



February 18, 2016

Mr. Nils Bentson  
City Manager  
City of Hesperia  
9700 Seventh Avenue  
Hesperia, CA 92345

**SUBJECT: CRIME FREE RENTAL HOUSING PILOT PROGRAM**

Dear Mr. Bentson,

The California Apartment Association (CAA) is the largest statewide rental housing trade association in the country, representing more than 50,000 owners and operators who are responsible for nearly two million rental housing units throughout California. CAA has the goal of promoting fairness and equality in the rental of residential housing and aiding in the availability of high quality rental housing in California. CAA advocates on behalf of rental housing providers in the legislative, regulatory, judicial, and other forums.

We have reviewed the Hesperia Crime Free Rental Housing ordinance on behalf of our local association, CAA-Greater Inland Empire and our members who have requested compliance guidance. Effective January 1, 2016, the ordinance requires rental properties within the City of Hesperia, to participate in the City's Crime Free Rental Housing Program. The program requires registration and inspection of all covered properties, use of a Crime-Free Addendum, screening of prospective residents by the Police Department and criminal background checks for all prospective residents and eviction of residents upon notice from the Chief of Police. Unfortunately compliance guidance is impossible to provide as many key provisions of the ordinance are unconstitutional, inconsistent with state law and subject owners to the risk of significant liability for fair housing violations and wrongful eviction.

Provisions identical to those in the Hesperia ordinance, were invalidated by the Fourth District Court of Appeal. *Cook v. City of Buena Park*, (2005) 126 Cal.App.4<sup>th</sup> 1. The Buena Park ordinance required landlords to evict "all occupants" of a rental unit when the Chief of Police provided a "notice" that a tenant is suspected of engaging in, or permitted illegal drug activity, gang-related crime, or a drug-related nuisance in or near the rental property. The Court held that the ordinance violates procedural due process "[b]ecause the ordinance imposes on landlords a substantial risk of erroneous deprivation of property rights through compelled eviction litigation, unwarranted fines and penalties, and countersuits by tenants." Specifically, the ordinance was unconstitutional because (1) "the notice requiring the landlord to institute unlawful detainer proceedings provides insufficient information to prosecute the action;" and (2) "the 10-day period within which the landlord must commence eviction is too short."

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CAA's specific comments on the ordinance appear below.

### **1. Good Standing-Holding Fines in Abeyance**

Section 8.20.050 (A) states that "Owners who comply with the requirements of this Chapter will be considered in "good standing," and the City may hold in abeyance any fines levied against a Tenant for such Tenant's unlawful activity in or around the Residential Rental Property leased by the Tenant and not levy such fines against the Owner. If the Owner is not in good standing, the City shall levy fines against the Tenant and the Owner jointly and severally."

It is not clear what fines this section refers to and where the authority is created for the City to levy fines against the owner for the tenant's conduct, as opposed to the owner's own action or inaction. This paragraph also suggests that a tenant's fines will be held in abeyance, despite the tenant's illegal conduct. CAA requests that the City clarify the meaning of and legal authority underlying this paragraph.

### **2. Crime Free Tenant Screening By Chief of Police**

Prior to executing a lease, the ordinance requires the owner to submit identifying information for all proposed adult occupants to the Chief of Police. "This database shall include all Owners participating in the Program." Using the "Crime Free data base" the Chief of Police will determine if the residents have been in violation of a "Crime Free agreement or rules" at previous locations. The Chief of Police will provide the determination to the Owner within two business days after receipt of the identifying information.

It is unclear what being "included" in the database means for an owner of rental property in Hesperia. What information is the City collecting and from what sources? What information and documentation will be provided to owners with the "determination"? Does the reference in the ordinance to a "Crime Free agreement or rules" mean only the items listed in the City's addendum, or does it also include an owner's own house rules/addenda that have not been reviewed by the City? By contrast the website states that this screening process will "determine if your prospective tenant has previously violated any rules of the Crime Free Housing Program." The "rules of the Crime Free Housing Program" are not stated in the ordinance or on the website.

