A Comprehensive Update on the Evolving Landscape of Tenant Protections

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COMPREHENSIVE UPDATE ON THE EVOLVING LANDSCAPE OF TENANT PROTECTIONS

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I. Introduction

It is no secret that California suffers from high housing costs, an issue that has consistently worsened since 1970.[1] The housing market is particularly challenging for renters. Across the state, lower-income renters struggle with housing instability and unsafe, unsanitary housing conditions due to extreme rent burden and overcrowding. As a result, these renters are more vulnerable than ever to housing instability, displacement from their communities, and ultimately, homelessness.

In 2018, California enacted Assembly Bill 686, imposing a state mandate for public agencies to go beyond combating discrimination to affirmatively furthering fair housing ("AFFH"). "Affirmatively furthering fair housing" means "taking meaningful actions that, taken together address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws."[2] A major part of the State's AFFH mandate relates to preparation of localities' housing elements and implementation and administration of the policies and programs identified therein.[3]

The AFFH's mandate not only requires that local jurisdictions plan and implement policies that give low-income families the opportunity to live in high resource and affluent areas, but also to adopt policies that address disproportionate housing needs of protected classes.[4] Affordable housing advocates have long touted the "three Ps" approach to the housing affordability crisis: **protect** tenants from displacement, **preserve** existing affordable housing, and **produce** new (affordable) housing. While production and, to a lesser extent, preservation, have taken the forefront, the COVID-19 pandemic, more than any occurrence before, shined a light on the importance of protection.

This paper seeks to provide a foundational understanding of the duty to affirmatively further fair housing and the legal landscape related to landlord-tenant law, tenant protections and other anti-displacement policies.

[1] Taylor, Mac. "California's High Housing Costs: Causes and Consequences," Legislative Analyst Report. March 17, 2015, available at https://www.lao.ca.gov.
[2] Gov. Code § 65583(c)(5) and Gov. Code Section 8899.50(a)(1).
[3] Gov. Code § 65583(c)(5); § 65583(c)(5) (c)(9) and Gov. Code § 65583.2(a).
[4] Gov. Code § 65583(c)(5).

II. Affirmatively Furthering Fair Housing in Housing Element Law

State law requires each city and county in the state to adopt a housing element endeavoring to provide for the housing needs of all economic segments of its community.[5] Over the years, Housing Element Law has "substantially strengthen[ed] the requirements of the housing element component of local general plans."[6] Several components of the housing element are mandatory,[7] including "an identification and analysis of existing and projected housing needs and a statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement and development of housing."[8] Each jurisdiction is required to review its housing element for the appropriateness of its housing goals, objectives and policies and revise its housing element in accordance with the statutory schedule.[9]

The most recent cycle of revisions – the sixth cycle – started on January 1, 2021. Beginning with the sixth cycle, the state mandated local jurisdictions to "affirmatively further fair housing" in their housing element policies and programs as follows[10]:

- **Outreach**. A local agency's preparation, adoption, and implementation of the housing element must include, throughout the planning period, diligent efforts to include public participation from all economic segments of the community, including lower income residents, persons and households with special needs, and members of protected classes.[11]
- **Assessment of Fair Housing**. Each jurisdiction's housing element must include an assessment of the jurisdiction's housing needs, including analysis of household characteristics (e.g., housing cost burden, overcrowding), housing conditions, and the special housing needs of certain populations (e.g., the elderly, persons with disabilities, large families, unhoused individual and families).[12] The housing needs assessment must incorporate "an assessment of fair housing in the jurisdiction" that contains the components specified in Housing Element Law.[13]

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[5] Gov. Code § 65580.
[6] *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 425, 445.
[7] *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1164, 1182.
[8] Gov. Code § 65583.
[9] Gov. Code § 65588(a)-(b).
[10] Although there are AFFH requirements associated with a jurisdiction's duty to identify adequate sites to meet housing needs, we do not detail those here since they do not relate to anti-displacement or tenant protections. (Gov. Code § 65583(a)(3); *see also* Gov. Code §§ 65583(c)(1), 65583.2(c).)
[11] Gov. Code § 65583(c)(9); (c)(10)(A)(ii).
[12] Gov. Code § 65583(a)(2); (a)(7).
[13] Gov. Code § 65583.

- **Prioritization of Contributing Factors.** Each housing element must include a ”statement of the community’s goals, quantified objectives, and policies relative to affirmatively furthering fair housing”[14] and identify “the jurisdiction's fair housing priorities and goals, giving highest priority to those factors identified…that limit or deny fair housing choice or access to opportunity, or negatively impact fair housing or civil rights compliance” and “the metrics and milestones for determining what fair housing results will be achieved.”[15]
- **Goals and Actions.** Finally, the housing element program must “promote and affirmatively further fair housing opportunities and promote housing throughout the community or communities for all persons regardless of race, religion, sex, marital status, ancestry, national origin, color, familial status, or disability and other characteristics” protected by FEHA.[16] Strategies and actions to implement the jurisdiction’s fair housing priorities and goals, include “enhancing mobility strategies and encouraging development of new affordable housing in areas of opportunity, as well as place-based strategies to encourage community revitalization, including preservation of existing affordable housing, and *protecting existing residents from displacement*.”[17]

Since the sixth cycle was the first housing cycle where jurisdictions were required to address the AFFH requirements, many jurisdictions have committed to studying anti-displacement strategies and tenant protections in an effort to address these requirements.

III. Landscape of Landlord-Tenant Law in California

While in practice “rent control” is just one policy that may be used to promote housing stability, its historical origins and the legal challenges to its enactment have shaped the entire landlord-tenant law landscape in California. As such, rent control has colloquially come to refer to a suite of regulations governing the landlord-tenant relationship.

