

DATE: May 23, 2022

TO: Rental Housing Committee

FROM: Karen M. Tiedemann, Special Counsel to the Rental Housing Committee
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SUBJECT: Clarifying Base Rent and Concessions in CSFRA Regulations

RECOMMENDATION

That the Rental Housing Committee direct staff to draft regulations for its consideration that:

1. Clarifies that rent concessions, discounts, or reductions provided during a tenant's initial tenancy shall be factored into the base rent calculation when determining the rent actually paid.
2. Sets the methodology for calculating the base rent as the sum of the rent actually paid by the tenant over the term of the initial tenancy and dividing the sum by the number of months in the initial tenancy, as illustrated in the two examples provided in the Analysis section, which would yield the average monthly base rent actually paid.
3. Defines the term of the initial tenancy as the actual number of months of the initial tenancy, or, in the case of a month-to-month tenancy or a lease longer than 12 months, the initial term will be 12 months.
4. Excludes any rent payment that a tenant may fail to pay from being factored into the calculation of base rent.

BACKGROUND

Over the past several months, the Community Stabilization and Fair Rent Act (CSFRA) staff received multiple questions from both landlords and tenants about how to comply with the CSFRA when a concession on the rent is offered or has been provided to tenants in their initial tenancy. Specifically, landlords are not sure how to apply the Annual General Adjustment (AGA) correctly when the actual or effective rent is different than the rent that is stated in a lease agreement due to concessions, and renters are not sure if the AGA they have been receiving from

landlords are in accordance with the CSFRA because the increases have been quite significant. Often, lease agreements have not clearly documented what the actual rents and concessions are, which has added to the confusion when landlords and tenants have questions.

While the CSFRA includes language and definitions that provide some framework for how to consider this issue, it does not include language specifically regarding concessions. The lack of specifics has been a primary reason for confusion, which has led to different interpretations and, therefore, different applications of the AGA in situations where there has been a rent concession. Because the AGA is a fundamental component of the CSFRA, staff recommends the Rental Housing Committee (RHC) adopt regulations to specify the rules and procedures about how to treat the issue of rent concessions in a clear manner. This will reduce confusion and allow landlords to know how to appropriately apply the AGA and tenants to know if the AGA they receive is correct when concessions have been part of a renter's initial tenancy.

The remainder of this Background section provides more context about this issue, followed by the Analysis section, which provides evaluation and recommendations for the RHC's consideration.

Purposes of the CSFRA

The CSFRA (also referred to interchangeably as "Act," "Amendment," or "Article" in this memo) is contained in the Mountain View City Charter, Article XVIII.¹ Sections 1700 and 1701 of Article XVIII provide the purpose and supporting findings for the CSFRA.

Section 1700 establishes the title and purpose of the CSFRA:

"This Amendment shall be known as the Mountain View Community Stabilization and Fair Rent Charter Amendment. The purpose of this Amendment is to promote neighborhood and community stability, healthy housing, and affordability for renters in the City of Mountain View by controlling excessive rent increases and arbitrary evictions to the greatest extent allowable under California law, while ensuring Landlords a fair and reasonable return on their investment and guaranteeing fair protections for renters, homeowners, and businesses."

Additionally, Section 1701 provides multiple findings that support and provide further context regarding the purpose of the CSFRA. In summary, Section 1701 includes findings regarding the high cost of housing in Mountain View, the prevalence of low-income households in the City, the affordability gap, the concern about excessive rent increases, the concern regarding the housing and economic conditions that create a detrimental effect on a substantial number of renters in the City, and the concern about evictions and displaced tenants. These findings articulate the

¹ https://library.municode.com/ca/mountain_view/codes/code_of_ordinances?nodeId=PTITHCH_ARTXVIII_COSTFAREAC

reasons for the purposes of the CSFRA and why the Act, and the provisions within the Act, is necessary. The full set of findings in Section 1701 can be found in the City Charter footnoted above.

