April 19, 2017

Submitted via FEHCouncil@dfeh.ca.gov
Fair Employment and Housing Council
c/o Brian Sperber, Legislative & Regulatory Counsel
Department of Fair Employment and Housing
320 West 4th Street, 10th Floor
Los Angeles, CA 90013

Re: Housing Regulations Regarding Harassment, Retaliation, and Select Disability Sections, Including Assistive Animals

Dear Fair Employment and Housing Councilmembers:

The following comments regarding the Fair Employment and Housing Council's (the Council's) proposed fair housing regulations are respectfully submitted on behalf of the undersigned attorneys and organizations. The undersigned organizations advocate for low-income tenants and homeowners throughout California and the country. We commend the Council's thoughtful approach toward these regulations, and appreciate the extensive revisions that the Council has made in response to prior comments. We look forward to working with the Council to ensure the adoption of effective fair housing regulations that provide clear guidance about existing protections from housing discrimination consistent with FEHA's recognition that the opportunity to seek, obtain, and hold housing without discrimination is a civil right.[1] We offer the following comments on the proposed modified regulations.

I. Article I General Matters

a. § 11098.3 Definitions

The proposed modifications in this section generally provide helpful clarification and the modified definitions correctly define "aggrieved person" and "dwelling" to be consistent with federal law. However several definitions would benefit from revised language in order to be consistent with the law.

b. § 11098.3(e): "Dwelling Unit"

Subsection (e) defines "dwelling unit" separately from "dwelling" and may cause some confusion as there are no separate obligations that arise from a party residing in a "dwelling unit" as opposed to a "housing accommodation" or "dwelling" as defined in subsection (f). We would therefore suggest defining "dwelling" to include "dwelling unit" instead of creating a separate

[1] Gov. Code §12921(b)

definition. This could be accomplished by adding the entire definition of "dwelling unit" as a subsection of § 11098.3(f). The definition of "Dwelling unit" in subsection (f)(1) should also be modified by striking through the word "migrant" so it refers to all farmworkers, not just migrant farmworkers.

c. § 11098.3(g)-(h): "Owner and "Person"

The definitions of Owner and Person as written omit a key category of entities that are subject to FEHA: Cities and other local government entities. We strongly recommend that the Council amend these definitions to include these entities in order to be consistent with federal and state law holding cities liable for fair housing violations.[2] Therefore we propose amending the definition of Owner as follows. (Throughout this letter suggested additions are underlined; suggested deletions are represented by strikethroughs):

> (g) "Owner" includes the lessee, sublessee, assignee, managing agent, real estate broker or salesperson, trustee, receiver, or any person having any legal or equitable right of ownership or possession or the right to rent or lease housing accommodations, ~~and includes~~ the state and any of its political subdivisions and any agency thereof, agencies and entities organized under state or federal law, and cities, counties (whether charter or not) and all political subdivisions and any agencies thereof. In common interest developments, "owner" also includes governing bodies of the common interest developments, and their agents and employees.

We also propose amending the definition of Person by adding the following language to § 11098.3(h)(5):

> (5) any entity that has the power to make housing unavailable or infeasible through its practices ~~actions or inactions,~~ including, but not limited to, government entities and agencies, insurance companies, real estate brokers and agents, and entities that provide funding for housing;

d. § 11098.3(i): "Practice"

A single act or failure to act may constitute a violation of FEHA,[3] thus we recommend adding the following language to the definition of "Practice":

> "Practice" includes an action or actions, a failure to act or failures to act, a rule or rules, a law or laws, a decision or decisions, a standard or standards, a policy, a procedure, and

[2] *Avenue 6E Investments, LLC v. City of Yuma, Ariz.* (9th Cir. 2016) 818 F.3d 493, *cert. denied* (2016) 137 S.Ct. 295 (City decision denying rezoning violated FHA); *Mhany Management, Inc. v. County of Nassau* (2d Cir. 2016) 819 F.3d 581 (Affirming summary judgment against City in part because City's decision to re-zone was based on racial prejudice of the public).