As far back as the 1970s, local officials in some California cities responded to the challenging rental market by enacting rent control. Today, California has statewide rent caps and just cause requirements for evictions, as established by the Tenant Protection Act of 2019.[18] In addition, many California cities and counties have adopted local policies that generally limit the

[14] Gov. Code § 65583(b)(1).
[15] Gov. Code § 65583(c)(10)(A)(iv).
[16] Gov. Code § 65583(c)(5).
[17] Gov. Code § 65583(c)(10)(A)(v).
[18] Assembly Bill 1482 (2019), codified at Cal. Civ. Code §§ 1946.2, 1947.12, 1947.13.

amount and frequency of rent increases, and require a just cause basis for eviction, while several others impose other tenant protections or anti-displacement policies, such as minimum lease requirements, relocation assistance, mediation programs and anti-harassment policies.[19]

A. Jurisdiction: Police Power

Rent control programs have been recognized as a legitimate exercise of a City's police power since the California Supreme Court's ruling in *Birkenfeld v. City of Berkeley* in 1972.[20] The *Birkenfeld* decision upheld the regulation of residential rents, reasoning that "[i]t is of the essence of the police power to impose reasonable regulations upon private property rights to serve the larger public good."[21] Nonetheless, the California Supreme Court in *Birkenfeld* concluded that Berkeley's 1972 rent control charter amendment violated due process because of its "inexcusably cumbersome rent adjustment procedure."[22]

To address the Court's concerns, Berkeley voters enacted a new rent control charter amendment in 1980, which guaranteed each landlord a fair return on their investment.[23] The fair return guarantee was fulfilled via two methods to rent adjustment: annual general adjustments granting increases based on a formula to be determined by the rent board, and a process for property-wide petitions to increase rent where necessary to ensure the landlord a fair return.[24] Following another challenge by Berkeley landlords, the Supreme Court concluded that the fair return guarantee addressed "every major procedural failing" identified in the *Birkenfeld* case.[25]

B. The Takings Clause

The California Supreme Court has also verified that local rent controls do not violate the takings clause in the U.S. and California Constitutions.[26]

In *Kavanau v. Santa Monica Rent Control Board*[27], the Court concluded that rent control is not a *per se* taking of property nor does it not constitute a regulatory taking of property so long as the "future rent ceiling [ ] will maintain financial integrity, attract necessary capital, and fairly

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[19] "Updates on California Rent Control and Rent Stabilization Laws" (Nolo), last updated Aug. 30, 2024, *available at* https://www.nolo.com/legal-encyclopedia/california-rent-control-law.html.
[20] *Birkenfeld*¸17 Cal. 3d at 140-143.
[21] *Id.*
[22] *Id*. at 173.
[23] *Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 651-52.
[24] *Fisher*, 37 Cal. 3d at 653; 688-690.
[25] *Id.* at 690.
[26] U.S. Const. Amend. V; Cal. Const. art. I, § 19.
[27] *Kavanau*, (1997) 16 Cal. 4th 761, 780.

compensate [a landlord] for the risks he has assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable."[28]

Two years later, the Court addressed a different claim of regulatory takings, which argued that Santa Monica's rent control program did not substantially advance a legitimate governmental purpose. In *Santa Monica Beach v. Superior Court*, [29] the California Supreme Court upheld the city's rent control law, finding that it was not an arbitrary regulation of property rights, and noting that rent control withstands heightened scrutiny even though the rational basis test controls (*i.e.* the Court noted that local rent control substantially advances a legitimate governmental purpose).[30]

More recently, takings challenges have been levied against other policies in the rent control suite. In *Ballinger v. City of Oakland,* landlords challenged the City of Oakland's tenant relocation assistance ordinance on the basis that the relocation fee requirements constituted an unlawful physical taking and an unlawful exaction in violation of the takings clause of the U.S. Constitution.[31] The Oakland ordinance requires, upon certain terminations of a tenancy, landlords to pay their tenants a relocation payment. The Ninth Circuit panel held that the relocation assistance ordinance was not an unconstitutional physical taking of a specific and identifiable property interest, but merely regulated the landlords' use of their land by regulating the landlord-tenant relationship.[32] The landlords had voluntarily chosen to lease their property and thereafter to evict their tenants; the ordinance simply imposed a transaction cost on their decision to terminate the tenancy. Relocation fees are a monetary obligation triggered by the landlord's actions with respect to their elected use of their property, not a burden on the landlord's property interest.[33][34]

C. Other Constitutional Challenges

California rent control programs and landlord-tenant regulations have been subjected to judicial challenges based on other constitutional provisions:

[28] *Id.* at 785.
[29] *Santa Monica Beach* (1999) 19 Cal. 4th 952.
[30] *Id.* at 967.
[31] *Ballinger v. City of Oakland*, 24 F.4th 1287 (9th Cir. 2022).
[32] *Id.* at 1293.
[33] *Id.* at 1293-94.
[34] See, e*.g., Southern California Rental Housing Assn. v. Cnty of San Diego*, 550 F.Supp.3d 863 (S.D. Cal. 2021); *Williams v. Alameda County*, 642 F.Supp.3d 1001 (N.D. Cal 2022), both holding COVID-19 eviction moratoria did not constitute per se or regulatory taking of property.