Staff's evaluation of the issue of rent concessions and recommendations for regulations found later in this memo include the evaluation of Sections 1700, 1701, and 1709 of the City Charter to ensure the recommendations, taking into account the public and stakeholder input received, are within the purposes of the CSFRA and the authority of the RHC.

Regulations

Adopting regulations to implement laws, policies, and programs (collectively to be referred to as "programs" for the remainder of this memo) is standard practice in the public sector. Rarely, if ever, are programs developed and established that can contemplate all of the particular situations that may arise in the administration/implementation of the programs, how actors may interpret the requirements of the programs, and whether or not the actors may or may not comply with the requirements according to the specifics or intent of the program. Regulations provide the necessary rules and procedures to implement programs in a clear and effective manner, particularly when programs do not include such clarity or specificity within the programs when they are first established.

As discussed above, Section 1700, supported by findings in Section 1701, identifies the purposes of the Act. The CSFRA specifically authorizes the RHC to adopt regulations to implement the Act in accordance with the purposes of the Act as stated in the following Sections:

- Section 1709(d)(1): Set rents at fair and equitable levels to achieve the purposes of this Article. Notwithstanding any other provision of this Article, the RHC shall have the authority to adopt regulations authorizing rent increases and/or adjustments required by State or Federal law.
- Section 1709(d)(2): Establish rules and regulations for administration and enforcement of this Article.
- Section 1709(e): The RHC shall issue and follow such rules and regulations as will further the purposes of this Article.

Since the adoption of the CSFRA, the RHC has undertaken its duties to develop necessary regulations. This has included RHC's approval of 16 resolutions related to the adoption of new amendments or amending previously adopted regulations.

The recommendation for the RHC to adopt regulations to clarify the issue of concessions is within the authority of the RHC, is consistent with the fact that the RHC has already adopted many

regulations over the past few years to provide clarity for the administration and implementation of the program, and is consistent with established governance practices in the public sector.

Process to Date

Based on the confusion of how to apply the AGA in the context of a concession as evidenced by the landlord and tenant questions received by staff over the past several months, it was determined that regulations would provide the necessary clarity to address this issue. Staff followed the procedures used for previous regulations adopted by the RHC. This included staff analysis, drafting proposed regulations, posting the meeting agenda and report at least 72 hours in advance of the meeting according to Brown Act requirements, and presenting the information to the RHC for its consideration during its March 28, 2022 meeting (see Attachment 1). Due to the comments received in correspondence ahead of the meeting, the RHC postponed the agenda item and requested staff to obtain additional stakeholder input first.

On April 28, 2022, one landlord stakeholder meeting and one tenant stakeholder meeting were held. A summary of the input and questions provided during the meetings is included in the Analysis section below as well as in the detailed summary in Attachment 2.

ANALYSIS

Concessions

As mentioned above, staff has received multiple inquiries from landlords and tenants over the past several months regarding the appropriate AGA in situations where renters have been offered or provided a concession on rents for their initial tenancy. It appears to be relatively common practice that housing providers may advertise vacant units at a certain rent, often called the “asking rent.” If units remain vacant at the asking rents, it may suggest that the asking rent is higher than the actual rent that the market will support. In response, landlords may provide rent concessions on the asking rent to fill the units since vacancies, especially prolonged ones, can create a financial impact for housing providers. “Concessions” can come in different forms, but typical concessions are reductions in the asking rent or offering one or more months of tenancy without a rental payment. When concessions are provided, the actual or “effective” rent paid by the tenant is lower than the asking rent. Two examples will be provided later in this section to illustrate this circumstance.

Industry Practices

Although concessions may be relatively common industry practice in general, the pandemic appeared to make the practice more widespread or cause landlords to offer deeper concessions than in the past. Between 2020 and 2022, the pandemic caused a downturn in the economy that resulted in a reduction in employment. In turn, this impacted the rental market, causing an

increase in vacancies and a decrease in rents. These employment and housing impacts were more pronounced in service-related sectors, which has disproportionately more lower-income jobs than in other sectors. Based on demographic data and information from the City's Tenant Relocation Assistance Ordinance program, many CSFRA tenants are lower-income households and/or employed in the services sector who were more disproportionately impacted with job loss, reduction in employment, and/or reduction in wages.

