



FEHA FAIR HOUSING REGULATIONS

Webinar 4: Land Use Discrimination
Article 15, 2 C.C.R. Sections 12161-12162

May 13, 2020



WELCOME & INTRODUCTIONS





GENERAL ISSUES

Send questions to: Shalineehunter@dfeh.ca.gov

For MCLE credit: Send name, bar number, address, and phone number to

DFEHMCLEProvider@dfeh.ca.gov

Regulations are on DFEH website:

<https://www.dfeh.ca.gov/legal-records-and-reports/laws-and-regulations/>

Citation example: 2 C.C.R. section 12005 (2020)





WHAT WE WILL COVER:

1. Fair Housing recap
2. Scope of regulations
3. History of fair housing and land use
4. Brief review of disparate impact
5. Land use definitions
6. Specific land use practices prohibited
7. Resources





POLL (1 OF 2)

How much experience do you have with fair housing?

- A. Expert
- B. Some knowledge
- C. New to Fair Housing





POLL (2 OF 2)

Which of the following describes you/your interest in this presentation?

- A. State government
- B. Local government
- C. Tenant lawyer/advocate;
- D. Landlord lawyer/advocate;
- E. Tenant;
- F. Landlord;
- G. Fair Housing Counselor;
- H. Condo Owner/Attorney;
- I. Other.





SCOPE OF REGULATIONS

To whom do these regulations apply?

Almost everyone!

How do these regulations relate to federal anti-discrimination laws?

Largely the same, but California's are more protective in some areas





The Department of Fair
Employment and Housing is
California's Civil Rights Agency





CIVIL RIGHTS LAWS ENFORCED BY DFEH

Fair Employment and Housing Act

- Government Code §§ 12940-12951, 12955-12956.2 protect individuals from housing and employment discrimination and harassment on the basis of protected characteristics.





HOUSING PROTECTED BASES (1 OF 2)

- Race (hair texture and style, effective 1/1/20)
- Color
- Ancestry
- Religion
- Sex
- Gender
- Sexual Harassment
- Sexual Orientation
- Gender Identity
- Gender Expression
- National Origin
- Source of Income (amended)
- Marital Status





HOUSING PROTECTED BASES (2 OF 2)

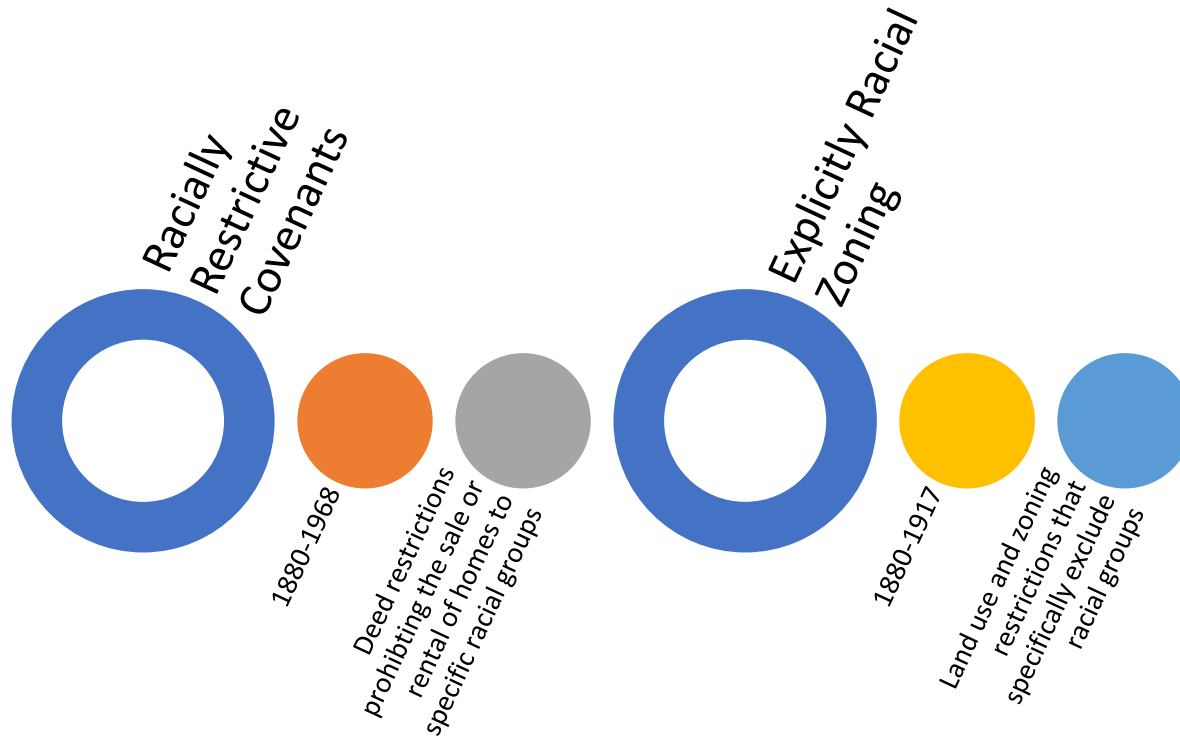
- Familial Status (children under the age of 18, pregnant, or becoming a legal custodian)
- Disability (mental and/or physical)
- Medical Condition
- Military or Veteran (new)
- Genetic Information
- Primary Language*
- Immigration Status*
- Age*
- Citizenship*