[3] *Avenue 6E Investments, LLC v. City of Yuma, Ariz., supra* at 504 (Single decision denying rezoning application constitutes discrimination under Fair Housing Act); *Salisbury v. Hickman* (E.D. Cal. 2013) 974 F.Supp.2d 1282, 1290 (finding that two isolated incidents of sexual harassment could create a hostile environment under the Fair Housing Act).

policies and procedures~~,~~ --whether written or unwritten~~,~~--and includes "practices" as used in 24 C.F.R. Part 100.

e. § 11098.4: Liability for Discriminatory Housing Practices

We appreciate the Council amending this section to more closely align with the federal regulation at 24 C.F.R. § 100.7. Importantly, the language in this regulation eliminated the reference to a failure to fulfill a *duty* to take prompt action to end discriminatory housing practices by a third party. In the preamble to HUD's regulation entitled "Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act," HUD notes[4]:

> The final rule does not use the term ''duty,'' and no longer identifies specific categories of potential sources for such a duty. A housing provider's obligation to take prompt action to correct and end a discriminatory housing practice by a third-party derives from the Fair Housing Act itself, and its liability for not correcting the discriminatory conduct of which it knew or should have known depends upon the extent of the housing provider's control or any other legal responsibility the provider may have with respect to the conduct of such third-party.[]

Proposed § 11098.4(a)(1)(C) includes the following language, "The power, control, responsibility or authority can be derived from an obligation to the aggrieved person created by contract, or lease, common interest development governing documents, or by federal, California, or local law." Including the language "can be derived from an obligation to the aggrieved person," could be mistakenly construed as requiring that a specific duty to the aggrieved person must be demonstrated, when, consistent with the law, and as HUD points out, the Fair Housing Act itself already imposes that obligation.

For clarity, we recommend amending the last sentence in § 11098.4(a)(1)(C) to state that:

> […]The power, control, responsibility, or authority can be ~~derived from an obligation to the aggrieved person~~ created by sources including, but not limited to, contract, or lease, common interest development governing documents, or by federal, California, or local laws, regulations, or policies.

f. § 11098.4(a)(2) – Unlawful Detainers

The Council's amendments to this section raise concerns because the current language is less protective than federal law[5] and inconsistent with state law authorizing DFEH to enforce FEHA

[4] 81 Fed. Reg. 63,054, 63,067 (Sept. 14, 2016) [hereinafter "Harassment and FHA Liability Rule"] (footnote omitted).
[5] *Auburn Woods I Homeowners Ass'n v. Fair Employment and Housing Com'n* (2004) 121 Cal.App.4th 1578, 1591 ("FHA provides a minimum level of protection that FEHA may exceed.")

by enjoining eviction proceedings. The Council's effort to address potential inconsistency by specifying that unlawful detainers may only proceed if they are unrelated to the discriminatory housing practice is insufficient because there is often disagreement between the parties about whether the eviction is related to the discriminatory practice. It is difficult if not impossible to address those complex factual issues in the context of a fast-moving unlawful detainer action in which discovery, defenses and affirmative claims are severely limited in time and scope.

While FEHA states that [n]othing herein is intended to cause or permit the delay of an unlawful detainer action,"[6] this language is inconsistent with federal law, which courts have interpreted to require stopping eviction proceedings where the tenant has a defense based on violation of fair housing laws.[7] This language also contradicts the specific authority granted to DFEH to obtain a temporary restraining order prohibiting the owner from proceeding with eviction.[8]

Accordingly, we offer the following proposed change to the language in § 11098.4(a)(2):

> For purposes of determining liability under this section, prompt action to correct and end the discriminatory housing practice may not include any action that penalizes or harms the aggrieved person, such as eviction of the aggrieved person. ~~Nothing herein is intended to cause or permit the delay of an unlawful detainer action otherwise authorized by law and unrelated to the discriminatory housing practice or opposition to the discriminatory housing practice. This also does not limit t~~The aggrieved person~~'s~~ maintains the right to raise the discriminatory housing practice as a defense to an unlawful detainer action.