Equal Protection. In *Pennell v. City of San Jose* [35], the U.S. Supreme Court denied an equal protection challenge to a provision of San Jose's rent control law that authorized hearing officers to consider individual tenant hardships when reviewing a landlord petition for a rent increase. The Court concluded that the regulation did not burden a suspect class or fundamental interest, and that protecting tenants facing hardships served a legitimate purpose, so the resulting differential treatment of certain landlords based on whether or not they house hardship tenants was rational.[36]

California Courts of Appeal have also upheld the differential treatment of similarly situated persons or entities in the rent control context. In *Cotati Alliance for Better Hous. v. City of Cotati*, the court rejected an argument that the use of a "return on investment" standard in Cotati's rent stabilization ordinance denied equal protection because it would "lead to the imposition of different rent ceilings for identical rental units." [37] Similarly, the Court concluded in *Interstate Marina Development Company v.* County *of Los Angeles* that generally applicable rent controls do not deprive landlords of equal protection of the laws.[38]

Right to Privacy. In *Hotop v. City of San Jose*, landlords challenged rental registration requirements on the basis that they violated the Fourth Amendment's guarantee against unreasonable government searches and seizures and the right to privacy under the California Constitution[39], by requiring disclosure of certain information via annual registration of rent stabilized units in the city.[40] The court concluded that plaintiffs would need to possess a reasonable expectation of privacy, which they did not, in the contents of the documents before the government's conduct could be deemed a "search."[41]

First Amendment. Finally, in a recent case, *Yim v. City of Seattle*, the Ninth Circuit addressed a challenge to Seattle's Fair Chance Ordinance.[42] In that case, plaintiffs challenged Seattle's complete prohibition on a landlord's ability to "inquire about" and "take adverse action based on" a prospective tenant's criminal history. The court reviewed the "inquiry" and "adverse

[35] *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988).
[36] *Id.*
[37] *Cotati Alliance for Better Hous. v. City of Cotati* (1983) 148 Cal.App.3d 280, 291.
[38] (1984) 155 Cal. App. 3d 435, 441; *see also Berman v. Downing* (1986) 184 Cal. App. 3d Supp. 1.
[39] *Hotop v. City of San Jose*, 982 F.3d 710 (9th Cir. 2020).
[40] *Hotop*, *supra*, 982 F.3d at 713-14.
[41] *Id.* at 714; see also *San Francisco Apartment Ass'n v. City and Cnty of San Francisco*, 881 F.3d 1169 (9th Cir. 2018) (holding requirement to provide buyout agreements to city in publicly searchable database did not violate right to privacy under California Constitution).
[42] *Yim*, *supra*, 63 F.4th 783 (9th Cir. 2023).

action" provisions separately.[43] Commercial speech receives a lower level of protection (intermediate scrutiny) than all other speech (strict scrutiny).[44] Without determining if the targeted speech was commercial or not, the court in *Yim* applied an intermediate scrutiny standard to the "inquiry" provision struck down the "inquiry" provisions as an overbroad regulation of speech.[45] The court noted that a more "narrowly tailored" ordinance, such as San Francisco's,[46] *might* withstand intermediate scrutiny.[47] On the other hand, the court upheld the "adverse action" provision as a proper regulation of conduct because landlords do not have a fundamental right to exclude people from their property.[48] Applying rational basis review, the court found that the city had a legitimate governmental interest in prohibiting the landlords from taking adverse action against prospective tenants based on their criminal history.[49]

D. State Law Constraints

While the constitutionality of rent control programs is well established, state laws prohibit specific aspects of local rent control.

1. <u>Rent Stabilization and the Costa-Hawkins Rental Housing Act</u>

The Costa-Hawkins Rental Housing Act imposes several restrictions on the right of jurisdictions to adopt rent control. The Act limits regulation of the housing units that received an initial certificate of occupancy prior to February 1, 1995.[50], and effectively deregulated detached single-family homes.[51] The Act mandates that a landlord can freely set the rent for a vacant rent regulated unit when a new tenancy begins. Because Costa-Hawkins prohibits cities and counties from setting the initial rent in multifamily housing, local programs are essentially limited to regulating the amount and frequency of rent increases for existing tenancies.

2. <u>Exiting the Rental Market and the Ellis Act</u>

The Ellis Act was adopted in 1985 to supersede a 1984 California Supreme Court decision

[43] *Id.* at 791.
[44] *Id.* at 793-94.
[45] *Id.* at 795-96.
[46] San Francisco's ordinance provides that a landlord may inquire about or require disclosure of (but may not take adverse action based on) misdemeanor convictions within the last 3 years, felony convictions within the last 7 years and "unresolved arrests."
[47] *Yim*, *supra*, 63 F.4th 797-99.
[48] *Id.*
[49] *Id.*
[50] Civil Code § 1954.52(a)(2).
[51] Civil Code § 1954.52(a).

that effectively allowed a city to require rental property to continue to be used as rental property until a demolition or removal permit was issued by the city.[52] The Act expressly gives landlords the unequivocal right to terminate tenancies in order to exit the residential rental market.

While granting right to landlords to exit the rental market, the Ellis Act provides specific authority for cities and counties to regulate aspects of a landlord's exit. Cities and counties must affirmatively enact ordinances to enable those protections. First, the Ellis Act allows local jurisdictions to require that landlords provide tenants with additional notice of a termination of tenancy that relies on the Act.[53] Generally, state law requires landlords provide at least 30 days' notice to terminate a tenancy of less than one year, and 60 days to terminate a longer tenancy.[54] The Ellis Act allows a local jurisdiction to require a 120-day notice to terminate a tenancy based on the landlord's withdrawal of the property from the rental market. The 120-day notice can be extended to one year for seniors over the age of sixty-two and persons with disabilities.

