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

(2) Regulations and rules governing use of property and its occupants;

(3) Provision or denial of services or facilities and land use that affect the use and enjoyment of Residential Real Estate and existing and proposed Dwellings;

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

(5) Other actions that make housing unavailable.

(c) The terms “Public Land Use Practices” and “Private Land Use Practices include a single action, multiple actions, and failure or failures to act.

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

§ 11098.14.2. Discrimination in Land Use Practices and Housing Programs Prohibited

(a) 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 pursuant to Article 4 on members of a Protected Class, including, but not limited to, a Practice that does any of the following in connection with Residential Real Estate or existing or proposed Dwellings:

(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;

(2) Makes housing opportunities unavailable or denies Dwellings to individuals or intended occupants of Dwellings;

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

(4) Provides different, limited, or no governmental infrastructure, facilities, or services, such as water, sewer, garbage collection, code enforcement, or other municipal services, in connection with 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, or otherwise makes unavailable such infrastructure, facilities or services;

(5) Denies, restricts, conditions, adversely impacts, or renders infeasible the use of privileges, services, or facilities associated with Residential Real Estate or existing or proposed Dwellings, or otherwise makes unavailable such privileges, services or facilities;

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

(8) 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 takes into consideration different criteria or uses different processes than those required for consideration as a reasonable accommodation;

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

(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 Residential Real Estate or existing or proposed Dwellings; or

(11) 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 Residential Real Estate 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.

(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. This is a case-specific analysis.

(c) Adoption, application or implementation of a facially neutral policy may violate the law if done in a manner that violates Government Code section 12955.8(a) and any implementing regulations by intentionally discriminating on the basis of membership in a Protected Class or in a manner that has a discriminatory effect based on membership in a Protected Class in violation of section 11098.04.2.

Except as specifically provided in other statutes regulating land use practices, housing, and housing programs, and where those statutes are not in violation of federal fair housing laws, it shall be unlawful for the State, a city, county, city and county, any other local government agency, or any other Person or Owner, to do any of the following:

(a) Enact or implement Public or Private Land Use Practices that 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;

(b) Deny, restrict, condition, or render infeasible the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to 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;

(c) Deny, condition, or make Public or Private Land Use decisions or authorizations, or impose different requirements than generally imposed, that restrict or deny housing opportunities or the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use, or that 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;

(d) Enact or implement Practices that provide different, limited, or no governmental services such as water, sewer, garbage collection, code enforcement, or other municipal services in connection with the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use or in connection with a Dwelling, or otherwise make unavailable such services, because of membership in a Protected Class or the intended occupancy of any Dwelling by individuals in a Protected Class;

(e) Limit the use of privileges, services, or facilities associated with a Dwelling, or otherwise making unavailable such privileges, services or facilities because of membership in a Protected Class or the intended occupancy of any Dwelling by individuals in a Protected Class;

(f) Use, approve of, or implement restrictive covenants 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;

(g) Enact, implement, or operate housing programs or Practices that restrict or deny the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to residential use, or in connection with a Dwelling 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;

(h) Refuse or fail to make reasonable accommodations in Public Land Use Practices, or ordinances, rules, policies, 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 a Dwelling, pursuant to section 11098.26, 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 accommodations, if the process takes into consideration different criteria or processes than those required for consideration as a reasonable accommodation; and~~

~~(i) Refuse or fail to make reasonable modifications in housing programs or Dwellings when such modifications are required by law.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, 12955.8, 12956.1, and 12956.2, Government Code; 24 C.F.R. § sections 100.70 et seq.; 24 C.F.R. § sections 100.500 et seq.; *Turning Point, Inc. v. City of Caldwell* (9th Cir. 1996) 74 F.3d 941; *Broadmoor San Clemente Homeowners v. Nelson* (1994) 25 Cal.App.4th 1; *Hall v. Butte Home Health* (1997) 60 Cal.App.4th 308.

§ 11098.14.3. Land Use Practices with Discriminatory Effect

Even if no discriminatory intent is shown, Practices prohibited under section 11098.14.2 shall be unlawful if they have a discriminatory effect on the basis of membership in a Protected Class unless a legally sufficient justification applies, pursuant to Article 4.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, 12955.8, 12956.1, and 12956.2, Government Code; 24 C.F.R. § sections 100.70 et seq.; 24 C.F.R. § sections 100.500 et seq.; *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc. et al.* (2015) 135 S.Ct. 2507; *Keith v. Volpe* (9th Cir. 1988) 858 F.2d 467.

