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Agenda Item: ID16-593 (1-K)

Date: 5/19/16

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## FRESNO CITY COUNCIL



### Supplemental Information Packet

Agenda Related Item(s) – ID16-593 (1-K)

#### Contents of Supplement: Letter from Western Center on Law and Poverty

##### Item(s)

BILL NO.B-14 – (Re-Introduced as amended on 5/12/2016) (For adoption) – Amending Article 7 of Chapter 10 of the Fresno Municipal Code relating to Management of Real Property.

##### **Supplemental Information:**

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**Via Facsimile and U.S. Mail**

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Mayor Ashley Swearengin  
City Council Members  
City of Fresno  
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Re: City Council Meeting May 19, 2016  
Public Comments re Proposed Management of Real Property Ordinance  
Agenda Item No. 1-K (Consent Calendar)

Dear Ms. Spence, Ms. Swearengin and Fresno Council Members:

Western Center on Law and Poverty is a statewide support center representing low-income residents throughout California, including lower-income tenants in Fresno. We submit these comments jointly with Leadership Counsel for Justice and Accountability and Tenants Together. On behalf of our lower income clients, we strongly oppose adoption of the proposed public nuisance ordinance, known as the Management of Real Property Ordinance (MORPO), because it violates federal and state fair housing laws, fails to provide adequate due process and is vague and overbroad.

These comments adopt and supplement public comments previously made against MORPO, including the May 10, 2016 and May 11, 2016 comment letters submitted by Faith in Community Clergy Caucus and the American Civil Liberties Union and Leadership Counsel. We request that these comments, together with all previous comment letters, be included in the record of proceedings regarding the MORPO.

**I. The MORPO is discriminatory and raises fair housing concerns.**

As a preliminary matter, the MORPO purports to abate "behavioral nuisances" by

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occupants of property, declaring violent (and now proposed non-violent crimes) as “unlawful nuisances.” MORPO at 1, 7-10. Yet, the Fresno Police Department reports that in the past 10 years, it has reduced violent crimes by 39% and property crimes by 17%—despite a “significant loss of [police department] personnel combined with a weakened criminal justice system.”<sup>1</sup> Thus, most of the “behavioral nuisances” defined in the MORPO are within the purview of, and apparently successfully handled by, the Fresno Police Department. As a result, implementation of the existing Ordinance, as well as the adoption of proposed amendments to expand its reach, is unnecessary and disingenuous.

Instead, it is evident that a strong motivation for adopting the MORPO is to target low-income tenants of rental housing and properties, and the owners and property managers of such housing. Significantly, the number of renter-occupied housing units in Fresno grew 16% in the last ten years and now surpasses the number of owner-occupied units.<sup>2</sup> Moreover, low-income non-white tenants in Fresno are disproportionately burdened with housing problems beyond their control, including substandard housing, overcrowding, unaffordable rents and increasing homelessness. The City identifies 31,560 low-income *renter* households as having one or more housing problems—almost 20,000 more households than those occupied by owners.<sup>3</sup> In addition, 37,690 non-white households with incomes less than 80% of the area median income endure these housing problems, but only 15,150 white households are similarly burdened in the same income group.<sup>4</sup> Moreover, Fresno’s mapping demographics clearly demonstrate that its Hispanic and African-American residents, tenants living in assisted or subsidized housing and its lower-income population in general are all highly concentrated in segregated and impoverished areas of the city.<sup>5</sup>

The City makes no effort to conceal its intent to target MORPO toward tenants, rental properties and other complexes such as condominiums that are not largely owner occupied. As responsible parties under the proposed ordinance, tenants (as “occupants” and “responsible parties”) are subject to joint and several liability of undefined financial penalties whether in actual possession of the property or simply an inhabitant therein, and regardless of whether culpability falls upon the tenant, another third party or someone under the tenant’s control. MORPO at 5-6, 14. Tenants also are subject to undefined and unregulated “suggested remedies” under the Ordinance.<sup>6</sup> In addition, liability may stem from a subjective “frequent [police] response standard” that as amended, includes “non-violent criminal acts, charged or not. . .” *Id.* at 8. It may stem from “juvenile or domestic disturbances” which again are not defined by the Ordinance. *Id.* at 9. In each of these cases, it is inconsequential whether the tenant is the victim or innocent bystander of the acts in question and regardless of any relationship to the alleged violator.

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<sup>1</sup> Fresno Police Department, 2014 Annual Report, <http://www.fresno.gov/NR/rdonlyres/1DDF85E6-64B7-4500-A04D-0A7EA0CD5996/0/AnnualReport2014.pdf>

<sup>2</sup> See City of Fresno 2016 Analysis of Impediments to Fair Housing Choice (AI) Preliminary Findings (powerpoint) at 22, 23.

<sup>3</sup> City of Fresno 2015-2019 Consolidated Plan at 45.