Second, the law authorizes local jurisdictions to require that landlords mitigate the impacts of the withdrawal on tenants, for instance, by paying relocation assistance to tenants.[55] Numerous published decisions explore the outer limits of relocation assistance that landlords can legally be required to pay departing tenants.[56]

Finally, the Ellis Act authorizes local jurisdictions to strictly regulate re-entry of previously withdrawn units to the rental market.[57] Cities and counties can impose penalties if the property is returned to the rental market within two years of withdrawal; can require re-control of the rents for units returned to the rental market within five years of withdrawal at the last monthly rental amount plus annual general adjustments; and can require landlords provide former tenants with a first option to re-rent units returned to the rental market up to ten years from withdrawal.[58]

3. Just Cause for Eviction and Preemption of Procedural Requirements

The essence of a "just cause for eviction" law is that tenants cannot be evicted unless it is for one or more enumerated reasons. The bases for just causes are often split into two categories:

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[52] Gov. Code §§ 7060 – 7060.7; *see e.g.* Gov. Code § 7060.7 & *Nash v. City of Santa Monica* (1984) 37 Cal. 3d 97.
[53] Gov. Code § 7060.4.
[54] Civ. Code §§ 1946-1946.1.
[55] Gov. Code § 7060.1(c).
[56] *Pieri v. City and County of San Francisco* (2006) 137 Cal. App. 4th 886 (upholding relocation payments of up to $13,500 per unit with additional payments of $3,000 if household included senior or disabled person); *Levin v. City and County of San Francisco* (2014) 71 F. Supp. 3d 1072 (striking down as "prohibitive" requirement that landlords pay twenty-four times difference between tenant's current rent and fair market value of comparable unit in city).
[57] Gov. Code § 7060.2.
[58] *Id.*

at-fault causes and no-fault causes. Common at-fault causes include nonpayment of rent, failure to cure a breach of a material term of a lease, maintenance of a nuisance, engaging in criminal activity, or using the rental unit for an illegal purpose. Typical no-fault causes include owner move-in, necessary and substantial repairs, demolition, or removal of the unit from the rental housing market. Where there are just cause requirements, each eviction or termination notice must expressly state the reason.

While a jurisdiction's police powers to enact regulations are broad, local regulation cannot conflict with the general laws of the state of California.[59] In *Birkenfeld,* the Berkeley ordinance restrained evictions both by (1) limiting the grounds upon which a landlord could seek to recover possession of a rental unit and (2) requiring landlords to obtain a certificate of eviction from the rent control board before seeking such eviction.[60] The landlords challenged both provisions alleging conflict with state unlawful detainer statutes.[61] The *Birkenfeld* court upheld the just cause for eviction provisions, reasoning that "[t]he mere fact that a city's exercise of the police power creates [a defense in unlawful detainer proceedings] does not bring it into conflict with the state's statutory scheme."[62] On the other hand, the court struck down the certificate requirement, finding that unlike the limitations on the grounds for eviction, which can affect summary repossession proceedings only by making substantive defenses available to the tenant, the requirement of a certificate of eviction raises procedural barriers between the landlord and the judicial proceeding."[63]

4. The Tenant Protection Act of 2019

In 2019, the California Legislature passed AB 1482 (2019), the Tenant Protection Act of 2019 ("TPA").[64] The TPA went into effect on January 1, 2020.

The TPA provides just cause for eviction protections to most tenants in the state who have been living in their units for at least twelve months (or where at least one tenant has occupied the unit for at least 24 months if a new tenant is added to the unit).[65] Under the TPA, a landlord who

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[59] Cal. Const., Article XI, § 5.
[60] *Birkenfeld*, *supra*, 17 Cal.3d 148.
[61] *Id.* at 149; *see also* Code of Civ. Pro. §§ 1159, et seq.
[62] *Birkenfeld*, *supra*, 17 Cal.3d at 149.
[63] *Id.* at 151.
[64] In 2021, the TPA was amended by Assembly Bill 798 to extend just cause for eviction protections and rent caps to tenancies of any mobilehomes owned by management of a mobilehome park, as those terms are statutorily defined. In 2023, the TPA was amended by Senate Bill 567 to address certain loopholes in the just cause for eviction provisions related to "substantial renovations" and "owner move-in."
[65] Civ. Code § 1946.2.

seeks to terminate a tenancy based on a no-fault just cause must provide relocation assistance to the tenant equal to one months' rent.[66] The TPA also caps rent increases to no more than 5% plus inflation according to the regional Consumer Price Index, or 10%, whichever is lower,[67] with no more than two rent increases in any twelve-month period.[68]

TPA exempt certain types of housing its requirements.[69] Of significance, the rent caps do not apply to housing that is subject to local rent control.[70] The just cause provisions also do not apply to residential real property subject to either a local just cause for termination ordinance adopted on or before September 1, 2019, or to a local just cause ordinance adopted after September 1, 2019 that is "more protective" than the TPA.[71] An ordinance is "more protective" than the TPA if (a) the just cause is consistent with the TPA, (b) the ordinance further limits the reasons for terminations of a residential tenancy, provides for higher relocation assistance amounts, or provides additional tenant protections that are not prohibited by any other provision of law, and (c) the local government has made a finding that their local ordinance is more protective than the TPA.[72] A local just cause ordinance adopted after September 1, 2019 that is less protective than the TPA is unenforceable.[73] Therefore, it is important for a local jurisdiction to ensure any local just cause ordinance meets the "more protective" definition in the TPA.