§ 11098.14.4. Specific Practices Related to Land Use Practices

To the extent that Public or Private Land Use Practices identified in this section require conduct that violates other provisions of the Act and this subchapter, or otherwise restrict or deny residence, 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 have a discriminatory effect on the basis of membership in a Protected Class, they shall be unlawful unless a legally sufficient justification applies. Those Practices include, but are not limited to, actions to enact, modify, enforce, or implement:

(a) Practices requiring Persons to take actions against individuals based upon broad definitions of nuisance activities or unlawful conduct, or mandating initiation of eviction procedures against tenants or occupants;

(b) Practices requiring Persons to use specified Criminal History Records in their Business Enterprises, 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) Practices requiring Persons to take actions against individuals based upon their calls to emergency services or visits to the property by emergency services;

(d) 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) Practices that violate, or mandate that other Persons violate, Article 18.
~~It shall be an unlawful public land use practice to:~~

~~(a) Enact or enforce ordinances or practices requiring owners or persons to take actions against individuals based upon broad definitions of nuisance or unlawful conduct to the extent that such ordinances or practices 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 have a discriminatory effect on the basis of membership in a Protected Class, unless a legally sufficient justification applies, pursuant to Article 4.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, 12955.6, 12955.8, 12956.1, and 12956.2, Government Code; 24 C.F.R. §sections 100.70 et seq.; 24 C.F.R. §sections 100.500 et seq.

Article 18. Consideration of Criminal History Information in Housing

§ 11098.18.1. Definitions

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

(b) “Criminal Conviction” shall mean 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 11098.18.8.

(c) “Criminal History Information” refers to any federal, state or local public record, investigative consumer reports, and other compilations, reports, or other formats based on information in public records which include individual identifiers and describe an individual’s arrests and subsequent dispositions. For purposes of this Article, Persons shall only seek, consider and use information on criminal convictions in compliance with section 11098.18.8.

(d) “Directly Related Conviction” means the conduct underlying the Criminal Conviction has a direct and specific negative bearing on the identified interest supporting the Practice, in other words, that not taking adverse action against individuals with such convictions would pose a demonstrable risk to the achievement of the identified interest.

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

§ 11098.18.2. Prohibited Uses of Criminal History Information.

(a) Any Practice of a Person that includes seeking information about, consideration of, or use of Criminal History Information is unlawful if:

- (1) It has a discriminatory effect under section 11098.18.3;
- (2) It constitutes intentional discrimination under section 11098.18.6;
- (3) It constitutes a discriminatory statement under section 11098.18.7; or
- (4) It relates to information specifically prohibited under section 11098.18.8.

(b) Subject to the requirements in this Article, Persons who choose to seek, consider or use Criminal History Information for decisions or actions covered by the Act may either:

- (1) Establish a Practice that uses a “bright line” policy (that is, categorical exclusions that do not consider individualized circumstances);
- (2) Establish a Practice that conducts an individualized assessment of an individual’s circumstances; or
- (3) Establish a Practice that combines a “bright line” policy with an individualized assessment of an individual’s circumstances.

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

§ 11098.18.13. Discriminatory Effect of Criminal History Information.

~~Any Practice of a Person or Owner that includes the use of, inquiries about, or solicitation of information about criminal history~~seeking, considering, or using Criminal History Information is unlawful if it has a discriminatory effect under section 11098.18.4, unless a legally sufficient justification applies under Article 4 and Government Code section 11098.18.5~~2955.8.~~

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

§ 11098.18.2. Discriminatory Statements Regarding Criminal History

~~A notice, advertisement, application, or other written or oral statement regarding criminal history or criminal records that conflicts with the provisions in this Article and Article 4 shall be a violation of the Act.~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, and 12955.6, Government Code; 24 C.F.R. § 100.500 et seq.~~

§ 11098.18.34. Plaintiff's Burden of Proof in Discriminatory Effects Cases Related to Criminal History Information.

The burdens of proof in discriminatory effect cases under this Article shall be those set out in section 11098.04.3.

