



Human Relations Commission Staff Report

From: Coleman Frick, Manager of Long Range Planning Division

Meeting Date: October 10, 2024

Report #: 2408-3355

TITLE

Initial Public Discussion of Fair Chance Housing Policy Considerations, Components and Approach Options Regarding the Use of Criminal History Information in Palo Alto Rental Housing Decisions

RECOMMENDATION

Staff recommend that the Human Relations Commission review, discuss, and receive public comments on Fair Chance Housing policy considerations, components, and approach options, and recommend to City Council the consideration of Fair Chance Housing policies.

EXECUTIVE SUMMARY

Fair Chance Housing policies advance fair housing, anti-discrimination, and renter's rights by specifying how and when criminal history information can be used in rental housing decisions. Local governments in California and elsewhere in the US employ Fair Chance Housing Ordinances to offer some local protections from housing discrimination to renters with a criminal history. This staff report is designed to support Human Relations Commission (HRC) review, discussion, and receipt of public comments on the development of Fair Chance Housing policies for Palo Alto.

BACKGROUND

On November 29, 2021, City Council directed staff to study or implement a package of rental protection policies to add more certainty, stability, and fairness in the Palo Alto rental market for both renters and landlords.¹ This included the evaluation of a potential Fair Chance Housing Ordinance including any consequences, both intended and unintended.

Housing Element Policy, Programs, and Implementation

Staff's work on this topic advances the City's 2023-2031 Housing Element Program 6.6: Fair Housing, which directs pursuit of renter protections, including a proposed Fair Chance Housing Ordinance.²

¹ City Council Meeting Minutes, 11/29/21 and City Council City Manager Report ID # 13786, 11/29/21: <https://www.cityofpaloalto.org/Departments/City-Clerk/City-Meeting-Groups/Meeting-Agendas-and-Minutes>
City Renter Protection Policy Development Webpage: <https://www.cityofpaloalto.org/Departments/Planning-Development-Services/Housing-Policies-Projects/Renter-Protection-Policy-Development>

² City of Palo Alto Housing Element, Certified August 20, 2024: <https://paloaltohousingelement.com/wp-content/uploads/2024/08/Palo-Alto-Housing-Element.pdf>.

2024 City Council Priorities and Objectives

The City Council approved a series of priorities and objectives for the City.³ One objective (#54) is for City Council to discuss a possible Ordinance related to Fair Chance Housing policy. Staff research is in progress to identify the policy implications from a legal, policy, and anticipated resource demand perspective.

Human Relations Commission (HRC) Recommendations

On February 9, 2023, the HRC recommended that City Council proceed with a Fair Chance Housing Ordinance, citing agreement with a previous 2021 Planning & Transportation Commission recommendation for an Ordinance that limits a landlord's ability to inquire about an applicant's criminal history.

Housing Ad Hoc (HAH) Discussion

Staff informally discussed Fair Chance Housing policies with the HAH committee in August 2024. The HAH recommended that the HRC consider potential policy approaches prior to City Council discussion. The committee members also discussed policy approach options, establishment of lookback periods for convictions that could be considered as directly related to housing, and City Council review and discussion.

Legal Context

Federal and State fair housing laws prohibit discrimination in housing decisions based on various protected characteristics, such as race, national origin, and disability.⁴ Having a criminal history is not a protected characteristic under State or Federal law. However, a landlord's practice or policy regarding criminal history information can violate fair housing law when it amounts to discrimination based on a protected characteristic, including when it has an unjustified discriminatory effect on members of a protected class, even if the landlord has no intent to discriminate. A landlord violates the law when it adopts a practice that has a discriminatory effect on members of a protected class unless the landlord can show that the practice is necessary to achieve a substantial, legitimate, nondiscriminatory purpose, the practice effectively carries out the identified purpose, and there is no feasible alternative practice that would equally or better accomplish the identified purpose with a less discriminatory effect.⁵

State regulations implementing California's Fair Employment and Housing Act (FEHA) provide some baseline requirements for the use of criminal history information in housing decisions.⁶ Most notably, a landlord may only consider a "directly related conviction," meaning a criminal conviction that has a direct and specific negative bearing on a substantial, legitimate, and nondiscriminatory purpose of the landlord, such as the safety of other residents, the housing provider's employees, or the property. They may not consider other criminal history information,

³ City of Palo Alto City Council Priorities Webpage: <https://www.cityofpaloalto.org/Departments/City-Clerk/City-Council/City-Council-Priorities>.