The ordinance does not indicate what actions the owner should take based on the Chief's "determination." It states "[u]pon receiving this notice, the Owner, or their designee has the sole discretion to take actions that he or she determines to be legally appropriate." CAA recommends to its members that they only deny or accept tenants based on objective verifiable information. CAA is concerned that the vagueness and unreliability of the information in the "database" will result in fair housing lawsuits against our members who take action based on the City's information. (For example, due to inclusion of arrest records that did not result in conviction). On the flipside, if an applicant who appears in the database *is* accepted, the owner may face liability for negligent renting or failure to warn, if that individual later engages in criminal conduct. This exposure to potential liability whichever way

the owner turns is especially unacceptable given that the registration form for the program requires the owner to release the Police Department from all liability and responsibility relating to the “Crime Free” program. This places owners in an untenable position.

### 3. Criminal Background Checks

**Type of Background Check:** The ordinance also requires owners to conduct “a criminal background check for all Tenants using a commercially available service” and to keep the results on file throughout the tenancy. The ordinance does not specify the type or scope of background check to be conducted. Is it limited to the county? The surrounding counties? The State of California? Nationwide? Must a nationwide search include those counties and states whose records are not available on the internet? As written, the ordinance allows an owner to choose any of these to comply. By contrast the City’s website specifies that the check be “nationwide”, although there is no authority in the ordinance for that requirement.

**Applicability to Current Tenants:** The ordinance does not limit the background check requirement to prospective residents, it appears to also apply to current tenants. It does not explain what the owner is to do if the existing tenant does not provide the consent required to run a criminal background check.

**Denial of Applicants/Eviction of Current Tenants Based on Criminal Background Results:** As with the “determination” of the Chief of Police, the ordinance does not indicate what actions should be taken with respect to applicants or existing tenants once the owner has the criminal background information. It is unclear what, if any, action an owner can take with respect to existing tenants. A tenant on a lease can only be evicted for one of the reasons listed in Civil Code 1161.1, not prior criminal conduct. Accordingly, there is no basis to terminate. It is unclear, however, what other duty the owner might have to other residents – for example, disclosure regarding a tenant’s background. Of course, a misstep here, in either direction, can also result in liability for the owner.

Many of CAA’s members do incorporate criminal background checks into their screening criteria and CAA has provided guidance about how to use the checks without violating fair housing laws. CAA’s White Paper on incorporating criminal background checks into screening criteria is attached for your reference.

### Crime Free Lease Addendum

**Content:** The addendum approved by the City Council must be incorporated into all rental/lease agreements, including renewals, executed after the effective date of the ordinance. Because the ordinance does not incorporate the addendum into existing rental agreements, owners will not be able to take action based on the addendum for tenants on fixed term leases.

**Relationship to existing grounds for eviction in State law:** The addendum refers to the owner's existing ability to "regain possession when illegal activity is being carried out on or near the premises with (*sic*) constitutes a public or private nuisance." However, both this reference and the provisions of the addendum are much broader than the provision of state law regarding eviction for nuisance, which is limited to [a]ny tenant .... maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose. CC 1161.1(4)

By contrast, the addendum sweeps in conduct of tenants and non-tenants that occurs off the premises, including "possession... of illegal drugs at any location..." and makes non-tenant occupants who are not otherwise in a contractual relationship with the landlord responsible for compliance with the addendum.

While CAA certainly supports broad rights for owners to evict problem tenants, CAA is not aware of any authority that gives the right to an owner to evict a tenant for conduct that is unrelated to the property or for the conduct of the tenant's guests when they are not on the property.

**Relationship between the Addendum and Conduct that will result in Notice from the Chief of Police:** In addition to being inconsistent with the grounds for eviction for nuisance under state law, the scope of conduct regulated by the addendum is broader than the conduct that will result in a notice of violation from the Chief of Police. The ordinance states that the owner is required to begin eviction proceedings when the Chief provides notice that a tenant has engaged in criminal activity that would violate any federal state or local law, on or near the Residential Rental Property leased to Tenant. This provision requires eviction only when the tenant (not a guest, or other person) is involved in the criminal activity and limits the location to "on or near" the premises, not "any location."