Otherwise the first sentence in proposed § 11098.4(a)(2) closely tracks the language in HUD's regulation at 24 C.F.R. § 100.7(a)(2).[9]

II. Article 2: Harassment and Retaliation

a. § 11098.5: Harassment

We appreciate the Council's efforts to improve the language in this section, including language regarding the important distinction that the Title VII affirmative defense to employer vicarious liability for hostile environment harassment engaged in by a supervisor does not apply in the housing context.[10]

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[6] Gov. Code, § 12955

[7] *Rana v. Gu* (N.D. Cal., Nov. 14, 2016, No. C 16-05589 WHA) 2016 WL 6679779 (injunction prohibiting landlord from proceeding with eviction where tenants likely to prevail on familial status discrimination claims); *Johnson v. Macy* (C.D. Cal. 2015) 145 F.Supp.3d 907 (injunction prohibiting landlord from proceeding with eviction where tenant likely to prevail on FHA and FEHA disability discrimination claims)

[8] Gov. Code §12983

[9] HUD regulations at 24 C.F.R. § 100.7(a)(2) states, "For purposes of determining liability under paragraphs (a)(1)(ii) and (iii) of this section, prompt action to correct and end the discriminatory housing practice may not include any action that penalizes or harms the aggrieved person, such as eviction of the aggrieved person."

[10] See proposed § 11098.5(b).

For clarity, we recommend making the following edits to proposed § 11098.5(c)(15):

> (15) Conditioning ~~the~~ an aspect of a loan or other financial assistance to be provided ~~in~~ with respect to a dwelling, or the terms or conditions thereof, on an individual's response to harassment related to membership in a protected class.

These changes reflect language similar to that at 24 C.F.R. § 100.130(b)(4).[11]

b. § 11098.6: Retaliation

We support the Council's removal of references to "dominant purpose." Although the phrase "dominant purpose" appears in Gov. Code § 12955(f), the federal Fair Housing Act contains no such requirement.[12] While FEHA and its regulations can be more protective than the Fair Housing Act, they cannot impose a more demanding standard on plaintiffs than what is imposed by federal law.[13] Therefore it was correct for the Council to remove the dominant purpose language from the regulations.

c. § 11098.6(b) – Unlawful Detainers

As discussed above with regard to § 11098.4(a)(2), the Council should amend this language to make it consistent with more protective federal law and DFEH's specific authority to enjoin actions taken to evict the victim of a discriminatory housing practice. Accordingly, we offer the following amendment to the language in § 11098.6(b):

> Retaliation ~~may~~ ~~be~~ is a defense to an unlawful detainer action. ~~Nothing herein is intended to cause or permit the delay of an unlawful detainer action otherwise authorized by law and unrelated to the discriminatory housing practice or opposition to the discriminatory housing practice.~~ ~~This also does not .~~These regulations shall not be construed to limit the

[11] Section 100.130(b)(4) states, "Conditioning an aspect of a loan or other financial assistance to be provided with respect to a dwelling, or the terms or conditions thereof, on a person's response to harassment because of race, color, religion, sex, handicap, familial status, or national origin."

[12] *See e.g., Walker v. City of Lakewood*, 272 F.3d 1114, 1128 (9th Cir. 2001) ("As with any retaliation claim, we apply the familiar burden-shifting analysis established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). To establish a prima facie case of retaliation, a plaintiff must show that (1) he engaged in a protected activity; (2) the defendant subjected him to an adverse action [of intimidation, threats, interference, or coercion]; and (3) a causal link exists between the protected activity and the adverse action. *See Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir.1994). If a plaintiff has presented a prima facie retaliation claim, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for its decision. *Id*. at 1464–65. If the defendant articulates such a reason, the plaintiff bears the ultimate burden of demonstrating that the reason was merely a pretext for a discriminatory motive.")