5. <u>Other Relevant State Laws</u>

In addition to these statutes, several other state laws either directly or indirectly impact a local jurisdiction's ability to legislate in the landlord-tenant field, including laws relating to mobilehome park and mobilehome tenancies[74], hiring of real property[75], sealing of unlawful

[66] *Id.* at subd. (d).
[67] Civ. Code § 1947.12(a)(1).
[68] *Id.* at para. (a)(2).
[69] *See, generally*, Civ. Code §§ 1946.2(e); 1947.12(d).
[70] Civ. Code. § 1947.12(d)(3).
[71] Civ. Code § 1946.2(i)(1).
[72] *Id.*
[73] *Id.*
[74] Mobilehome Residency Law (Civ. Code § 798, et seq.), Mobilehome Parks Act (Health & Safety Code § 18200, et seq.), Manufactured Housing Act (Health & Safety Code § 18000, et seq.), Recreational Vehicle Park Occupancy Law (Civ. Code § 799.20, et seq.), and Special Occupancy Parks Act (Health & Safety Code § 18860, et seq.)
[75] Civ. Code §§ 1940-1954.06 (regulating key topics related to rental housing and the landlord-tenant relationship, including prohibitions on retaliation against or harassment of tenants, limitations on security deposits, limitations on rental housing application fee, landlord's right of entry to rental units, and tenant screening and credit reporting).

detainer records[76], habitability of rental housing[77], fair housing[78], and land use.[79] It is critical for local jurisdictions to refer to these laws when enacting policies that regulate the rental housing business and the landlord-tenant relationship.

IV. Comprehensive Review of Anti-Displacement Policies

A. Rental Registries and Affordable Housing Portals

Rental registration programs are designed to collect basic information about the rental housing market in a jurisdiction. Rental registration programs are used generally used to monitor compliance in jurisdictions with just cause programs. The jurisdiction-specific data provided by rental registration helps to better inform further policymaking and tailor policies to local needs.

Rental registration policies may require either or both of the following: (1) that rental registration information be updated annually or (2) that rental registration information be updated upon any change. Appendix A lists a sample of the rent registry information collected by various jurisdictions.

Because rental registration programs require the collection of tenant information, questions and concerns about public disclosure due to California's Public Records Act requests are a concern. To address the concerns, jurisdictions often include language to address the handling of personal information.[80]

To increase compliance with rental registration requirements, jurisdictions that require rental housing operators to secure a business license often tie the registration requirements to the licensing requirement. Jurisdictions without a business license requirement use several other

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[76] Civ. Pro. Code § 1161.2.
[77] Civ. Code §§ 1941-1941.7; Health & Safety Code §§ 17920; 17920.3.
[78] Fair Employment and Housing Act (Gov. Code §§ 12900, et seq.), Unruh Civil Rights Act (Civ. Code §§ 51, et seq.), Ralph Civil Rights Act of 1976 (Civ. Code § 51.7), and Disabled Persons Act (Civ. Code §§ 54, et seq.)
[79] Housing Crisis Act (Gov. Code § 66330.5).
[80] Sample language might read: "The City Council recognizes that some of the Rental Registry Information constitutes Personal Identifying Information (PII) or proprietary information of a Landlord that could create a competitive disadvantage for every Landlord required to comply with this Chapter. The City Council also recognizes that the Public Records Act (Government Code §§ 6250, et seq.) generally requires that the City make available to the public information in its possession that relates to the conduct of the public's business. The Public Records Act contains several exceptions intended to protect the privacy of individuals and the proprietary information of businesses that is in the City's possession only because of a legal requirement to provide it to the City in connection with a regulatory program. Except for the Rental Registry Information to be made available via the public database, the City Council declares that all other Rental Registry Information shall be received in confidence, and that the public interest in nondisclosure of such Rental Registry Information clearly outweighs the public interest in disclosure."

enforcement tools, including late fees, affirmative defense to unlawful detainer based on a failure to register, and administrative citations to enforce the requirement.

B. Building on TPA

As noted, local just cause for termination ordinances adopted after September 1, 2019, must be "more protective" than the TPA.[81] The various policies outlined below could be adopted by various entities to strengthen the protections in the TPA.

1. Anti-Price Gouging

The applicability of the rent caps in the TPA is greatly limited by the six (6) categories of exemptions.[82] To the extent permitted by state law, a jurisdiction could readopt the rent caps in the TPA and apply them to more types of rental housing than authorized by the TPA. These provisions of the TPA could also benefit from local enforcement, such as a requirement to register regulated units and provide the jurisdiction with notice of any rent increases for those units.

2. Tenant Relocation Assistance

A jurisdiction may elect to strengthen the relocation assistance provisions of the TPA. For example, greater relocation assistance could be required where a tenant is displaced either temporarily or permanently and based on a no-fault just cause. In instances where substantial renovations cause displacement, a jurisdiction might require temporary relocation assistance in the form of comparable replacement housing, rent differential payments, and per diem compensation for food, or transportation.

In addition, a local agency might provide for an increased permanent relocation assistance amount to mitigate the effects on a tenant where the tenant is to be permanently displaced from their unit based on a no-fault just cause. Relocation assistance policies typically feature at least some of the following:

- To cover expenses associated with first month's rent, security deposit and moving expenses, relocation payments of up to 2 to 3 months of rent or additional, payments for lower-income households, households that have resided in their unit for longer, or households with children, disabled persons, seniors, or terminally ill individuals;
- An unlimited 60-day subscription to a rental listing service; and
- Personalized relocation assistance services from a relocation specialist/agency.

[81] Civ. Code § 1946.2(i)(1).
[82] Civ. Code § 1947.12(d).

In crafting a permanent relocation assistance program, jurisdictions should consider a disbursement schedule for rental assistance payments that fairly balances the interests of the landlord in ensuring the tenant vacates the unit and the interests of the tenant in ensuring adequate resources to complete a move. Local agencies should also consider who will monitor and administer the relocation assistance program. Finally, ongoing engagement with stakeholders will be necessary for the jurisdiction to tailor the policy to specific jurisdictional needs. For example, there may be local interest in creating a tiered system of relocation payments based on length of tenancy or size of landlord portfolio or an expressed need to develop a loan, grant, or waiver program to assist low-income, low asset and special needs landlords with meeting relocation assistance obligations.