The inconsistencies between the state law, the addendum, and the Chief's notice create uncertainty among owners and tenants about what actions the owner can take. The purpose of a lease addendum is to have specific rules that can legally be enforced by the owner and that can be relied on by other tenants.

### **Notice of Violation from the Chief of Police**

**Content:** The required content of the Notice of Violation from the Chief of Police, like that at issue in *Cook v. Buena Park* is constitutionally insufficient. The Notice is "insufficient to assure a reasonable chance of success in the unlawful detainer action, thus exposing the landlord to unwarranted litigation costs, as well as the possibility of a tenant countersuit for forcible entry if the landlord has attempted to take possession, or malicious prosecution or abuse of process if the owner lacked probable cause to bring the action."

The Buena Park ordinance required that the police chief's notice "identify the offending tenant(s), [the] unit number if applicable, . . . the specific violation(s), and . . . the date(s) and times(s) of any observed criminal activity and any resulting arrest(s) . . ." The Hesperia Ordinance language is identical: "[w]hen

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allowed by law the notice provided by the Chief of Police shall provide a report or incident number, identify the offending Tenant(s), unit number of applicable, and the specific violation(s), and shall state the date(s) and time(s) of any observed criminal activity and any resulting arrest(s)..." It is unclear when provision of this information would not be "allowed by law." The remaining information that can be included in the notice is optional, "at the Chief's discretion."

The terms of notice under the ordinance fail to require sufficient specificity to aid the landlord in the unlawful detainer action. The alleged offender's identity, unit number, and the mere "date(s) and time(s)" of any alleged criminal activity or arrest do nothing to establish a nuisance or illegal purpose. Notice of the "specific violation(s)" presumably alerts the landlord to the category of criminal activity at issue, but the ordinance requires no specificity as to these activities that would aid the landlord in making his or her unlawful detainer case.

This provision is just as constitutionally deficient in Hesperia, as it was 80 miles away in Buena Park. Both ordinances lack a "requirement that the purportedly observed criminal activity and any resulting arrest(s)" be described." (BPMC, § 8.48.050(B).) The court in *Cook v. Buena Park* stated that the notice must include "the documented observations of any witness willing to testify, such as a neighbor or an informant, [which] would supply probable cause for the landlord's unlawful detainer action and give the landlord a chance at success in the action. This would not unduly increase any administrative burden on the City, because "it is the same information that the City would have to gather to file its own action for nuisance, and presumably [is the same] information the police chief . . . used as the basis for notice."

**Deadline to Commence Eviction Proceeding:** As in Buena Park, the Hesperia Ordinance's "second, and related, failing is its onerous requirement that the landlord institute the unlawful detainer action within just 10 days of receiving notice from the Chief of Police. This is not nearly enough time for the owner to bolster his or her evidence if the City's notice is lacking or to otherwise investigate the matter and develop the case. We note that the pilot program's notice period was recently increased from 15 days to 30 days. Since the pilot program is not under review, we express no opinion on whether 15 days or 30 days is constitutionally adequate. It suffices to say that 10 days is far too short."

In short, Hesperia's requirement that the owner "begin the eviction process" within 10 business days of receipt of notice from the Chief of Police that the "tenant is engaged in criminal activity that would violate any federal state or local law on or near the residential rental property leased to tenant" is unconstitutional and cannot be enforced by the City.

**Compliance with Notice and Lack of Opportunity for Appeal:** The ordinance does not specify when the 10 day period begins – for example, upon confirmation of receipt of the emailed notice or certified mail, or a certain number of days after emailing or mailing. The website provides "from the date of the notice" but there is no language in the ordinance to support this.

It is also unclear if any further action is required by the City when a tenant prevails in the unlawful detainer, premised on the Police Chief's notice. At what point is the owner free to focus on paying

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attorneys' fees and defending the tenant's wrongful eviction and libel actions? The Website provides that "failure to initiate, complete or provide proof of the eviction process can result in fines." Unlike the Buena Park ordinance, the Hesperia ordinance (despite what the website provides) does not require the owner to win the unlawful detainer suit. Nonetheless, any requirement that the owner prevail or be penalized would be as unconstitutional as it was in Buena Park.