*Covered under the Unruh Civil Rights Act, which applies to most housing accommodations in California



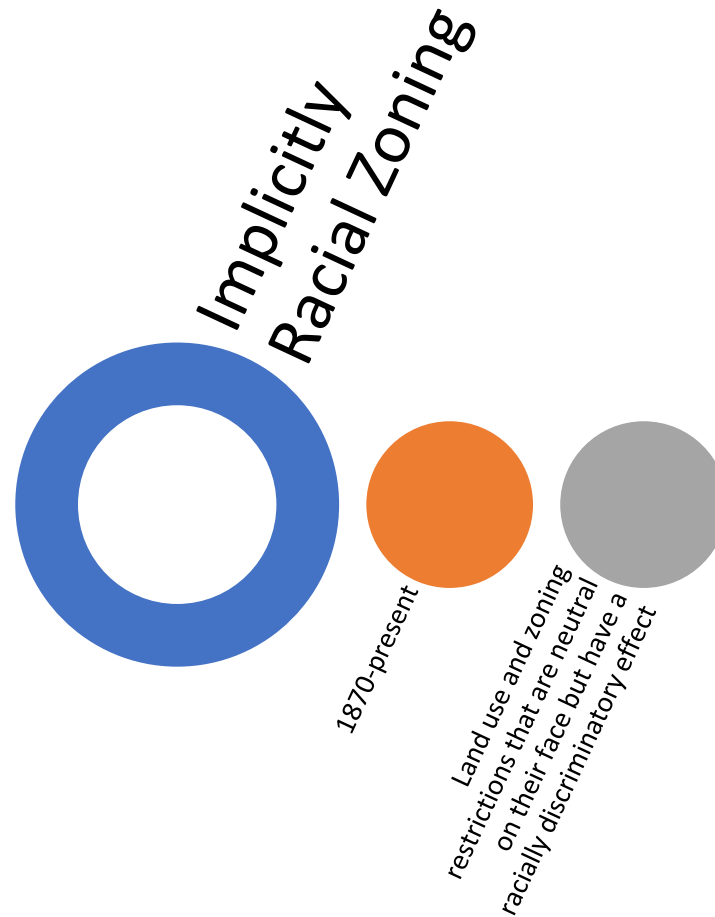


HISTORY OF LAND USE & FAIR HOUSING (1 OF 2)





HISTORY OF LAND USE & FAIR HOUSING (2 OF 2)





RESTRICTIVE COVENANTS: 1880-1968

- Common in Cal.
- Endorsed by federal government and real estate industry and in some cases lenders
- Struck down by Supreme Court in *Shelley v. Kraemer* in 1948

Why is EVERYONE talking
Eagle Rock

—and they're not only talking "Eagle Rock"—but they're buying Eagle Rock—and building Eagle Rock! Real Estate and construction activity in this Community is now leading Southern California! Eagle Rock has had a steady and rapid growth without any explanation—and this promises a fine foundation for a very remarkable development during the next few years! *EVERYONE* is talking Eagle Rock—

—because:

The advantageous location of Eagle Rock is unexcelled! (Note Map) Eagle Rock is a corporate part of the great city of Los Angeles! Our hills and dales provide the most favored of "view" homesites! Eagle Rock is 400 feet higher than 7th and Broadway! (Out of Fog!) Favorable Restrictions help create a community of beautiful Homes! The Residents of Eagle Rock are all of the White or Caucasian race! With prices now *LOW*, property values promise substantial increase!