⁴ See, e.g., Fair Housing Act, 42 U.S.C. §§ 3601 et seq.; Unruh Civil Rights Act, Cal. Civ. Code § 51; California Fair Employment and Housing Act, Cal. Gov. Code §§ 12900 et seq.

⁵ 2 CCR § 12266.

⁶ 2 CCR §§ 12264-12271.

like arrests that did not lead to a conviction, or convictions that have been sealed, dismissed, or expunged. State law encourages (but does not require) landlords who consider criminal history information to adopt certain procedural protections for renters, including:

- Providing written notice of the policy and an opportunity for the renter to present mitigating information;
- Considering the factual accuracy of the criminal history information; and
- Delaying seeking out criminal history information until after an individual's other qualifications are verified.

Efforts to pass Fair Chance Housing legislation at the State level in California have so far been unsuccessful. Nevertheless, local jurisdictions may adopt Fair Chance Housing policies that are more protective than existing State requirements, including by further restricting the criminal history information a landlord may consider. However, the U.S. Court of Appeals for the Ninth Circuit has held that a Fair Chance Housing Ordinance that banned all inquiry into a prospective renter's criminal history was an unconstitutional restriction of landlords' right to free speech under the First Amendment.⁷ The court reasoned that Seattle's ordinance, which included a blanket ban on inquiring about a renter's criminal history information except where required by law, was not "narrowly drawn" to serve the city's stated interests. Though it did not rule on the constitutionality of any other local ordinance, the court cited with approval local ordinances from around the country that allow landlords to consider some criminal history information under some circumstances.

Commercially Available Criminal History Databases

While widely used and accessible, there are some challenges with the commercially available criminal history databases often used in housing decisions. These databases may be inaccurate or incomplete. For example, from one study that analyzed criminal records for 101 persons comparing official state reports, qualitative interviews, and private sector background reports (one regulated and one unregulated), the authors found that up to sixty percent of these persons had a private sector criminal background report with an incident that did not appear in an official government record and nearly all persons had private sector criminal background report that failed to report an incident shown in an official government record.⁸ Further, these databases don't necessarily have important search filters, they often have different levels of detail or inconsistent classification of crimes, and may incorrectly attribute records from someone else to the person for which the history information is solicited.

⁷ *Yim v. City of Seattle*, 63 F.4th 783 (9th Cir. 2023).

⁸ Sarah Lageson and Robert Stewart, *Criminology*, The problem with criminal records: Discrepancies between state reports and private-sector background checks, February 9, 2024: <https://onlinelibrary.wiley.com/doi/10.1111/1745-9125.12359>; <https://nij.ojp.gov/library/publications/problem-criminal-records-discrepancies-between-state-reports-and-private>. Funding was provided by the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, under Award 2017-IJ-CX-0036.

Local Information

Staff conducted basic initial interviews with Project Sentinel and Alta Housing. Both hold contracts with the City and provide services pertaining to rental housing in Palo Alto. From these interviews, staff discovered that neither organization frequently interfaces with renters regarding criminal history information — instead, individual landlords and housing providers follow their own procedures for renting units in Palo Alto. However, in the few instances when Project Sentinel did advocate for renters with criminal history, these instances mostly pertained to criminal history related to underlying mental health issues, and the history could include misdemeanors or felonies.

DISCUSSION

Staff seeks feedback from the HRC and the public on the Fair Chance Housing policy considerations, components, and approach options outlined in this section.

Fair Chance Housing Policy Considerations and Purpose

The purpose of local Fair Chance Housing policies that limit the use of criminal history information in renter selection is to give previously incarcerated persons or other persons with a criminal history a fair opportunity to compete for rental housing, thus putting them in a better position to reintegrate into the community, obtain gainful employment, and access health and other services.⁹ Fair Chance Housing policies also seek to reduce the incidence of homelessness for persons with a criminal history and reduce the risk of recidivism through housing stability.¹⁰

Standard Fair Chance Housing Policy Components

Local Fair Chance Housing policies have the following standard components, at a minimum.

Definitions

Fair Chance Housing policies include key definitions. As an example, Fair Chance Housing policies prohibiting landlords from taking adverse action against a renter because of their criminal history would include a broad definition of “adverse action,” which is consistent with State law. Examples of “adverse action” toward a renter could include but not be limited to the following:

- Failing or refusing to rent or lease housing to a person;
- Failing or refusing to continue to rent or lease housing to a person;
- Reducing the amount or term of any person’s subsidy for housing;

⁹ Center for American Progress, Strengthening Access to Housing for People With Criminal Records Is Key to Successful Reentry, April 17, 2023: <https://www.americanprogress.org/article/strengthening-access-to-housing-for-people-with-criminal-records-is-key-to-successful-reentry/>.