The Hesperia ordinance does not provide any process for appealing the Notice from the Police Chief. Forcing an owner to go forward with an eviction that has no legal basis, is a violation of the owner's constitutional right to due process. The owner's only chance for an appeal would occur after a strict liability penalty is imposed for failure to comply with the Chief's notice.

### **Protections for Victims of Domestic Violence**

The ordinance expressly states that it cannot be applied "in a manner that will result in the eviction of a victim of domestic violence or abuse." Unlike state law, this provision is not limited to evictions related to the domestic violence or abuse. In other words, if a tenant is a drug dealer, but also a victim of domestic violence, the tenant cannot be evicted. This is not consistent with state law regarding evictions for illegal activity or the protections in state law for victims of domestic violence.

California Civil Code Section 1161.3 protects victims of domestic violence and other offenses from termination or non-renewal based upon an act or acts against a tenant or a tenant's household member that constitute domestic violence, stalking, human trafficking, or abuse of an elder or a dependent adult. This law provides a balance between the needs of the victim of domestic violence, the safety of other residents of the property and the owner.

In order to qualify for this defense to eviction the tenant must provide specific documentation and the perpetrator cannot be a tenant of the same dwelling unit as the tenant or household member. This is because the law does not authorize "partial eviction" where the victim stays and the perpetrator leaves. In addition, even if the above conditions are met, under state law, an owner may terminate or decline to renew a tenancy if the tenant allows the perpetrator to visit the property or the landlord reasonably believes that the presence the perpetrator poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to quiet possession.

By contrast, the Hesperia ordinance gives victims of domestic violence a "get out of jail free" card that provides a complete defense to any eviction for any reason. This violates the specific grounds for eviction provided to owners in state law.

## Property Inspection

All residential rental properties are subject to an annual exterior inspection for compliance with:

- (1) "The Program," (Section 8.20.060 (B)(1))
- (2) "Applicable Laws" (Section 8.20.060 (A), (B)(1))
- (3) "Items relating to crime prevention" and "health and safety of the occupants." (Section 8.20.060 (C))

The ordinance further states that "the specific items to be inspected shall be in keeping with national standards for the Crime Free program and can be adjusted with approval of the City Manager to meet the needs of this city." The definitions section defines "Annual inspection" as "an inspection meeting the criteria and standards of Crime Free Through Environmental Design (CFTED)." Other provisions of the ordinance, however, refer to the "standards of CPTED, Crime Prevention Through Environmental Design)."

There is a checklist for the inspection available on the city's website link that is surprisingly short, considering the broad scope of items 1-3 above. Other than the checklist, neither the standards of "CFTED" nor "CPTED" are defined in the ordinance or on the City's website. It is unclear whether the checklist reflects the complete scope of the inspection; what, if any, legal duty the owner has to comply with many of these items; what authority the City has to enforce them or how someone could even measure compliance. For example "front landscaping is adjusted to eliminate any hiding places" and "adequate security lights" are vague and not related to any legal requirement. Some of the other items listed as "recommended" are in fact covered by existing laws, but the legal requirements are not reflected in the checklist (i.e., locks, lights, fire extinguishers) or are incorrect (working smoke detectors—at least one centrally located). In addition, many of these items could only be observed from the interior of the premises (lighted laundry rooms, smoke detectors, deadbolts), yet the inspection is limited to the exterior.

**Inspection of Records:** The ordinance indicates that the exterior inspection will take place after the completed property's registration form is submitted and that no prior notice of the exterior inspection will be provided. The ordinance also states "a subsequent inspection of the Owner's records may be requested to ensure compliance with this Chapter." The ordinance does not indicate what the scope of this "requested" record review will be or a timeline for compliance. The government may require businesses to maintain records and make them available for routine inspection when necessary to further a legitimate regulatory interest. However, the Fourth Amendment places limits on the government's authority in this regard. The inspection demand must be "sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome" and, the demand to inspect "may not be made and enforced by the inspector in the



field." The party subject to the demand must be afforded an opportunity to "obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply." The vague provisions of the Hesperia ordinance lack these essential procedural safeguards against arbitrary or abusive inspection demands. The ordinance places no limit on the scope of the record inspection and provides no opportunity for pre-compliance judicial review of a demand to inspect an owner's records. (See *Patel v. City of Los Angeles*, 738 F.3d 1058 (2013)). CAA will recommend to its members to consult with their attorneys if they receive such a request.