Another practice that appears to be common is that, when a concession is provided, landlords prefer to include in the lease agreement the asking rent as the "contract" or "stated" rent, rather than using the actual/effective rent that has factored in the concession. The concession itself may or may not be documented in the lease agreement. If documented, it is sometimes in an addendum or in the body of the lease agreement, but often the documentation is unclear, making it difficult to determine what the actual concession is. If not documented, the concession is sometimes provided verbally.

Base Rent and the Annual General Adjustment

Recent confusion among landlords and tenants have resulted from how to correctly apply the AGA when a concession is provided, particularly when the lease agreement stipulates the contract rent as the asking rent instead of the actual/effective rent that has factored in the net effect of the concession. The primary issue is that concessions have the practical effect of lowering the asking rent. The greater the concession, the greater the difference between the asking rent and the actual/effective rent. To the tenant, the effective rent is the actual rent that they pay, which is typically the rent that tenants are concerned with. However, if the landlord applies the AGA to the asking (i.e., higher) rent rather than to the actual/effective (i.e., lower) rent, then the tenant will experience a more significant rent increase in the following year.

Because this issue has arisen specifically regarding tenants in their initial tenancy that began during the pandemic, the definition of Base Rent must be reviewed to be able to determine the correct way to apply the AGA when a concession is part of the initial tenancy.

Section 1702(b) of the CSFRA states:

"The Base Rent is the reference point from which the lawful Rent shall be determined and adjusted in accordance with this Article.

- (1) Tenancies commencing on or before October 19, 2015. The Base Rent for tenancies that commenced on or before October 19, 2015 shall be the Rent in effect on October 19, 2015.
- (2) Tenancies commencing after October 19, 2015. The Base Rent for tenancies that commenced after October 19, 2015 shall be the initial rental rate charged upon

initial occupancy, provided that amount is not a violation of this Article or any provision of state law. The term “initial rental rate” means only the amount of Rent actually paid by the Tenant for the initial term of the tenancy.”

Subsection 2 above is underlined to denote that as the relevant language to review because it discusses the rent actually paid by the tenant for the initial term of tenancy, which is the issue in question.

Section 1702(b)(2) clearly stipulates that initial rent means only the amount of rent actually paid by the tenant during the initial tenancy. Therefore, the AGA must be based on the rent actually paid. The definition does not use the term “contract rent,” “stated rent,” or “asking rent.” In staff’s analysis, “rent actually paid” is distinct and different from “contract rent,” “stated rent,” and “asking rent” given the plain language of the CSFRA, the practical application of the terms, and a common-sense understanding of the terms. Below are two relatively common examples of rent concessions to provide an illustration of the difference between asking rent, actual rent paid, and the impact of the rent increases as a result.

- *Example 1: A temporary rent concession during the initial term of the tenancy is offered, whereby the tenant signs a lease for 12 months with a rent of \$3,000 per month, and the landlord provides a concession of two months of free rent. Assume the AGA is 3%.*

Analysis: In Example 1, the tenant pays \$30,000 in total ((10 months x \$2,500/month) + (2 months x \$0/month)) during the initial tenancy. When averaged over 12 months, the actual base rent paid is \$2,500/mo. (\$30,000/12 months).

If the landlord applies the 3% AGA to the contract rent of \$3,000/month, the rent increase for the second year is \$90/month, for a new contract rent of \$3,090/month. However, to the tenant, this has the effect of increasing the actual rent paid from \$2,500/month to \$3,090/month, which is an increase of \$590/month for a 23.6% increase and, therefore, much greater than the 3% AGA.

Instead, if the landlord applies the 3% to the actual Base Rent paid of \$2,500/month, the rent would increase by \$75/month for a rent of \$2,575/month in the second year.