¹⁰ California Health Policy Strategies, LLC, Criminal Justice System Involvement and Mental Illness among Unsheltered Homeless in California, November 2018: <https://calhps.com/wp-content/uploads/2018/11/policy-brief-unsheltered-homelessness-11.20.2018.pdf>.

Prison Policy Initiative, Nowhere to Go: Homelessness among formerly incarcerated people; August 2018: <https://www.prisonpolicy.org/reports/housing.html>.

Leah Jacobs and Aaron Gottlieb, Criminal Justice Behavior, The Effect of Housing Circumstances on Recidivism, September 2020 47(9): 1097-115, Published Online August 6, 2020: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8496894/>.

- Treating an applicant or renter differently from other applicants or renters, including but not limited to taking such actions as requiring higher security deposit or rent;
- Treating a person as ineligible for a renter-based rental assistance program; or
- Failing to permit a renter's close family member¹¹ to occupy a rental unit while the occupying renter remains in occupancy.

Applicability & Exemptions

Fair Chance Housing policies need to outline applicability parameters, such as which persons and rental units are subject to the policy. Unless otherwise informed by the HRC's feedback, staff would include applicability parameters in any draft Ordinance that extends Fair Chance Housing policy protections to both primary renters and subtenants.

Fair Chance Housing policies usually include some clarifications regarding what rental circumstances are exempt from the policies. Most rental units would be subject to Fair Chance Housing policies; exemptions typically pertain to when a landlord lives on a property that has only one or a few rental units or when a renter is trying to replace a roommate or sublet. Unless otherwise informed by the HRC's feedback, staff would include at least the following exemptions for the following rental circumstances in any draft Ordinance:

- Single family dwellings, including condos, townhomes and detached single-family homes, where one or more landlords occupies the dwelling as their principal residence;
- Single family dwellings with accessory dwelling units where either the main or an accessory dwelling unit is occupied by one or more landlords as their principal residence;
- Duplexes or triplexes where one of the units is occupied by one or more landlords as their principal residence; and
- Renter-occupied units where an occupying renter seeks to replace an existing co-renter, add an additional co-renter, or sublet the unit, provided that the occupying renter remains in occupancy.

Exceptions

It is necessary for Fair Chance Housing policies to include exceptions for landlord and/or housing provider compliance with existing State or Federal law. As examples:

- Some affordable housing providers are required to consider certain types of criminal history in determining an applicant's eligibility.
- A landlord may consider a conviction that leads to an applicant becoming a lifetime registered sex offender in order to protect persons at risk.

Staff would include exceptions pertaining to compliance with State or Federal law in any draft Ordinance.

¹¹ "Close Family Member" means a spouse, registered domestic partner, child, sibling, parent, grandparent, or grandchild.

Remedies

Fair Chance Housing policies should specify the remedy for a violation of the policy. Consistent with existing rental policies in the Palo Alto Municipal Code (PAMC), staff recommends that any Fair Chance Housing Ordinance be enforceable through a private right of action, meaning that a person aggrieved by a violation of the ordinance may sue the alleged violator in civil court. As noted in the resources considerations section, currently there are insufficient resources for staff to take on enforcement action.

Waiver

Fair Chance Housing policy should allow a landlord or housing provider to request a waiver or adjustment of requirements if it could be shown that strict application would effectuate an unconstitutional taking of property or otherwise have an unconstitutional application to the landlord, or is necessary to avoid an imminent risk of harm to the landlord, landlord's agents, or other renters. Staff would include this waiver provision in any draft Ordinance.

Fair Chance Housing Policy Approach Options

In tandem with the standard Fair Chance Housing policy components discussed above, there are two primary policy approach options for Fair Chance Housing policy implementation.

Under **Option 1**, a draft Fair Chance Housing Ordinance would present substantive restrictions on the criminal history information that landlords may consider in their rental housing decisions, coupled with offering certain procedural protections for renters.

- Option 1 would be consistent with State law that already prohibits landlords from considering criminal history other than “directly related convictions.”
- Option 1 could include further restrictions on the criminal history information that may be considered by establishing “lookback periods.” Lookback periods specify a time period after which certain convictions may no longer be considered (e.g., no misdemeanors or felonies older than three (3) years from the date of sentencing).
- Option 1 would require a landlord to take certain procedural steps before taking an adverse action against a renter based on their reviewable criminal history including:
 - Giving an otherwise qualified renter a conditional housing offer before checking the renter's criminal history;
 - Allowing a renter to present evidence of inaccuracy, rehabilitation, or other mitigating factors regarding their criminal history;
 - Providing the renter with a copy of their background check and written statement of the reasons for taking adverse action, such as denial of their rental application, based on the renter's criminal history; and
 - Other landlord notice and recordkeeping protocols.