**Inspection Report:** A written report of the inspection will be provided to the owner at an unspecified time after the inspection. According to the ordinance, the report will specify the violations of "Applicable Laws" identified in the inspection and will provide a timetable for compliance and re-inspection, including re-inspection fees. If no violations are found, the City shall issue a certificate of registration to the owner.

While CAA does not dispute the City's authority to cite its members for violating housing standard laws, the description of this process on the website and the scope of the inspection suggests that fines will be issued and registration denied due to non-compliance with the vague "standards of CPTED, Crime Prevention Through Environmental Design)," set out in the checklist such as "inadequate" security lights.

The ordinance suggests that registration is a prerequisite to offering residential rental property for rent, but there is no process for the owner to appeal the inspection results or the City's refusal to register the property. The right to appeal doesn't accrue until an administrative fine has been assessed. Fines may be assessed against owners who:

- (1) Fail to "correct a violation of the Applicable Laws"
- (2) "Fail or cause to fail to cooperate with inspections (*sic*)"

The vagueness of the inspection standards and the resulting impossibility of proactive compliance, make failure of the inspection and denial of the certificate of registration extremely likely. Combined with the statement that all violations are strict liability offenses, regardless of intent, this creates a great risk of erroneous deprivation of the owner's constitutionally protected interests

CAA is not interested in defending property owners who maintain property that constitutes a public nuisance nor is the Association interested in acting as the spoiler in any reasonable effort to deal with properties that are a public nuisance. Rental property owners, however, should not be unfairly burdened when it comes to controlling anti-social behavior of tenants in blighted communities. What rental property owners need is clear authority to address criminal behavior on the property, and they need support from law enforcement.



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CAA and its local association look forward to resolving the issues presented in this letter through collaboration with staff and to lawfully achieving the city's goal of reducing crime and improving the quality of life for residents of Hesperia.

Thank you for your consideration of our concerns.

Sincerely,

**California Apartment Association**



By  
Heidi Palutke  
Research Counsel

Attachment: CAA's White Paper: *Criminal Background Checks - Deciding Whether to Add Criminal Checks to Your Tenant Screening Process*



# WHITE PAPER



BROUGHT TO YOU BY THE CALIFORNIA APARTMENT ASSOCIATION

## **Criminal Background Checks Deciding Whether to Add Criminal Checks to Your Tenant Screening Process**

As information regarding criminal background becomes more readily available, many owners and managers are considering the need for criminal background checks as part of their screening process for prospective residents. Criminal background checks raise a number of important legal and social issues: the right to privacy and fair housing are implicated, as are questions about whether ex-offenders who have “done the time” should be hampered in their efforts to rejoin society. In the case of sex offenders, recidivism rates indicate that some wariness is appropriate. Many owners have asked if this means they must become an expert in criminology, assessing the likelihood of future criminal behavior in every applicant. In this light, any screening policy a company decides to implement must be carefully designed and consistently applied so that the resident selection process is objective.

As with any other tenant screening criteria, the goal is to select the resident who is most likely to pay the rent on time and the least likely to damage the premises or cause problems with other residents. Screening criteria must be narrowly tailored to avoid illegal discrimination, while also serving the legitimate business goals mentioned above. Excluding every applicant with any criminal background, regardless of the crime and its relationship to the applicant’s ability to meet tenancy obligations is likely to run afoul of fair housing laws.

This paper is intended to present pros and cons and to suggest questions and issues that members should discuss with their attorney to develop a policy that is appropriate for each individual property or company.