If space permitted, we could give you reasons also, some why Eagle Rock is the most favored residential community in the Southwest! It will be very much worth your while to learn these reasons—either by a personal visit—or through letters which we will be glad to send upon request. INVESTIGATE! EAGLE ROCK, 1937!

for further particulars write
The Greater Eagle Rock Club
Eagle Rock (Los Angeles) California

800 Drive is unobscured for Beauty! Follow it next time you go through Eagle Rock. For a window view, enter over 800 Drive soon arriving!





RACIALLY EXPLICIT ZONING: 1880-1917

- Cities created separate zoning areas for whites and non-whites
- Practice ruled unlawful by the Supreme Court in *Buchanan v. Warley* in 1917

RACE SEGREGATION LAW IS ATTACKED

Louisville Case Argued in
Supreme Court; Other
Cities Affected.

WASHINGTON, April 14.—Constitutionality of race segregation ordinances was argued Monday before the supreme court in a case investigating the validity of the Louisville, Ky., regulation, mak-

ing it unlawful for any negro to occupy a residence in any block in which a greater number of houses are occupied by white folk and unlawful for a white person to occupy a residence in a negro block. The decision is expected to affect all cities having similar ordinances.

Pointing out that segregation ordinances now are in force in Baltimore, Richmond, St. Louis, and many other cities and towns, counsel emphasized that a decision would have a sweeping effect, especially throughout the south. Pennington Hedley, Louisville city attorney, and Stuart Chandler of Louisville, defending the validity of the ordinance argued that its object was reciprocal and would tend to preserve race integrity and to avoid race conflict.

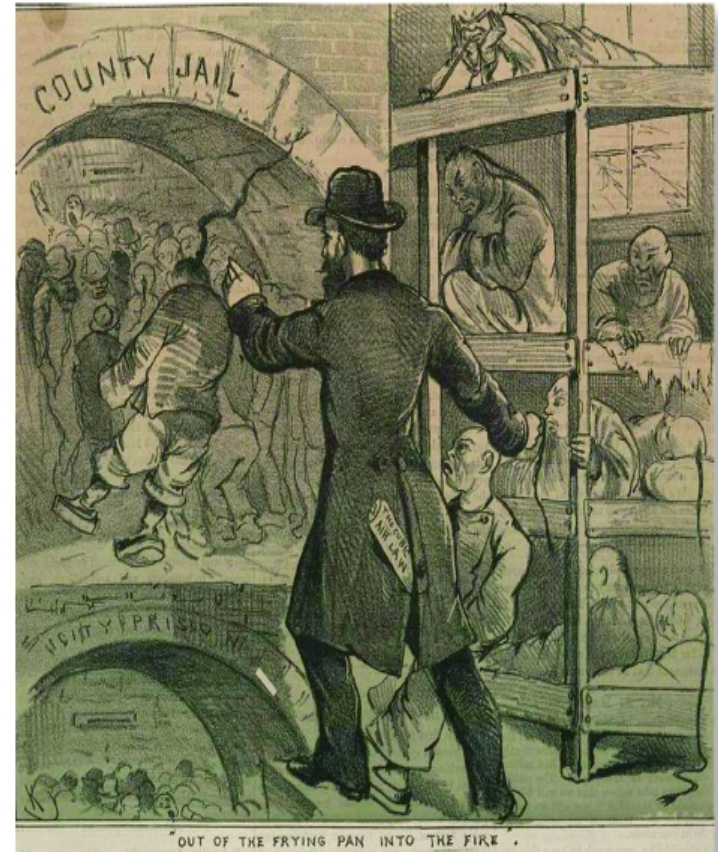
Clyton B. Haskay of Louisville and Charlesfield Stacy of Boston contended that it violated the rights of negroes, being as a predominant purpose to prevent them from approaching a condition of social equality.





IMPLICITLY RACIAL EXCLUSIONARY ZONING: 1890-PRESENT

- Municipalities found other ways to segregate using land use and zoning laws



OUT OF THE FRYING PAN INTO THE FIRE .



BRIEF REVIEW OF DISPARATE IMPACT (1 OF 3)

Article 7, § 12060, et seq.