<sup>4</sup> *Id.* at 45-55.

<sup>5</sup> See generally AI Preliminary Findings.

<sup>6</sup> Although not defined or regulated under the MORPO, such remedies in other jurisdictions require the initiation of eviction proceedings to avoid the financial administrative citations set forth in the ordinance.

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By focusing on rental properties in which occupants likely cannot control their environment, the MORPO targets and discriminates against low-income renter households of color. Accordingly, the proposed MORPO conflicts with the City's duty to affirmatively further fair housing (AFFH) opportunities and violates state and federal fair housing laws.

#### **A. The City's failure to Affirmatively Further Fair Housing.**

In addition to violations addressed in previous comments submitted to the City Council, the City's proposed ordinance runs afoul with other federal fair housing protections. To the extent the MORPO is economically driven by a desire to offset municipal salaries and expenses to promote its code enforcement efforts, it is extremely short-sighted.

The City's failure to comply with its duty to AFFH endangers its continued receipt of federal housing and Community Development Block Grant (CDBG) dollars. It also can subject the City to liability under the False Claims Act. As you know, when Westchester County, New York certified to HUD that it was affirmatively furthering fair housing, it was subjected to a False Claims Act lawsuit alleging that it had received federal funds through false certifications. *See United States of America ex rel Anti-Discrimination Center of Metro New York, Inc.*, U.S. D.C. S.D. N.Y., Case No. 06. Westchester's efforts to dismiss the action failed, and the lawsuit ultimately resulted in a settlement requiring the County, among other things, to spend more than \$50 million of its own money to acquire and construct affordable housing to be marketed to minority families.

Like Westchester County, the City repeatedly certified to HUD over the past two decades that it is affirmatively furthering fair housing opportunities. Indeed, as discussed above, impediments to fair housing in the City of Fresno clearly exist. The City only recently prepared an Analysis of Impediments to Fair Housing Choice (its first revision since 1999) but this Analysis does not address the MOPRO or the proposed amendments. In its 1999 AI revision, the City acknowledged the budgeting of \$2.68 million of CDBG for code and nuisance ordinance activities, *i.e.* the MOPRO, in its CDBG (low income) target areas. However, the 1999 AI also did not analyze or address the fair housing impacts of the MOPRO and the City made no attempt in subsequent years to ensure that it was affirmatively furthering fair housing opportunities.

The City acknowledges that a disproportionately large number of renters in Fresno experience housing discrimination related to disability, race or ethnicity.<sup>7</sup> Nonetheless, these protected classes are precisely among the "responsible persons" that the MOPRO would target. Given these circumstances, adoption of the MOPRO would contradict the City's *previous and current* certifications that it is affirmatively furthering fair housing. Indeed, it would send the message that the City is willing to condone and even perpetuate discrimination against protected classes.

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<sup>7</sup> AI Preliminary Findings at 27-33.



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## **B. The City's violation of State fair housing laws.**

The California Legislature has declared "that discriminatory practices that inhibit the development of housing for persons and families of very low, low, moderate, and middle incomes . . . are a matter of statewide concern." Government Code §65008(h). Accordingly, cities are prohibited from implementing practices that discriminate against a protected class:

Any action pursuant to this title by any city . . . in this state is *null and void* if it denies to any individual or group of individuals the enjoyment of residence, landownership, tenancy, or any other land use in this state because of . . . the lawful occupation, age, or any characteristic of [a member of a protected class]...This section shall apply to chartered cities."

*Id.*, §65008(a), (g). As a result, the City's action in implementing MORPO is invalid.

In its recent Housing Element, the City recognizes that Fresno residents with special housing needs are members of protected classes: low-income families, farmworkers and their families, and individual and families threatened with homelessness.<sup>8</sup> In fact, persons "threatened with homelessness are those with current shelter, but who are at risk of losing their residence [including] victims of domestic violence, people doubled-up in unstable conditions, households with incomes of less than 30 percent of area median income[,] farm workers and low-income single-person households."<sup>9</sup> The Element acknowledges that in 2013, "the Fresno Unified School District reported that 2,400 schoolchildren are homeless."<sup>10</sup>

The City is not permitted to engage in discriminatory housing practices. To this end, its stated Housing Element objective is to "[c]ontinue to promote equal housing opportunity in the City's housing market regardless of age, disability/medical condition, race, sex, marital status, ethnic background, source of income and other factors" by among other things, providing "equal access to housing for special needs residents."<sup>11</sup> Whether intentional or unintentional, the consequences of amending and adopting the MORPO and applying it to rental developments and properties will undoubtedly have a discriminatory effect on, at a minimum, low-income families with children and persons of color. Accordingly, it would be inconsistent with the City's proposed housing element to adopt or promote any such policy.