- *Example 2: A year-long rent reduction is provided during the initial term of the tenancy, whereby the tenant signs a lease for 12 months with a stated rent of \$3,000/month, and the landlord provides a reduction in rent of \$600 for each of the 12 months. Assume the AGA is 3%.*

Analysis: In Example 2, the tenant pays \$28,800 in total (12 months x (\$3,000/month - \$600/month reduction)) during the initial tenancy. When averaged over 12 months, the actual base rent paid is \$2,400/month (\$28,800/12 months).

If the landlord applies the 3% AGA to the contract rent of \$3,000/month, the rent increase for the second year is \$90/month for a new contract rent of \$3,090/month. However, to the tenant, this has the effect of increasing the actual rent paid from \$2,400/month to \$3,090/month, which is an increase of \$690/month for a 29% increase and, therefore, significantly greater than the 3% AGA.

Instead, if the landlord applies the 3% to the actual base rent paid of \$2,400/month, the rent would increase by \$72/month for a rent of \$2,472/month in the second year.

A related question that has arisen is whether an increase in the actual rent up to the stated rent in the lease is allowed under the CSFRA. Using Examples 1 and 2, landlords have asked whether they can raise the actual base rent paid to the stated rent of \$3,000 without adding an AGA. This question may be an acknowledgement that the actual Base Rent paid is meaningfully lower than the stated rent; therefore, bringing the actual rent paid up to the stated rent by removing the concession for the second year would already represent a sizeable increase in the rent actually paid by the tenant even without applying the AGA.

Differentiation from Voluntary Rent Reduction During an Existing Tenancy

Rent concessions during the initial term of a tenancy need to be distinguished from a voluntary reduction of rent during an existing tenancy. The RHC approved a process to voluntarily reduce the rent for existing tenants (i.e., tenants not in their initial tenancy) for a limited time in case of a tenant COVID hardship or in case of temporary major construction and capital improvements (CSFRA Regulations Chapter 7.D and E). The landlord and tenant can agree on the duration of the reduction. After the end of the temporary reduction, the rent level goes back to the level before the reduction, and the AGA can be raised on the original rent level.

Stakeholder Input

On April 28, 2022, one landlord-focused and one tenant-focused stakeholder meeting were convened to seek input on how to address the issue of correctly applying the AGA to the base rent where rent concessions, discounts, or reduction of rent was provided during the initial term of the tenancy. To facilitate the discussion, two identical questions were posed to both stakeholder groups: (1) What is considered the base rent from which the following year's allowed rent increase can be calculated?; and (2) Should concessions be included or excluded from calculating base rent?

The following is a summary of the landlord and tenant input. A detailed summary is provided in Attachment 2.

- Summary of Landlord Input. Approximately 35 people attended the landlord-focused stakeholder meeting. In summary, landlords who attended the meeting did not support including concessions in the calculation of base rent for the following stated reasons:
 - Base rent should be the agreed-upon rent stated in the rental agreement between the tenant and landlord.
 - The draft Regulations initially proposed in March are inconsistent with the plain language of the CSFRA.
 - Retroactive application of the regulations violates housing providers' right to due process.
 - Comparisons with other jurisdictions are incorrect and incomplete.
 - Concessions should be considered "deferred rent."
 - Concessions are comparable to providing a discount such as in other businesses (e.g., 10% off the listed price of merchandise).

According to the landlords who attended the stakeholder meeting, concessions would no longer be used if they were to be included in the calculation of base rent. Landlords provided examples why the industry uses concessions as part of their practices:

- It is important to help make housing more affordable and keep tenants housed in case of hardships.
- Concessions are temporary and not indicative of future rents or discounts.
- Concessions are a marketing tool/expense to mitigate vacancy and help keep down vacancy rate/persuade tenants to move in/reduce barriers to moving in.
- Concessions are used to assist tenants to prevent them from paying double rent, giving their 30-day termination notice at the old rental unit, and moving to the new rental unit.