### **Special Requirements for Government-Subsidized Properties**

The Housing and Urban Development Department (HUD) regulations set screening restrictions for certain subsidy programs that are designed to ensure that tax money is not used to subsidize criminals or individuals with a criminal record. The regulations require that owners who participate in these programs develop and make public screening criteria that *must* prohibit admission of persons who are registered sex offenders, were recently evicted from federally assisted housing for drug-related criminal activity, or are currently engaged in the use of illegal drugs or abuse of alcohol. The regulations also provide that owners may establish additional standards, including violent criminal activity, drug-related criminal activity, and “other” criminal activity that threatens the health, safety, and right to the peaceful enjoyment of other people, generally. These requirements vary depending on the type of subsidy that is received. Owners should consult with their attorney and local housing authorities regarding the requirements for the property at issue. Owners and attorneys should be aware of the differences between federal law, which requires the denial of subsidized housing to registered sex offenders and California law, which prohibits the use of information from the Megan’s law database for housing decisions. See further discussion below.



## Are Ex-Offenders A Protected Class?

The California Fair Employment and Housing Act (FEHA) and the Unruh Act expressly provide that it is unlawful to refuse to rent to an individual based on membership in certain listed protected classifications. While ex-offenders are not one of the specifically enumerated protected groups or classifications, in the case of *Marina Point v. Wolfson*, the California Supreme Court interpreted the Unruh Act to prohibit any arbitrary discrimination, not just discrimination against the categories listed in the law. Disqualification for residency based on criminal background could be considered unlawful “arbitrary” discrimination unless it relates to the prospective resident’s ability to meet tenancy obligations. For this reason, an owner’s criteria should be narrowly tailored. Another reason to narrowly tailor criteria is to avoid claims of *disparate impact* discrimination, meaning even if the screening criteria is neutral and applied objectively to all applicants, it may have the impact of disqualifying members of a particular legally protected group (race or gender) at a significantly higher rate than others. In this case, the criteria may be unlawfully discriminatory unless the owner/manager has a valid defense, such as *business necessity*. Criteria that are narrowly tailored to determine an applicant’s ability to fulfill the responsibilities of tenancy are likely to qualify for the business necessity defense.

## Types of Offenses/Activities That May Not Be Considered

California law prohibits a consumer report from including arrests, indictments, or misdemeanor complaints that did not result in a conviction. Also, reports may not include arrests, indictments, misdemeanor complaints, or convictions of a crime that “from the date of disposition, release, or parole antedate the report by more than seven years.” (Civil Code Section 1785.13.) Labor laws and regulations also prohibit most employers from inquiring about arrests or detentions that do not result in conviction, expunged convictions, and certain misdemeanor convictions. These laws evidence a governmental policy that older convictions and arrests that did not result in conviction should not limit an individual’s ability to seek employment, credit, and perhaps housing. (Note: The existence of California’s on-line sex offender registry does contain older convictions, which indicates that the policy is different for certain offenses that are believed to have higher rates of recidivism.) Screening criteria that are consistent with these factors are less likely to constitute unlawful arbitrary discrimination.

## Selecting Screening Criteria Related to Criminal Background

Any screening standards should be narrowly tailored to help an owner select individuals who are able to fulfill their tenancy obligations without excluding others arbitrarily. The purpose is to identify past bad conduct that is relevant, based on a reasonable belief that the prospective resident or employee may be a direct threat to persons or property. Owners should consult with an attorney when they develop screening criteria.

Questions to consider:

**How far back to look?** Convictions or past bad credit information are likely to be less relevant with the passage of time, (for example, bankruptcies diminish in relevancy each year an individual remains solvent). Owners may wish to set different time periods for different crimes, such as denying applicants with certain old felonies but accepting those with old misdemeanors or felonies unrelated to tenancy or employment obligations.

**Type and Severity of Crime?** Background checking services can provide lists of crimes that can be included in screening criteria. For example, the following crimes are more likely to be found relevant toward the risk an ex-offender may pose to other residents or the property: burglary, assault, sexual crimes, manufacture of controlled substances, arson, possession of illegal weapons, or passing bad or forged checks. By contrast the following crimes, while serious, do not reflect as much on an individual’s



ability to fulfill the obligations of tenancy or employment: bigamy, traffic offense, illegal gambling, jury tampering.