C. Limiting At-Fault Just Causes

Some jurisdictions have sought to prevent displacement and homelessness (particularly in the post-COVID era) by limiting the scope of at-fault just causes. For example, several jurisdictions require landlords to first provide tenants with a "notice to cease" requesting that the tenant cease the violative behavior within a reasonable time after receipt of the notice before seeking to evict the tenant.[83]

Perhaps most creatively, the City of Los Angeles adopted an ordinance amending its just cause for eviction provisions to establish a "minimum rent arrears" threshold for evictions based on non-payment of rent.[84] In essence, the ordinance restricts a landlord's ability to evict a tenant for non-payment of rent where the tenant owes rent in an amount equal to or less than one month's worth of fair market rent. For the purposes of the ordinance, "fair market rent" means the fair market rent in Los Angeles County, as published annually by the U.S. Department of Housing and Urban Development, for an equivalent sized rental unit (based on number of bedrooms) as that occupied by the tenant. The theory is that lower-income tenants often experience displacement (and its life-changing effects) due to a single unexpected expense, such as a medical emergency, a car accident, or the sudden death of a family member. Providing these tenants with the "buffer" of a minimum threshold for amounts in arrears can provide them with invaluable time to recover from these economic setbacks and to seek and receive rental assistance.

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[83] See *Rental Housing Association of Northern Alameda County v. City of Oakland* (2009) 171 Cal.App.4th 741; *San Francisco Apartment Assn. v. City and County of San Francisco* (2018) 20 Cal.App.5th 510.
[84] Los Angeles Municipal Code §§ 151.09; 165.03.

D. Tenant Screening and Fair Chance Ordinances

Tenant screening practices are often a major barrier to accessing otherwise affordable housing. Landlords may consider any number of details in a prospective tenant's background check, including their credit score, criminal record, or eviction history, as a disqualifier, regardless of the recency or accuracy of that information. Residential landlords have been known to use eviction history and records, consumer credit reports, and algorithmic or automated tenant screening in evaluating tenants for their rental properties. These sources of information may contain misleading, incomplete, or inaccurate information, and ultimately serve as a barrier to otherwise qualified tenants seeking to access housing.[85]

In many cases, landlords do not even see the report detailing the issues flagged in the tenant's background. Rather, a landlord enters the applicant's information into a tenant screening program that uses an algorithm and publicly available records to inform the landlord whether they should rent to this person. There is no opportunity for the tenant to challenge the validity or relevance of the information. As a result, some jurisdictions have sought to limit the information that can be used by a landlord in making rental decisions.

Attempts to make rental selection a more open process started with "fair chance" laws, i.e. policies seeking to eliminate the unique barriers that prevent formerly the incarcerated and other individuals who have interacted with the criminal justice system from accessing housing. Other limitations on landlord practices for screening of prospective tenants that a jurisdiction may consider include:

- Requiring that a landlord establish uniform eligibility criteria for applicants;
- Prohibiting the use of algorithmic or automated tenant screening services;
- Prohibiting inquiry or adverse action based on certain tenant information; or
- Requiring a process that allows applicants to dispute or rebut information used as the basis for and adverse action.

The policy could provide that a landlord will not inquire about or base an adverse action on any of the following: (1) a prospective tenant's failure to pay rent or utility bills during the COVID-19 emergency period; (2) a prospective tenant's participation in a rental assistance

[85] Liewant, Matthew H., "Locked Out: How Algorithmic Tenant Screening Exacerbates the Eviction Crisis in the United States," 6 Geo. L. Tech. Rev. 1 (2022).

program; (3) a prospective tenant's eviction history; (4) a prospective tenant's criminal history; or (5) a prospective tenant's consumer credit history.

E. Prohibition on Algorithmic Rent Setting

As with the algorithmic tenant screening services described above, the use of algorithmic rent-setting devices and platforms poses unique problems in a housing market that is already experiencing historic rent levels. In 2022, ProPublica published a report about RealPage's Yieldstar, a software that uses data analytics to suggest daily prices for open units based on data from clients, including private information on what nearby competitors are charging.[86] As the ProPublica report noted: "For tenants, the system upends the practice of negotiating with apartment building staff. RealPage discourages bargaining with renters and has even recommended that landlords in some cases accept a lower occupancy rate in order to raise rents and make more money."[87]

On September 3, 2024, San Francisco became the city in the nation to pass a law banning the sale or use of devices to set rents or occupancy levels. There are some exemptions, including software that establishes rent or income limits for the city's affordable housing program and products that use trade association reports of anonymous renter data. Landlords who violate the law may be subject to civil penalties of up to $1,000 per violation and fines that cover damages, restitution and attorneys' fees. The law also authorizes the city to sue landlords and software providers who continue to use these algorithmic programs.

F. Anti-Retaliation and Anti-Harassment Policies

Many jurisdictions have adopted ordinances prohibiting landlords from harassing or retaliating against tenants. "Tenant harassment" means actions by a landlord against a tenant that are intended to upset the tenant and make them want to move out. "Retaliation" is a related concept referring to adverse actions by a landlord against a tenant after the tenant has exercised a right or otherwise engaged in a protected activity. Protected activities may include complaining about violations of applicable laws, requesting maintenance or repairs, forming a tenants' association or union, displaying political speech, etc. Some common acts that may be considered harassment and retaliation are listed in Appendix B.