~~(a) Overbroad or arbitrary inquiries into or use of criminal history information in housing may have a discriminatory effect on members of Protected Classes. A discriminatory effect may be established through the use of conviction statistics or by any other evidence that establishes a discriminatory effect.~~

~~(b) State or national level statistics showing substantial disparities in the conviction records of individuals based on membership in a Protected Class are presumptively sufficient to establish a discriminatory effect of a Practice under Article 4, unless there is a reason to expect a markedly different result after accounting for any particularized circumstances such as the relevant geographic area for the applicant pool, the types of convictions being considered, or the particular type of housing or housing related service. Regardless of the data used, determining whether a Practice results in a discriminatory effect is ultimately a fact specific and case specific inquiry.~~

~~Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code; *Dothard v. Rawlinson* (1977) 433 U.S. 321; *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).~~

§ 11098.18.45. Establishing a Legally Sufficient Justification Relating to Criminal History Information

(a) Persons with a Practice of seeking, considering or using Criminal History Information that has a discriminatory effect on individuals in Protected Classes must establish that the Practice complies with this Article and meets all of the prongs of a legally sufficient justification under Article 4.

(b) Business Establishment: A Business Establishment whose Practice has a discriminatory effect shall not be considered to have committed an unlawful housing Practice in violation of the Act if the Business Establishment can establish that:

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

(2) The Practice effectively carries out the identified business interest. This prong requires that the Practice limit seeking, consideration and use of Criminal History Information to Directly Related Convictions. To demonstrate direct relatedness, a Practice may take into account the nature and severity of the Criminal Convictions and the amount of time that has passed since the criminal conduct occurred. For example, a recent Criminal Conviction for residential arson could be directly related to the risk that a person may injure other residents or property, while a ten-year old conviction for a non-alcohol related traffic offense would not likely be directly related to fulfilling financial obligations; and

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

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

(1) The Practice is necessary to achieve a substantial, legitimate, nondiscriminatory purpose of the non-Business Establishment;

(2) The Practice effectively carries out the identified purpose. This prong requires that the Practice limit seeking, consideration and use of Criminal History Information to Directly Related Convictions. To demonstrate direct relatedness a Practice may take into account the nature and severity of the Criminal Conviction and the amount of time that has passed since the criminal conduct occurred;

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

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

(d) Whether a Practice qualifies as a least discriminatory alternative is a fact-specific and case-specific inquiry and will depend on the particulars of the Criminal History Information Practice under challenge, provided that the implementation of the Practice does not otherwise violate this Article. The following factors may be taken into consideration when determining whether a less discriminatory alternative to the challenged Practice exists:

(1) The Practice includes the following two components:

(A) Provides the individual an opportunity to present individualized, mitigating information and evidence of rehabilitation either by providing space on the relevant form or by offering to meet with an individual upon request; and

(B) Before taking an Adverse Action, the Person considers the information to determine whether the Criminal History Information used was factually accurate and whether the individualized, mitigating information and evidence of rehabilitation shows that the individual is not likely to pose a demonstrable risk to the achievement of the identified interest. Such mitigating information and evidence of rehabilitation could include, but is not limited to:

1. Whether the individual was a juvenile or young adult at the time of the conduct upon which the conviction is based;
2. The amount of time that has passed since the conviction;
3. Evidence that the individual has maintained a good tenant history before and/or after the conviction;
4. Evidence of rehabilitation efforts, including, but not limited to, a person's satisfactory compliance with all terms and conditions of parole and/or probation; successful completion of parole, probation, mandatory supervision, or Post Release Community Supervision; a Certificate of Rehabilitation under Penal Code section 4852.01; or other conduct demonstrating rehabilitation, such as maintenance of steady employment; or
5. Other relevant facts or circumstances surrounding the criminal conduct and/or conduct after the conviction;

(2) The Practice delays seeking, considering, or using a third party report of Criminal History Information until after an individual's financial and other qualifications are verified;

(3) The Practice includes providing a copy or description of a Person's policy on the use of Criminal History Information to an individual upon request; or

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

~~(a) Persons or Owners with a Practice of soliciting, inquiring about, or using criminal history information that has a discriminatory effect on individuals in Protected Classes must be able to prove that the practice meets all of the prongs of a legally sufficient justification under Article 4 and in this section.~~

~~(b) In order to meet their burden of establishing a legally sufficient justification under Article 4 and this section, Persons or Owners must:~~

~~(1) Identify a specific substantial, legitimate, nondiscriminatory interest supporting the Practice, such as a risk to the safety of its residents, employees, or property;~~

~~(2) Take into account the nature and severity of an individual's conviction and the amount of time that has passed since the criminal conduct occurred;~~