Option 2 would prohibit discrimination based on criminal history in housing decisions except when required by law. To clarify, Option 2 would not prevent housing providers from inquiring about criminal history information but would ban discrimination based upon that potential history.¹²

See Table 1 for an initial staff analysis of the pros and cons of these options.

Table 1: Fair Chance in Housing Policy Approaches Pros and Cons		
Option 1	Pros:	Cons:
Limit use of criminal history in housing decisions with additional procedural protections for renters	Landlords might prefer overall because the approach leaves landlords with remaining authority to decide renter fitness	Procedurally heavy for landlords
	Affords opportunity for renter to present mitigating information and provides other tools for renters/advocates	
	Similar to other cities	
	Might be easier to enforce due to the records created in each step of the process	
Option 2	Pros:	Cons:
Blanket prohibition on discrimination based on criminal history in housing decisions, unless required by law	Procedurally clear for landlords	Landlords might not prefer this approach because it leaves landlords with no remaining authority to decide renter fitness
	More straightforward and similar to PAMC regarding other types of discrimination	Does not afford opportunity for renter to present mitigating information or provide other tools for renters/advocates
		Might be more difficult to enforce

Consistent with what is proposed in Option 1, Project Sentinel expressed a perspective during their interview that it was important for Fair Chance Housing policies to allow a renter the opportunity to present mitigating information to prospective landlords, which could make a difference in housing decisions.

¹² In *Yim v. City of Seattle*, the Ninth Circuit held that a fair chance ordinance that prohibited all inquiry about a prospective renter's criminal history violated the First Amendment.

Regarding lookback periods that could be included as part of Option 1, more recent Clean Slate and Fair Chance Housing policy related work discusses establishment of shorter lookback periods than those generally instituted or discussed in the past. The following list presents a few examples of lookback periods for HRC consideration:

- The U.S. Department of Housing and Urban Development (HUD) recently issued a proposed rule that would require lookback periods for HUD-assisted housing and would treat lookback periods longer than three (3) years as presumptively unreasonable. However, the proposed rule would permit a landlord and/or housing provider to determine a longer lookback period for certain crimes if they are able to provide empirical evidence justifying such longer period. HUD sought public comments on the lookback periods as part of their rulemaking process through June 10, 2024;¹³
- HUD compiled a list of other lookback periods contained in state laws, including:
 - State of New Jersey, *Fair Chance in Housing Act* - certain types of conviction records require a longer lookback period than others. For example, a six (6) year lookback period is in place for a first-degree indictable offense; that decreases to four (4) years for a second- or third-degree indictable offense;
 - State of Colorado, *Rental Application Fairness Act* - landlords may not consider arrest records or criminal conviction records more than five (5) years before the date of housing application, though exceptions are made for certain crimes including crimes related to methamphetamine, crimes requiring registration to the sex offender registry, and homicides; and
 - State of Illinois, *Public Housing Access Bill* - lookback periods for criminal activity are six (6) months prior to a rental housing application date with exceptions for federal requirements.¹⁴
- In California, the Investigative Consumer Reporting Agency Act (ICRAA) prohibits investigative consumer reports from including records of arrest, indictment, information, misdemeanor complaint, or conviction of a crime more than seven (7) years old, with some exceptions;¹⁵

¹³ Federal Register, Reducing Barriers to HUD-Assisted Housing A Proposed Rule by the Housing and Urban Development Department, April 10, 2023: <https://www.federalregister.gov/documents/2024/04/10/2024-06218/reducing-barriers-to-hud-assisted-housing>; <https://www.federalregister.gov/documents/2024/04/10/2024-06218/reducing-barriers-to-hud-assisted-housing#citation-95-p25345>; <https://www.govinfo.gov/content/pkg/FR-2024-04-10/pdf/2024-06218.pdf>

¹⁴ Federal Register, Reducing Barriers to HUD-Assisted Housing A Proposed Rule by the Housing and Urban Development Department, April 10, 2023: <https://www.federalregister.gov/documents/2024/04/10/2024-06218/reducing-barriers-to-hud-assisted-housing>.