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[86] Vogell, Heather, "Rent Going Up? One Company's Algorithm Could Be Why.," ProPublica (October 15, 2022), available at https://www.propublica.org/article/yieldstar-rent-increase-realpage-rent.
[87] *Id.*

In these ordinances, the remedies for a landlord's violation of anti-harassment and anti-retaliation often include an affirmative defense to an unlawful detainer or other action to recover possession of a rental unit, damages assessed per day or per violating act, administrative fines, and in particularly egregious cases, criminal prosecution of the offending landlord.

G. Summary of Other Related Policies

1. Mediation Programs

Mediation programs provide landlords and tenants with a neutral forum for resolving common disputes and disagreements without the need to resort to costly, time-consuming court proceedings. Cases suitable for landlord-tenant mediation include security deposit disputes; rent increase or repayment negotiations; tenant buyout agreements; negotiations related to repairs and maintenance of a rental unit; and renegotiation of rental leases or provisions. Jurisdictions looking to establish a mediation program can either contract with a local agency or an organization that already provides these services or create their own city-run program.

For instance, in 2017, the Marin County Board of Supervisors adopted the Rental Housing Dispute Resolution Ordinance, requiring mediation of disputes related to cumulative rent increases in excess of five percent (5%) in any twelve-month period, if requested by either the landlord or tenant. Although participation is mandatory if mediation is requested by any party, it may result in either a voluntary mediation agreement or a nonbinding mediation statement from a neutral third party.[88] There are no direct costs to participating landlords or tenants for the mediation services.

2. Legal or Counseling Services

As a response to the pandemic, the cities of San Jose and Mountain View created Eviction Help Centers where tenants and landlords could receive information on local laws, assistance to apply for rent relief and legal aid. These cities have now made the centers a permanent tenant/housing resource center post-pandemic. Relatedly, language barriers can keep many communities from accessing the housing opportunities and services they need. Taking steps to increase the city's capacity to engage under multiple languages can improve those outcomes.

Some jurisdictions, such as San Francisco and the City of Los Angeles, have gone beyond counseling to provide tenants with eviction defense services. Typically referred to as a "right to counsel," these programs contribute public funds (typically to third-party legal service providers) to provide tenants with legal assistance in eviction cases.

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[88] Marin County Code § 5.95.050.

3. Rental Housing Habitability/Code Enforcement Inspection Programs

Poor housing conditions are a significant cause of tenant displacement. Numerous jurisdictions, particularly those with rent control and just cause, have established programs whereby local code enforcement officers routinely inspect the rental housing inventory and notify property owners of conditions that violate state and local housing and building codes, or otherwise threaten the health and safety of residents. The development of rental housing inspection programs may also help jurisdictions satisfy new state requirements related to code enforcement, including new rules on cities and counties related to the enforcement of complaints of substandard conditions or lead hazard violations pursuant to Assembly Bill 838 (2019) and mandates that cities and counties expand their code enforcement programs to require building-wide inspections where major problems are identified in one unit under AB 548 (2023).

4. No-Net-Loss and "Right to Return"

SB 330 (the Housing Crisis Act of 2019) requires that protected units are replaced one-for-one in cases of the redevelopment of a rental property and that lower-income tenants are provided with an opportunity to return to the newly constructed units at an affordable housing cost. These provisions are currently mandated by state law through January 1, 2030, but local jurisdictions could adopt permanent no-net-loss and "right to return" policies. These policies would protect critical sources of housing affordable for lower-income families and incentivize higher-density infill redevelopment when paired with land use policies to support the feasibility of this redevelopment.

5. Vacancy Tax

A vacancy tax is an annual tax on vacant property, intended to incentivize property owners to make their properties available for rent and reduce the number of underutilized homes.

The Empty Homes Tax was approved by San Francisco voters on November 8, 2022, and went into effect on January 1, 2024. Generally, the tax is imposed on certain residential units that remain vacant for more than 182 days in a year. For the first year that the property is determined to be vacant, the tax ranges between $2,500 and $5,000 based on the square footage of the residential unit and increases to $20,000 by the third year.

San Francisco's tax was immediately challenged by property owners upon its adoption. The property owners have argued that the vacancy tax measure should be disqualified as an "illegal special tax" because they have a right to keep their properties vacant under the Fifth Amendment and because the Ellis Act prohibits the city from penalizing property owners for refusing to offer units for rent. Most recently, the superior court judge rejected the city attorney's motion to dismiss the lawsuit and the case remains pending.

V. The Role of Anti-Displacement Policies in AFFH

The tenant protections and anti-displacement policies outlined above can be utilized by jurisdictions to address the several elements of their duty to affirmatively further fair housing.

Addressing Disparities in Housing Needs and Access to Opportunities. Housing Element law requires "analysis and documentation of household characteristics, including level of payment compared to ability to pay, housing characteristics, including overcrowding, and housing stock condition"[89] and "analysis of any special housing needs, such as those of the elderly; persons with disabilities" and others.[90] Rental registration policies can assist jurisdictions in better understanding the conditions of the rental housing marketing, their existing rental housing inventory, the characteristics of their renter households, and ultimately, their jurisdiction's rental housing needs. Rental registration data often results in analyses of rent burden, housing stock and special housing needs that highlight fair housing issues.

Policies such as tenant screening policies, bans on algorithmic rent-setting software, and unified affordable housing portals may ultimately help public agencies to meet their duty to affirmatively further fair housing by removing historical barriers to accessing affordable housing, particularly for vulnerable groups. Rent control and just cause help to keep units affordable, ensuring that lower-income tenants are not further rent-burdened.