~~(3) Limit consideration to convictions that are directly related to an individual's capacity and likelihood of fulfilling the obligations related to the housing or services. (For example, a recent conviction for arson or possession of illegal weapons could be directly related to tenancy obligations, while a conviction for illegal gambling or a non-alcohol related traffic offense would not likely be directly related to tenancy or a real estate loan or transaction); and~~

~~(4) Prove that its Practice actually achieves the identified interest, which includes proving that its Practice accurately distinguishes between criminal conduct that poses a demonstrable risk to its proffered interest and criminal conduct that does not.~~

~~(c) Whether a less discriminatory alternative is sufficient to defeat an allegation of a discriminatory effect will depend on the particulars of the criminal history information Practice under challenge, provided that the implementation of the Practice does not violate section 11098.18.5.~~

~~(1) A Practice that takes into account individualized, mitigating information and evidence of rehabilitation before making an adverse decision may constitute a less discriminatory alternative. Such mitigating information could include, but is not limited to:~~

~~(A) Facts or circumstances surrounding the criminal conduct;~~

~~(B) The age of the individual at the time of the conduct;~~

~~(C) The amount of time that has passed since the conviction;~~

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

~~(E) Evidence of rehabilitation efforts.~~

~~(2) Delaying obtaining or considering a third party report on criminal history until after an individual's financial and other qualifications are verified may constitute a less discriminatory alternative.~~

~~(3) If a Person or Owner has a policy on the use of criminal history in housing decisions, providing a copy or description of the policy to an individual upon request may constitute part of a less discriminatory alternative.~~

~~(4) If a Person or Owner's application form or other forms inquire about criminal history, including on the form space for an individual to explain or provide additional information about rehabilitation or other mitigating circumstances, or, alternatively, offering to meet with an individual upon request, may constitute a less discriminatory alternative.~~

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

§ 11098.18.56. ~~Intentional Violations Liability~~Discrimination and the Use of Criminal History Information

(a) ~~Inquiries or solicitation of information about, or use of criminal history information in housing Practices,~~ that seek, consider, or use Criminal History Information may be a discriminatory Practice if they violate Government Code section 12955.8(a) and any implementing regulations by intentionally discriminating on the basis of membership in a Protected Class is a motivating factor in the decision. This includes cases where selective use of the information is demonstrated to be a pretext for unequal treatment of individuals who are members of a Protected Class.

(1) For example, the fact that a defendant or respondent has acted upon Criminal History Information differently for a member of a Protected Class than the defendant or respondent has acted upon comparable information for another individual may demonstrate pretext is strong evidence that the defendant was not considering criminal history information uniformly.

(2) Pretext also may be shown where evidence establishes that the defendant or respondent did not actually know of the individual's eCriminal History Information record at the time of the alleged discrimination.

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

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code; *Allen v. Muriello* (7th Cir. 2000) 217 F. 3rd 517; *Johnson v. Macy* (C.D. Cal. Nov. 16, 2015) 145 F.Supp.3d 907.

§ 11098.18.7. Discriminatory Statements Regarding Criminal History Information.

(a) A Person's notice, advertisement, application, or other written or oral statement regarding Criminal History Information that violates Government Code section 12955(c) or its implementing regulations or which conflicts with the provisions in this Article and Article 4 shall be a violation of the Act.

(b) Advertising a lawful screening policy or providing individuals a copy of a lawful screening policy pursuant to section 11098.18.5(d)(3) is not unlawful. Offering an individual an opportunity to present individualized, mitigating information and evidence of rehabilitation pursuant to section 11098.18.5(d)(1) is not unlawful.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12926, 12927, 12955, and 12955.6, Government Code; 24 C.F.R. sections 100.500 *et seq.*

§ 11098.18.68. Specific Practices Related to Criminal History Information

(a) It is unlawful for a Person ~~or Owner~~ to:

(1) ~~Seek, consider, use, or take an Adverse Action based on Use, inquire, or solicit~~ information about any ~~charge, a Arrest, indictment, or detention by any law enforcement or military authority that did not result, or that has not yet resulted,~~ in a Criminal Conviction;

(2) ~~Use, inquire, or solicit~~ Seek, consider, use, or take an Adverse Action based on information about any referral to or participation in a pre-trial or post-trial diversion program or a deferred entry of judgement program; provided that if this information was provided by an individual for purposes of offering mitigating information or evidence of rehabilitation, a Person ~~or Owner~~ may consider and use such information;

(3) ~~Use, inquire, or solicit~~ Seek, consider, use, or take an Adverse Action based on information about any ~~e~~Criminal Conviction records that have been sealed ~~are dismissed, vacated, expunged, sealed, voided, invalidated, or closed~~ otherwise rendered inoperative by judicial action or by statute (for example, under California Penal Code sections 1203.1 or 1203.4); provided that if this information was provided by an individual for purposes of offering mitigating information or evidence of rehabilitation, a Person ~~or Owner~~ may consider and use such information.