- Burden-shifting test
- Different standard than current federal regulations
- Includes both disparate impact and perpetuation of segregation
- Complainant/Plaintiff must show that the practice being challenged has a discriminatory effect or perpetuates segregation





BRIEF REVIEW OF DISPARATE IMPACT (2 OF 3)

- Burden shifts to Respondent/Defendant to show legally sufficient justification
- Respondent/Defendant has burden show no less discriminatory alternative (“feasible alternative practice”)
- Examples of types of evidence that can be used (e.g., national, state, or local statistics; tenant files/data)





BRIEF REVIEW OF DISPARATE IMPACT (3 OF 3)

Examples:

- Zoning ordinance restricting affordable multi-family housing to a narrow urban renewal area and refusal to rezone a parcel outside this area for affordable housing
- Zoning ordinance prohibiting multifamily housing adopted after developer sought to build affordable apartment building
- Post-Hurricane Katrina ordinance restricting the rental of housing units to only blood relatives in an area of the city that was 88.3% white





LAND USE: DEFINITIONS (1 OF 5)

- Housing accommodation or dwelling:
 - One or more dwelling units
 - *Any* building, structure, or portion thereof used or intended as a home, residence, or sleeping place and their common areas.
- Practice: an action, failure to act, rule, law, ordinance, regulation, decision, standard, policy, procedure, and common interest development, whether written or unwritten or singular or multiple.





LAND USE: DEFINITIONS (2 OF 5)

- Which of the following are housing accommodations or dwellings?
 - backyard shed occupied by a farmworker.
 - tents used for residence and shelter on public grounds
 - a courtyard in an apartment complex





LAND USE: DEFINITIONS (3 OF 5)

- **Housing opportunity:** the opportunity to obtain, use or enjoy a dwelling, a real estate-related transaction, financial assistance, land use practices, or other housing related privileges, services and facilities.

Examples:

- single family & multi-family residential zoning
- garbage service provision
- Residential mortgage credit terms





LAND USE: DEFINITIONS (4 OF 5)

- **Private land use practices:** *all* non-governmental practices in connection with development and land use that are related to or have an effect on existing or proposed dwellings or housing opportunities, including:
 - Rehabilitation, demolition, development
 - Regulations, rules regarding use or occupant characteristics
 - Infrastructure, services, facilities
 - Covenants & deed restrictions





LAND USE: DEFINITIONS (5 OF 5)

- **Public land use practices:** *all practices* by governmental entities in connection with development and land use that are related to or have an effect on existing or proposed dwellings or housing opportunities, including:
 - ordinances, resolutions, actions, policies
 - Actions authorized under land use & housing laws
 - Provision or denial of infrastructure, services, facilities
 - Housing-related programs





§12161 (B) DISCRIMINATION IN LAND USE

Any public or private land use practice that:

- a) Intentionally discriminates
- b) Has a discriminatory effect, *unless* there is a legally sufficient justification.

Includes:

- 12 categories of impacts “in connection with housing opportunities or existing or proposed dwellings”
- Acquiescence to bias, prejudices, or stereotypes of the public
- Facially neutral discriminatory practices





§12161 UNLAWFUL PRACTICES (1 OF 7)

1) Denies, restricts, conditions, adversely impacts, renders infeasible the enjoyment of residence, land ownership, tenancy, or any other land use benefit related to housing opportunity.

2) Makes housing opportunities unavailable or denies dwellings to intended occupants

3) Imposes different requirements than generally imposed or fails to enforce generally imposed requirements





§12161 UNLAWFUL PRACTICES (2 OF 7)

Example:

A city ordinance prohibits land use activity that results in odor emissions which impact other properties. A meat rendering plant located in a neighborhood disproportionately comprised of people of color and immigrants generates foul odors which pervade the community's homes. The city refuses to enforce its zoning ordinance to curb the emissions. Violation?

- 1) Yes, probably.
- 2) Maybe.
- 3) No.





§12161 UNLAWFUL PRACTICES (3 OF 7)

4) Provides inadequate, inferior, limited, or no governmental infrastructure, facilities, or services, such as water, sewer, garbage collection, code enforcement

5) Denies, restricts, conditions, adversely impacts, or renders infeasible the use of privileges, services, or facilities

6) Uses, approves of, or implements restrictive covenants





§12161 UNLAWFUL PRACTICES (4 OF 7)

Example:

After some residents complain of excessive noise, an apartment complex prohibits the use of common area green space by children under age 18. Violation?