¹⁵ CA Civ Code § 1786.18 (2023), Justia Webpage: [https://law.justia.com/codes/california/code-civ/division-3/part-4/title-1-6a/article-2/section-1786-18/#:~:text=\(c\)%20Except%20as%20otherwise%20provided,tax%20lien%2C%20or%20outstanding%20judgment%20](https://law.justia.com/codes/california/code-civ/division-3/part-4/title-1-6a/article-2/section-1786-18/#:~:text=(c)%20Except%20as%20otherwise%20provided,tax%20lien%2C%20or%20outstanding%20judgment%20)
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- City of San Francisco Fair Chance Housing policies specify that a conviction cannot be considered in housing decisions if it is more than seven (7) years old from the date of sentencing;¹⁶
- City of Richmond Fair Chance Housing policies specify that a conviction cannot be considered if it is more than two (2) years old from the date of sentencing;¹⁷
- The Housing Ad Hoc committee discussed lookback periods for misdemeanors and felonies and considered if lookback periods for misdemeanors might be shorter than for felonies, such as three (3) years for misdemeanors and five (5) years for felonies.

Potential Implementation Impacts/Unintended Consequences

City Council requested an analysis of potential Fair Chance Housing implementation consequences, both intended and unintended.

Currently, Palo Alto landlords and housing providers utilize their own policies regarding the use of criminal history information in housing decisions. An intended consequence of City implementation of Fair Chance Housing policies would be to have a codified, consistent, and clear anti-discrimination, anti-displacement, and housing stability policy for all housing providers.

Although it could not actually be directly measured, another intended consequence would be to reduce the potential for housing discrimination against renters with a criminal history.

Unintended consequences could possibly pertain to:

- Potential changes in the public perceptions of public safety, regardless of being founded or unfounded;
- Potential controversy based on differing public opinions on Fair Chance Housing policy content, applicability, exceptions, and exemptions; and
- Potential implementation difficulty for housing providers if their existing procedures conflict with any new Palo Alto Fair Chance Housing policies.

Requested Feedback

Staff seeks general feedback from the HRC and members of the public on the Fair Chance Housing policy components, approach options, and policy considerations outlined in this staff report.

Specifically, staff seeks HRC recommendations on the following:

1. Support for one of the discussed Fair Chance Housing policy approach options; and
2. Support for City Council consideration of Fair Chance Housing policies.

¹⁶ City of San Francisco Police Code, Article 49 Section 4906: Procedures for Considering Arrests and Convictions and Related Information in Employment and Housing Decisions:

https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_police/0-0-0-8616

¹⁷ City of Richmond, Ordinance No. 20-16 N.S., Chapter 7.110 Fair Chance Access to Affordable Housing:

<https://www.ci.richmond.ca.us/DocumentCenter/View/49090/20-16-NSChapter-7110-Fair-Chance-Access-to-Affordable-Housing>

The HRC and members of the public might also raise additional Fair Chance Housing policy considerations and additional potential intended/unintended consequences of Fair Chance Housing policy implementation.

TIMELINE

Staff will incorporate feedback received at the HRC meeting into materials presented to City Council. Given City Council's stated 2024 objective to discuss a possible Ordinance related to Fair Chance Housing policy, next steps in later 2024/early 2025 could include staff taking these materials to City Council to receive further policy direction or staff taking a draft Fair Chance Housing Ordinance to City Council for a first reading.

FISCAL/RESOURCE IMPACT

Initial Fair Chance Housing policy exploration utilized existing City staffing resources which would also be used for any forthcoming public engagement, public hearings, and draft Ordinance preparation. No additional staff or budget resources are necessary to bring a draft Fair Chance Housing Ordinance to City Council, though existing staffing resources are limited. If City Council adopted a Fair Chance Housing Ordinance, additional staff and other resources might be needed in the future, especially if the final ordinance contains an administrative enforcement provision. Staff currently provides Palo Alto residents with code interpretations of existing rental and other policies contained in PAMC as part of standard staff work. Project Sentinel provides fair housing services and consultation to Palo Alto residents for any specific circumstances, as funded through the City's Community Development Block Grant (CDBG) Program.

POLICY IMPLICATIONS

Pursuing renter protection policy work is consistent with the goals in the City's 2030 Comprehensive Plan to provide adequate housing for all. Additionally, this Fair Chance Housing policy work is consistent with Program 6.6: Fair Housing in the Council adopted 2023-2031 Housing Element. This and other rental policy topics are considered a means to affirmatively further fair housing within Palo Alto, as well as a means by which to promote certainty, stability, and fairness in the rental market.

STAKEHOLDER ENGAGEMENT

Staff proposes this initial public hearing with the HRC and members of the public to receive preliminary feedback, as well as future public outreach efforts and forthcoming public hearings.

ATTACHMENTS

None.