- Summary of Tenant Input. Approximately 51 people attended the tenant-focused stakeholder meeting. The tenants and tenant advocates who attended the stakeholder meeting were in favor of including concessions in the calculation of base rent for the following reasons:
 - The definition of base rent specifically states: “the initial amount actually paid for the initial term.”
 - The real rent received as an average over the initial term (e.g., 12 months) makes sense.
 - Defining base rent as stipulated in the lease, instead of rent actually paid, makes rentals less affordable.
 - Defining base rent as stipulated in the lease does not reflect actual market rate.
 - If concessions are meant to entice tenants to move in, just lower the rent.
 - Concessions are used as a loophole to circumvent the CSFRA and make the rent stabilization program less effective.

Attachment 2 provides a more extensive summary of the input received at the stakeholder meetings. Questions raised in the stakeholder meetings and in subsequent communications to the RHC will be addressed below.

Analysis of Key Stakeholder Questions

Stakeholders have also posed various questions and issues since March and during the April 28 meetings. This subsection includes a summary of the key questions/issues posed by the stakeholders, followed by an analysis.

- Landlord Questions:
 - *What is the rationale for RHC’s ignoring the definition of rent in CSFRA which includes all periodic payments and all nonmonetary consideration?*

The issue of applying the AGA appropriately for tenants who have received a concession during their initial tenancy primarily concerns the definition of base rent for the reasons discussed above.

Regarding the definition of rent as noted in the landlord question, the CSFRA defines “rent” as:

“All periodic payments and all nonmonetary consideration including, but not limited to, the fair market value of goods, labor performed or services rendered to or for the benefit of the Landlord under the Rental Housing Agreement concerning the use or occupancy of a Rental Unit and premises and attendant Housing Services, including all payment and consideration demanded or paid for parking, Utility Charges, pets, furniture, and/or subletting.”

Per the definition, “rent” in the CSFRA refers to all periodic payments the tenant pays to the landlord as well as nonmonetary benefits that a tenant might provide a landlord in exchange for some reduction in rent. The benefit provided by the tenant to the landlord for a rent reduction is not related to the issue of a concession that a landlord freely provides to a tenant. Therefore, the definition of base rent, than the definition of rent, is the relevant definition to use regarding concessions and AGA.

- *What are the benefits or drawbacks from including or excluding concessions when calculating base rent?*

The benefits of including concessions when calculating base rent include providing certainty and clarity to landlords about how to comply with the CSFRA. Tenants in their initial tenancy benefit by having AGA rent increases based on the rent actually paid.

The drawback of excluding concessions includes continued confusion of how to apply the AGA and potential rent increases in excess of the AGA which can cause tenant displacement.

- *Maybe the revised definition could include language such as: “If Resident and Landlord have agreed on the amount the rent will be at the termination of the bonus period, that agreement will be binding.”*

The language in the CSFRA cannot be modified because it is a voter-approved amendment of the City Charter. The CSFRA also prohibits a tenant from waiving their rights under the CSFRA (see Section 1713). Nonwaivability is included in most rent stabilization ordinances and in many State tenant-protection laws in recognition of the inherently unequal bargaining power between landlords and tenants.

- *Could you please put the draft regulation out for comment before the staff report is published and then include those comments in the analysis to the RHC?*

The agenda for RHC meetings is posted on the Wednesday before the meeting. At the time of agenda posting, staff reports and attachments, such as regulations, are typically also available for public review, but in all events, all staff reports and attachments are available no less than 72 hours before the meeting. Staff provides the RHC with all written comments received on agenda items prior to the meeting.

- *Does the vacancy rate published by the RHC reflect just registered CSFRA housing or the overall Mountain View market? Please specify both in your reporting.*

The monthly reports presented at each RHC meeting include a chart showing the vacancy rate for covered units as well as all rental units in Mountain View.