## **Offenses Related to Controlled Substances**

It is illegal to refuse to rent to someone because of past drug addiction; both state and federal law classify *past* drug addiction and alcoholism as disabilities. However, the federal Fair Housing Act does allow you to refuse to rent to individuals who have been convicted of the manufacture or distribution of a controlled substance.

## **Sex Offenders and Issues Related to Megan's Law**

Megan's Law has given rental property owners a contradictory directive. The law itself and the existence of first the 900 number and now the website, evidence the Legislature's concern over recidivism rates among sex offenders and the desire to empower the public to protect itself. The law, however, also prohibits certain uses of the information. Specifically, the law prohibits a rental property owner from using the sex offender registry to discriminate against a sex offender and imposes heavy penalties for doing so. There is an exception, however, a person is authorized to use the sex offender registry in order to "protect a person at risk" or as allowed by "any other provision of law." Unfortunately, the statute provides little, if any, guidance as to what constitutes "at risk" for purposes of triggering a rental property owner's right to use the sex offender registry to "protect" a tenant. Megan's law does not, however, prohibit discrimination against sex offenders; it simply prohibits use of the information from the database. Accordingly, if information is obtained from a criminal background check or other source, the prohibitions in Megan's law do not apply. A screening policy that excludes sex offenders would then be evaluated against the same fair housing and privacy laws as any other criminal background.

## **Consistent Application of Screening Criteria**

Any screening criteria, whether about criminal background, income, or credit rating, must be consistently applied to all applicants. This does not necessarily mean owners must run a criminal background check on every applicant. They can establish an order in which the screening criteria are applied so that the background check is only run if the applicant has met all the other requirements. Owners, however, should document the process and must use the same process for each applicant. Once owners have established a process and criteria, they should not make exceptions for any applicant.

## **Economic Considerations – Resident Screening Law**

California law limits the fee owners may charge a prospective resident to cover the cost of screening. The fee cannot be greater than the actual out-of-pocket costs of gathering information on the prospective resident. The initial law provided that in no case can the amount of the application fee charged by the owner be greater than \$30 per applicant. This fee may be adjusted annually by the owner commensurate with an increase in the Consumer Price Index. Owners who do not currently charge the maximum could increase their fee to cover part of the cost of the criminal background check. The cost of both a credit check and a criminal background check will, however, likely exceed the maximum fee allowed by law. Some background checking businesses suggest that owners require the applicant to provide the background check. Considering the legal limit on the screening fee, however, a policy established by an owner that requires applicants to *provide* their own report may be a violation of that law or at least an "unfair business practice." In addition, allowing applicants to provide their own documentation creates an opportunity for fraud.



Fair housing laws require that any screening criteria be applied consistently. This means that a criminal background check must be performed on all applicants equally. Due to the inability to pass on the entire cost of the background check, this additional expense may be a problem in some areas where the market would not allow an increase in rent, and the owner is unable to otherwise absorb the cost. Some ex-offenders may be excluded by tightening your other screening criteria. Individuals who have been recently incarcerated are unlikely to have a stellar credit, housing, and employment history.

## **Additional Liability Considerations**

There is very little case law to date that addresses the question of an owner's liability when the only reason to believe a tenant has dangerous propensities is based on prior, possibly very dated, convictions. Generally, in determining an owner's liability for the acts of a tenant, the court will look at factors such as whether (1) it was foreseeable, i.e., there was a history of similar behavior to what caused the present injury; (2) the owner knew of the tenant's dangerous propensities, (3) the owner or manager had an opportunity to prevent the injury; and, (4) as a result of the owner/managers' failure to do so, the injuries happened. It is unclear in what circumstances information from a criminal background check, as opposed to more recent conduct, would qualify as "history of similar behavior" or otherwise make an injury foreseeable. Some courts have been reluctant to impose a duty to warn or take other action based on behavior for which the ex-offender has already been punished (*i.e.*, prior convictions), because it would contravene the public policy of allowing rehabilitated ex-offenders to reenter society.

## **References**

- CAA White Paper No. 47 - *Use of Criminal Background Checks and Consumer Credit Reports In Employment Decisions*