- 1) Yes, probably.
- 2) Maybe.
- 3) No.





§12161 UNLAWFUL PRACTICES (5 OF 7)

7) Denies, restricts, adversely impacts the enjoyment of residence, land ownership, or tenancy in the adoption or implementation of housing-related programs, policies, and plans;

8) Refuses or fails to make reasonable accommodations, including charging a fee or requiring land use permits;

9) Refuses or fails to make reasonable modifications when required by law;





§12161 UNLAWFUL PRACTICES (6 OF 7)

Example:

A county's general plan includes a policy to withhold infrastructure and services, including water and wastewater service, to historic farmworker communities which the general plan deems "non-viable." These communities are disproportionately comprised of Black and Latino residents, immigrants, and people who speak a language other than English. Violation?

- 1) Yes, probably.
- 2) Maybe.
- 3) No.





§12161 UNLAWFUL PRACTICES (7 OF 7)

10) Results in the location of toxic, polluting, or hazardous land uses in a manner that adversely impacts housing opportunities.

11) Adversely impacts housing opportunities based on an individual's ability to speak, read, or understand English.

12) Creates, reinforces, or perpetuates segregated housing patterns, regardless of whether it produces a disparate impact.





§ 12162 SPECIFIC PRACTICES PROHIBITED

Any land use practice that violates another part of FEHA *plus*:

- a) discriminatory nuisance ordinances
- b) overbroad criminal records policies
- c) anti-immigrant policies

Exemption for non discriminatory enforcement of state and local public nuisance laws, provided that they do not conflict with FEHA.





§ 12162(A) NUISANCE POLICIES

- a) Prohibits practices that require eviction or other adverse actions against tenants and guests based on:
 - i) calls to law enforcement/emergency
 - ii) visits by law enforcement/emergency
 - iii) broad definitions of unlawful conduct
 - iv) broad definitions of criminal activity





EXAMPLE 1

City has an ordinance which requires owners of rental property to evict tenants who cause a nuisance. Nuisance is defined to include “the frequent response by the Police Department to the real property or the adjacent area.”

Is this a FEHA violation?

- 1) Yes, probably.
- 2) Maybe.
- 3) No.





EXAMPLE 2

Why are overbroad nuisance ordinances prohibited?

Consider who is impacted:

- Domestic violence survivors
- People with disabilities
- Over-policing of certain populations





EXAMPLE 3

Landlord has a policy of giving a three day notice to tenants who are visited by police, fire department, or ambulance more than twice in one month.

Any FEHA violation?

- 1) Yes, probably
- 2) No, this is not a nuisance ordinance.





CRIMINAL RECORDS POLICIES

12162(B) (1 OF 2)

b) Prohibits practices that violate or require others to violate Article 24 of the regulations, relating to criminal records.

Among other things Article 24 prohibits:

- “blanket bans” and consideration of arrests, juvenile records, sealed records, diversion programs and similar records

May not require eviction or other adverse actions against tenants based on these discriminatory policies.





CRIMINAL RECORDS POLICIES

12162(B) (2 OF 2)

May not require eviction or other adverse actions against tenants or others in relation to housing opportunities based on specified criminal convictions.





CRIMINAL RECORDS: EXAMPLE

City has a below market rent housing program for low income residents. The admissions policy calls for zero tolerance on criminal records; anyone with a criminal record from the last 7 years will not be admitted.

FEHA violation?

- a) no, recent criminal records may be considered
- b) yes, this is a blanket ban
- c) yes, this appears to consider arrests and other records that should be excluded
- d) Yes, for reasons stated in (b) and (c)





12162(C) IMMIGRATION POLICIES

Prohibits policies that require adverse actions based on immigration status or legal residency

Exempts activities required by federal law or court order.





IMMIGRATION: EXAMPLE

Waples Inc. acquires a rental property and institutes a policy requiring all tenants to provide proof of lawful immigration status. Tenants who do not comply receive 3 day notices to cure or quit. Any FEHA violation here?

- a) Yes.
- b) No, undocumented tenants are not protected by FEHA.
- c) No, as long as the landlord applies the policy equally to tenants of all races.





QUESTIONS?





DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

THANK YOU!

Branden Butler

Branden.Butler@dfeh.ca.gov