(4) Seek, consider, use or take an Adverse Action based on any adjudication in the juvenile justice system, or information regarding a matter considered in or processed through the juvenile justice system; provided that if this information was provided by an individual for purposes of offering mitigating information or evidence of rehabilitation, a Person may consider and use such information; or

(45) Implement Use a “blanket ban prohibition” or categorical exclusion Practice that takes Adverse Action against that covers all individuals with any conviction record whatsoever, without distinguishing between criminal record regardless of whether the underlying conduct underlying a Criminal Conviction is directly related to a demonstrable risk to the identified that indicates a demonstrable risk to the proffered substantial, legitimate, nondiscriminatory interest or purpose. and criminal conduct that does not indicate such a demonstrable risk. Examples of such prohibited categorical exclusion Practices include, but are not limited to, bans against all individuals with a criminal record, bans against all individuals with prior convictions, bans against all individuals with prior misdemeanors, and bans against all individuals with prior felonies.

(b) There is a rebuttable presumption that a conviction that is seven or more years old ~~does is not~~ a indicate a demonstrable risk to the safety of residents, employees, or property. Directly Related Conviction. In other words, generally seven years is the longest relevant period of inquiry for considering and using Criminal History Information. Practices using shorter look-back periods may be less discriminatory alternatives.

(c) Persons ~~or Owners~~ who obtain investigative consumer reports or ~~e~~Criminal hHistory Information from third parties are also subject to the requirements of applicable federal and

state law regarding such reports, including the Fair Credit Reporting Act (15 U.S.C. ~~sections~~Seet. 1681 *et seq.*) and the California Consumer Credit Reporting Agencies Act, Cal. Civ. Code §§sections 1785.2 *et seq.*, including California Civil Code sections §§ 1785.10 *et seq.* (Consumer Credit Reporting Agencies) and specifically including §§sections 1787.20 *et seq.* and 1785.13, and sections §§ 1786.10 *et seq.*, (Investigative Consumer Reporting Agencies) specifically including §-sections 1786.18 and §-1786.50.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12927, 12955, and 12955.8, Government Code; *Green v. Missouri Pacific R.R.*, 523 F.2d 1290 (8th Cir. 1975).

§ 11098.18.79. Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History.

In some instances, Persons ~~or Owners~~ may also be subject to federal or state laws or regulations that require or prohibit consideration of certain ~~e~~Criminal H~~i~~History I~~n~~formation.

(a) Compliance by a Person ~~or Owner~~ with specific federal or state laws that apply to the particular transaction at issue and require consideration of ~~e~~Criminal H~~i~~History I~~n~~formation constitutes a rebuttable defense to a discriminatory effect claim under the Act, e.g. Ineligibility of Dangerous Sex Offenders for Admission to Public Housing (42 U.S.C. §section 13663(a)) and Ineligibility of Individuals Convicted for Manufacturing or Producing Methamphetamine on Premises of Federally Assisted Housing for Admission to Public Housing and Housing Choice Voucher Programs (24 CFR section 982.553).

(b) Failure of a Person ~~or Owner~~ to comply with specific federal or state laws that prohibit consideration of specific ~~C~~riminal H~~i~~istory I~~n~~formation, or require certain acts in regard to consideration of such history, and that apply to the transaction, shall constitute a violation of the Act.

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

§ 11098.18.810. Local Laws or Ordinances

In some instances, a Person ~~or Owners~~ may also be subject to local laws or ordinances that provide additional limitations on ~~the use of~~seeking, considering, or using ~~e~~Criminal H~~i~~istory I~~n~~formation. Nothing in this Article exempts Persons ~~or Owners~~ from compliance with those local laws or ordinances; if provided that such local laws or ordinances do not violate the Act or implementing regulations and those limitations are more protective of individuals in Protected Classes.

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