As you know, the City of Fresno's proposed update of its housing element was rejected by the California Department of Housing and Community Development (HCD).<sup>12</sup> Although it has since revised its housing element, it has yet to achieve HCD approval of its latest revision. As noted by HCD, the draft element includes programs that lack definitive timelines or the necessary commitment to have an impact on addressing housing needs and fails to address the

<sup>8</sup> Fresno General Plan: 2015-2023 Housing Element, Public Review Draft – Revised March 2016, at 2-17 *et seq.*

<sup>9</sup> *Id.* at 2-21.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 6-18.

<sup>12</sup> See Letter from HCD to City of Fresno Director of Development and Resource Management dated March 7, 2016.

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adequacy of sites in its sites analysis. It also does not adequately analyze potential governmental constraints to the development of housing for all income levels or demonstrate the City's efforts to remove any identified constraints. As detailed in public comments previously submitted by Leadership Counsel, these defects remain in the City's Housing Element.

Application of the MORPO to rental housing is a severe disincentive to providing such housing and will result in increasing numbers of lower-income renters losing their housing. Moreover, the extraordinary fees and penalties envisioned by the MORPO will have a similar chilling effect on any future development of affordable housing in Fresno. The City has repeatedly failed to adequately address the governmental constraints imposed by the MORPO, and its current efforts to expand the reach of MORPO will likely impede the City's ability to bring its housing element into substantial compliance with state law or to meet its share of regional housing needs.

When a City fails to have a housing element in compliance with state law, of course, it is ineligible to receive state affordable housing funds. Moreover, the courts are empowered to suspend the City's ability to approve *any* development until it complies with the law. These consequences could have a significant fiscal impact on the City and the local economy, a risk the City should carefully weigh against any desire to recoup municipal costs and expenses (including salaries) from owners, managers, and tenants of private property.

## **II. MORPO will not withstand legal challenge.**

As noted above, the Fresno Police Department has successfully decreased the number of violent and non-violent crimes in the City over the past ten years. Imposition of penalties and fines based on an arbitrary number of police calls to particular properties hardly serves to mitigate the nuisance behaviors that purportedly prompted initiation of the ordinance. To the contrary, the MORPO actually discourages Fresno residents and landlords from seeking police assistance for any reason for fear of being fined up to \$50,000. Prohibiting the community from requesting police assistance can only encourage criminal and nuisance activity to flourish. Thus, the MORPO is not rationally related to the alleged behaviors it purports to regulate.

Our last major concern is the lack of any due process hearing at any stage short of an administrative appeal. This omission is exacerbated by the failure to sufficiently define "frequent" response" and the fact that any number of police calls may pass without any notice about impending "frequency" and possible escalation of monetary fines. MORPO at 9-11. In particular, the lack of clarity and the proposed expansion of the MORPO to non-violent crimes, public property and common areas has a significant impact on owners and residents of multi-family developments. Without knowing how many police responses are logged against the property and whether such response constitutes a "nuisance", owners and residents will be obligated to defend any police response because it could form the basis of the police department's "frequent response" determination.

Second, the proposed language expands liability far beyond accepted nuisance doctrines, particularly because it attempts to impose strict and joint liability upon residents, managers and owners for disparate acts of criminal behavior occurring in different residential units and

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common areas. By definition, concepts of "abatement" have little meaning when applied to this situation, particularly if offensive conduct is by a trespasser or uninvited guest or the resident is, in fact, the victim of a crime. The proposed MOPRO is fraught with due process deficiencies and is both vague and overbroad.

### III. Conclusion

For all of the above reasons, we urge the City Council to remove the proposed amendment relating to the MOPRO from the consent calendar and to reject its adoption. Rather than enacting an ordinance under the guise of curbing the "behavioral nuisances" of tenants, the Mayor and the Council should take immediate steps to address the substandard housing plaguing tenants in Fresno by ensuring effective enforcement of habitability standards and to encourage community support for fair and affordable housing. It should start by preparing a long overdue assessment of fair housing, bringing its rejected Housing Element into substantial compliance with state law, encouraging public participation in that process from all segments of Fresno's economically, racially and ethnically diverse community, and honoring its own intention to educate "tenants on their rights and responsibilities so that they are not legally or illegally evicted or discriminated against."<sup>13</sup>

Thank you for your attention.

Very truly yours,

WESTERN CENTER ON LAW & POVERTY  
LEADERSHIP COUNSEL FOR JUSTICE & ACCOUNTABILITY  
TENANTS TOGETHER



S. Lynn Martinez  
Attorney at Law

SLM:as

cc: Kamala Harris, California Attorney General  
Angela Sierra, Supervising Deputy Attorney General, Civil Rights Enforcement Section  
Jeff Jackson, Program Compliance Branch Chief, U.S. Dept. of Housing & Urban  
Development (via email)  
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<sup>13</sup> Fresno General Plan: 2015-2023 Housing Element, Public Review Draft – Revised March 2016 at 2-21.