[13] FEHA states, "Nothing in this part shall be construed to afford to the classes protected under this part, fewer rights or remedies than the federal Fair Housing Amendments Act of 1988 (P.L. 100-430)[] and its implementing regulations (24 C.F.R. 100.1 et seq.), or state law relating to fair employment and housing as it existed prior to the effective date of this section…This part may be construed to afford greater rights and remedies to an aggrieved person than those afforded by federal law and other state laws." Cal. Gov. Code § 12955.6 (internal footnote omitted).

aggrieved person's right to raise the discriminatory housing practice as a defense to an unlawful detainer action.

III. Article 4. Disability

a. § 11098.26 –Reasonable Accommodations

i. § 11098.26(a)

We support the inclusion of proposed § 11098.26(a)(1), which provides useful illustrations of reasonable accommodations necessary to afford tenants with the equal opportunity to use and enjoy their dwelling, and that do not constitute an undue burden nor fundamental alteration. For the sake of completeness, we recommend that proposed § 11098.26(a)(1) also include reference to reasonable accommodations required when a housing provider's action or inaction with respect to maintenance or repairs prevents tenants from equal use and enjoyment of their dwelling. For example, a housing provider should have a heightened duty to accommodate tenants with mobility disabilities that are affected by a malfunctioning elevator. We therefore propose adding the following example as (a)(1)(G):

> *(G) Teresa lives in a second floor apartment in a building with an elevator. Last month her leg was amputated and she now requires a wheelchair. The elevator in the building is broken, and Teresa cannot leave her home unless someone carries her down the stairs. She requests that the property management expedite repairs to the elevator and offer her the first available ground floor unit. The housing provider should grant her request because there is a nexus between Teresa's disability and her request. The request would not create an undue burden on the housing provider.*

ii. § 11098.26(d) Timeliness of reasonable accommodation requests

We propose adding a new section (d)(1) to § 11098.26 to clarify that an owner or person is obligated to engage in the interactive process and must consider a reasonable accommodation request at all times until a person with a disability is physically evicted from her home. As the court in *Douglas v. Kriegsfeld Corp*. explained, a "reasonable accommodation" defense is available at any time before the individual is evicted.[14] The court further recognized that under federal case law interpreting the Fair Housing Act, a discriminatory denial can occur at any time during the entire period before a tenant is "actually evicted;" and actionable discrimination is not limited to the shorter cure period specified in an eviction notice, or to any other period short of the eviction itself. This is also the position of HUD and the Department of Justice who have explicitly stated that the Fair Housing Act does not require that a request be made in "a particular manner or at a particular time."[15]

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[14] *Douglas v. Kriegsfeld*, 884 A.2d 1109, 1121 (D.C. COA 2005); *Boston Housing Authority v. Bridgewaters*,452 Mass. 833 (2009) (A reasonable accommodation request made to the judge at trial was considered timely)

[15] Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations under the Fair Housing Act (May 14, 2004) ("Joint Statement on Reasonable Accommodations"), available at: https://www.hud.gov/offices/fheo/library/huddojstatement.pdf

This clarification is necessary because in unlawful detainer cases, housing providers often refuse to grant, let alone consider, an accommodation request after a notice of eviction is served or an unlawful detainer case has been filed. Therefore, we propose adding a new section (d)(1):

> *"(d)(1) A request for a reasonable accommodation will be considered timely if it is made before the requesting party is physically evicted from the property, and may be timely in certain circumstances when made after eviction."*
>
> *(A) For Example:*
>
> 1. *Rowan is a person with a disability who receives Social Security Disability benefits on the sixth day of each month. He is served a three-day notice to pay rent or quit on the second day of the month, but is unable to pay until after the notice expires. As a result, the owner of Rowan's apartment files an unlawful detainer. At the trial, Rowan explains to the judge that he is unable to pay his rent until the sixth because that is when he receives his disability benefits. This is a timely request for a reasonable accommodation. The accommodation should be granted as it does not constitute an undue financial or administrative burden as defined in Section 11093.28."*

iii. Failure to reasonably accommodate as an eviction defense

We also propose adding a new section (g) to § 11098.26 to reinforce a tenant's right to challenge an eviction on the grounds of a landlord's refusal to grant a reasonable accommodation. It is clearly established that courts must consider affirmative defenses under the Fair Housing Act as part and parcel of the eviction proceeding itself.[16] Accordingly, the Judicial Council Answer form for unlawful detainers lists a fair housing violation as an affirmative defense to an eviction.[17] Despite this clear authority, there is often a lack of awareness that refusal to reasonably accommodate is a defense to an unlawful detainer. Thus, it is necessary that the regulations clarify that the refusal to grant an accommodation is discrimination and a defense to an unlawful detainer.