Replacing Segregated Living Patterns with Integrated. AFFH policies can also help replace segregated living patterns with integrated and balanced living patterns. Gentrification and its consequent displacement are one cause of resegregation throughout the state.[91] Rent control and just cause stabilize housing costs for existing tenants in changing neighborhoods, thereby contributing to community stability, and minimizing segregation caused by displacement.

No net loss, the right to return, and tenant relocation assistance can help to ensure that any necessary displacement is temporary, allowing long-term community members to return to revitalized communities. Anti-displacement polices also help keep tenants in place when new investment in racially and ethnically concentrated areas of poverty could displace existing tenants.

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[89] Gov. Code § 65583(a)(2).
[90] Gov. Code § 65583(a)(7).
[91] Fair Housing Imperative to Address the Displacement Crisis, Anne Bellows, Civil Rights Insider 2018, pp 5-6.

Policies such as rent stabilization, just cause, tenant relocation assistance, and no-net-loss stabilize lower-income communities, preserve affordable housing, and prevent displacement, enabling lower-income tenants to reap the benefits (e.g., jobs, education, transportation, community spaces) of new investment.[92]

Fostering Public Participation Throughout the Housing Element Cycle. Tenant protections can help meet the requirement for public participation throughout the housing element cycle. Housing element law requires a "diligent effort by the local government to achieve public participation of all economic segments of the community in the development of the housing element."[93] For one, tenants, particularly those who are low-income, have demanded protections for decades.[94] A jurisdiction's responsiveness to these demands would undoubtedly demonstrate meaningful engagement with lower- and even moderate-income community members.

Rent control and just cause can give lower-income community members more housing stability to help them participate in decision-making. These policies also naturally facilitate communication between the public agency and stakeholders, including landlords, tenants, realtors, and advocacy organizations. They also foster relationships between the public agency and other third-party service providers, who hold valuable information and data.

Preserving Existing Affordable Housing Stock. The assessment of fair housing must include strategies and actions to preserve existing affordable housing and protect existing residents from displacement.[95] Housing element law also requires that local governments plan to "conserve and improve the condition of the existing affordable housing stock."[96] Rent control and just cause prevent landlords from increasing rent at a rate that renders their units unaffordable and help conserve and improve affordable housing stock. Enhanced relocation assistance ensures tenants can remain in their communities, where unsafe or uninhabitable conditions are being addressed

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[92] Urban Habitat case studies available at:
https://urbanhabitat.org/sites/default/files/UH%202018%20Strengthening%20Communities%20Through%20Rent%20Control_0.pdf.
[93] Gov. Code §§ 65583(c)-65583(c)(8).
[94] See, e.g., Center for Popular Democracy: https://www.populardemocracy.org/news/publications/our-homes-our-future-how-rent-control-can-build-stable-healthy-communities; Pasadena Now:
https://www.pasadenanow.com/main/tenant-groups-expand-push-for-rent-control-in-pasadena/; Public Advocates:
https://www.publicadvocates.org/wp-content/uploads/PA-comments-on-HUD-regulatory-reform-notice-6.14.17.pdf
Spectrum News: https://spectrumnews1.com/ca/orange-county/election/2020/09/16/renters--advocates-push-for-prop--21-rent-control-initiative; and Tenants Together rent control ordinance map:
https://www.tenantstogether.org/resources/list-rent-control-ordinances-city.
[95] Gov. Code § 65583(c)(10)(A)(v).
[96] Gov. Code § 65583(c)(4).

through substantial repairs and replacement. Anti-harassment and anti-retaliation empower tenants to enforce state and local habitability requirements. Proactive inspections of rental housing stock can prevent not only displacement of tenants due to unsafe or unsanitary conditions, but also the degradation of a jurisdiction's existing affordable housing units.

APPENDIX A

SELECT RENT REGISTRY INFORMATION

- Property ownership and management information;
- The Assessor's Parcel Number(s) for the property;
- The number of buildings and rental units on the property;
- The street address of each rental unit;
- The year the property (or the rental unit(s)) received their initial certificate of occupancy;
- The size of each rental unit (e.g., square footage, number of bedrooms and bathrooms);
- The occupancy status of each rental unit (e.g., vacant or occupied);
- For each occupied rental unit, the date of commencement of the existing tenancy;
- For each occupied rental unit, the current amount the monthly rent received for the unit, including the amount of any charges or fees for utilities and housing services;
- For a rental unit in a condominium or other common interest development, the amount of the homeowners' association fees, regular and special assessments, or other similar charges paid to an association;
- Whether or not the tenant receives a housing voucher or other rental subsidy;
- Any change in a rental unit's ownership or management, or a change in the owner's or manager's contact information;
- Any change in the monthly rent for a rental unit, including the amount of the rent change, the effective date of the rent increase, and the new monthly rent amount;
- Any other change in the terms of the rental agreement;
- Information regarding evictions or terminations of tenancies, including copies of relevant notices and unlawful detainer filings;
- A change in the occupancy status of a rental unit, including the reason for which the prior tenancy was terminated.

APPENDIX B

COMMON ACTS OF HARASSMENT

- Taking away services provided in the lease (such as parking or laundry).
- Shutting off utilities to the tenant’s unit.
- Entering the apartment without proper notice.
- Using lies or intimidation intended to make a tenant move out.
- Giving a "three-day notice" or other eviction notice that's based on false charges, where the landlord does not intend to take the case to court.
- Using fighting words or threatening bodily harm.
- Making sexual or unwanted advances.
- Refusing to do repairs that are required by law.
- Intentionally disturbing a tenant's peace and quiet.
- Interfering with a tenant's right to privacy.
- Refusing to acknowledge receipt of a lawful rent payment.