CALIFORNIA LEGISLATIVE ACTION COMMITTEE
community ASSOCIATIONS INSTITUTE

Fair Employment and Housing Council

c/o Brian Sperber

July 9, 2018

Dear Council:

We are very appreciative of the work of the Council in trying to provide Fair Housing regulations in California. We also recognize that the Council is working within the context of HUD regulations which were adopted in October 2016.

Our organization works on behalf of the millions of Californians who own residences in common interest developments. They are quite different than other housing providers. In a common interest development, the residents are most often also owners. Instead of a landlord, the CID association has a board of directors. Thousands of CIDs are too small to use a professional manager, much less legal counsel, and so they struggle along to do the best they can to comply with the law, or they just ignore it altogether. Large associations have been likened by some Legislators to a municipality, but that comparison fails on most counts because associations are created by covenants. For the most part common interest development associations have no staff or employees, and quite rightly do not have the powers a municipality has.

It is in this context we bring our comments. We applaud the cause of the DFEH and the Council, and our organization is known for frequently educating managers and volunteer boards regarding Fair Housing compliance. The advent of regulations to guide property owners in California can be a true blessing, as for many years attorneys have had to rely on anecdotal information for the most part in applying and interpreting the Fair Housing laws in California.

Section 12005 – Definitions

12005(q)(2) – replace “community associations, condominiums, townhomes, planned developments, community apartments and other common interest developments” with “common interest developments.” Community associations include voluntary neighborhood associations, and townhouse is an architectural term, not a real estate term. Neither is included in the definition of “common interest development” in the Davis-Stirling Common Interest Development Act, so both those terms should be removed.

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12005(v)(1) – “Owner” should not include managing agents, at least not in the common interest development context. Managers carry out the instructions of the board of directors, and should not be confused with persons having ownership or control.

12005(w)(5) – “Person” should be revised at sub (5), to read “Common interest developments as defined in Civil Code Section 4100.”

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

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

12176 – Reasonable Accommodations

12176(c)(7) – This new section, allowing a resident to request financial accommodation, is disconnected from the disability, but would require the housing provider to make financial concessions which allegedly are necessitated because of the disability. We have twice this year seen residents ask the association board to delay or otherwise forbear on a member’s delinquent assessments, on the claim that the homeowner’s health problems created a financial hardship – the most recent such claim involved a landlord owner, who claimed they were due to illness unable to pay their assessments on the rented residence on time. While we absolutely are committed to the important public policy of accommodating physical disabilities, broadening the issue from physical accommodations to financial accommodations will harm associations. Accommodating a disability should not relieve the homeowner from paying their share of the association expenses, as to do so would actually harm all other assessment-paying residents.

12178 - Establishing That a Requested Accommodation is Necessary

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

12178(g) describes the persons who can document a disability and need for accommodation. Subparts 1 and 2 should designate a medical professional or health care provider practicing in the area of the disability alleged. Otherwise, if a resident has a friend who is an anesthesiologist, would that friend be able to write a letter regarding the resident's allergies, or need for a support animal?

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

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

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

12179 – Denial of Accommodation

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

12185 - Assistance Animals

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

OTHER CRITICAL ISSUES NOT ADDRESSED IN DRAFT REGULATIONS

There are some other very important issues which we urge the Council to add to the draft regulations.

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

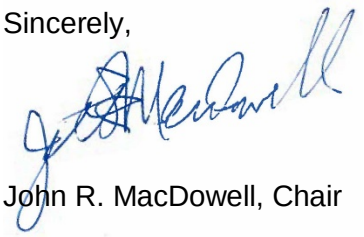
If the accommodation involves physical alteration of the housing project, must the alteration be restored after the disabled resident leaves the housing project? The DOJ/HUD interpretive guide states that if the alteration is structural, it need not be restored. While not explicitly so stating in the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

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

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

We thank the Council for considering these remarks.

Sincerely,



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