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[16] See 42 U.S.C. § 3604(f)(3)(B); *Abstract Inv. Co. v. Hutchinson*, 204 Cal.App.2d 242, 248 (1962); Joint Statement of the Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations under the Fair Housing Act (May 14, 2004) ("Joint Statement on Reasonable Accommodations"), available at: https://www.hud.gov/offices/fheo/library/huddojstatement.pdf; *Bhogaita v. Altamonte Heights Condominium Ass'n*, Inc.765 F.3d 1277 (2014) (Housing provider's "failure to make a timely determination after meaningful review amounts to constructive denial of a requested accommodation, as an indeterminate delay has the same effect as an outright denial, for purposes of a failure-to-accommodate claim under the Fair Housing Act (FHA).")

[17] See California Court Form UD-105 § 3.f. "By serving the Defendant with the notice to quit or by filing the complaint, Plaintiff is arbitrarily discriminating against the Defendant in violation of the Constitution or the laws of the United States or California."

We therefore propose adding a new section (g):

> *"(g) Failure to provide a reasonable accommodation for a disability is a defense to an unlawful detainer action."*

b. § 11098.28: Denial of Reasonable Accommodation

Proposed § 11098.28(b) provides various factors to consider in determining whether an accommodation poses an undue financial or administrative burden. Modified § 11098.28(b) correctly explains that the cost of the requested accommodation and the financial resources of the person asked to grant the accommodation should be considered. For the sake of completeness, we recommend that proposed § 11098.28(b) also explain how the factor test is applied where a housing provider's action or inaction with respect to maintenance or repairs prevents tenants from equal use and enjoyment of their dwelling. The undue financial or administrative burden test as written ought to be applied differently where a reasonable accommodation is necessary due to the housing provider's refusal to provide maintenance or repairs to members of protected classes.[18] We therefore propose adding subsection 11098.28(b)(6) stating:

> (6) a Person or Owner may not cite cost as a reason to refuse a reasonable accommodation where the need for accommodation arises from the housing provider's failure to maintain or repair the property.

c. § 11098.29: The Interactive Process

We support the inclusion of proposed § 11098.29(b), which discusses the need for additional information regarding a requested accommodation. However, the language should be revised to clarify that the interactive process requires that a person or owner considering an accommodation request seek additional information *before* denying a reasonable accommodation request based insufficient information. [19]

We therefore propose modifying the language of 11098.29(b) as follows:

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

[18] *Martinez v. Optimus Properties, LLC* (C.D. Cal., Mar. 14, 2017, No. 216CV08598SVWMRW) 2017 WL 1040743, at *3 (Dismissing property owner's arguments that they failed to repair the units of tenants with disabilities and other members of protected classes because of cost).
[19] *Auburn Woods I Homeowners Association v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1598-99.

> clarification or additional information and providing a reasonable opportunity for the individual requesting the accommodation to provide it.

This change is necessary to ensure that housing providers do not attempt to avoid the obligation to engage in the interactive process by citing a lack of information regarding the disability. For these reasons, we would strongly encourage the Council to adopt the modified language.

IV. Conclusion

We appreciate the thoughtful process the Council has already engaged in with the proposed regulations, as well as the opportunity for public input throughout this process. Should you have any questions about these comments, please contact Madeline Howard at (mhoward@wclp.org). We look forward to working with the Department of Fair Employment and Housing to ensure that no Californian is denied access to housing due to discriminatory housing practices.

Sincerely,

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