- *What justification does the RHC have to bring this issue forward nearly six years after the adoption of the CSFRA? This could serve to reopen seven years of rent increases issued in good faith if the rent increases were based on base rents that did not factor in rent concessions and violate constitutional rights.*

As discussed in the Background section above, over the past several months, both landlords and tenants have brought questions regarding how to appropriately apply the AGA when concessions have been part of the initial tenancy. Given the confusion, the item was initially brought to the RHC at its March 2022 meeting for its consideration, but the process was extended to provide time for additional stakeholder input. The CSFRA gives the RHC the authority to set regulations to further the purposes of the Act as noted in the Background section of this memo.

If the RHC were to adopt a regulation clarifying the definition of base rent, it is possible that would have impacts on leases that were entered into after October 19, 2015 and that tenants could file petitions for downward adjustments of rent. However, tenants could file those petitions now, potentially resulting in the same effect, even if regulations are not adopted to clarify the issue of base rent and concessions. In the case of a petition, the Hearing Officer would determine if a downward adjustment and rebate were owed and for what time period. Hearing Officers would need to consider applicable statutes of limitations in addressing petitions that may result from leases entered into in the early days of the CSFRA. Going forward, adopting clear regulations can help landlords apply the AGA appropriately when a concession is part of the initial tenancy without needing to resort to the petition process.

Any regulation adopted must follow agenda posting requirements, be adopted at a public meeting where the RHC must consider all information provided by the

members of the public, and follow procedural due process requirements. Therefore, adoption of regulations implementing a voter-approved law does not deprive landlords of substantive due process rights. Additionally, there is ample case law that addresses the impact of rent-stabilization ordinances, tenant-protection ordinances, and, most recently, eviction moratoria on contractual rights. Courts have not found such laws and regulations to improperly impair contracts or violate property owners' substantive due-process rights.

- Tenant Questions:

- *How does this affect you if your initial term is six or three months?*

Using the base rent examples provided earlier in this memo, if the initial term of the lease is six months, for example, then pursuant to the definition of base rent in the CSFRA, the base rent would be the rent actually paid during those six months divided by six.

- *Is base rent retroactive? I moved in on May 1, 2021, and my lease renews on May 1, but my landlord did not incorporate the fact that I received one month off as a rent concession.*

Base rent is the initial rental rate charged upon initial occupancy (see Section 1702(b) of the CSFRA). Therefore, base rent is retroactive by definition.

- *Are these questions related to Mobile Home Park lot rents?*

While the current process is focused on potential CSFRA regulations, the Mobile Home Rent Stabilization Ordinance (MHRSO) contains a definition of base rent that is nearly identical to the CSFRA, so these issues are the same for mobile home park tenants and tenants covered by the CSFRA.

- *If rent paid is the base rent, does that mean if I do not pay all my rent, then my base rent is lower for calculating rent increase? In the first year of my lease, I did not pay rent to my landlord for several months due to COVID, and I was protected from eviction. Do the months I did not pay rent impact the base rent when they calculated my rent increase?*

This is another area where regulations would be helpful. The language in the CSFRA defining base rent uses the term “rent actually paid.” However, for landlords to achieve a fair rent, it would not be reasonable to conclude that the language is intended to reduce base rent if the tenant fails to pay rent. Proposed regulations

could emphasize that "initial rental rate" shall be the amount of rent actually required to be paid by the tenant during the initial term of the tenancy.

- *You mentioned how some other California municipalities have ruled on this question. The State of California itself has some Statewide rent-control regulations now. How does their law interpret this question? Do they also use "rent actually paid during the initial term?"*

Rental units covered by the CSFRA are not subject to State rent regulations, otherwise known as Assembly Bill (AB) 1482.

Additionally, AB 1482 is not structured the same way as the CSFRA and does not use the same terminology as the City's rent stabilization programs. Specifically, AB 1482 does not use the language "rent actually paid during the initial term." AB 1482 (codified in California Civil Code Section 1947.12) prohibits landlords from raising rents in certain properties by more than 5% plus the percentage increase in the cost of living. Section 1947.12 requires that the rent increases be calculated based on the lowest gross rental rate charged for the dwelling at any time during the 12-month period prior to the effective date of the increase. In determining the lowest gross rental amount, rent discounts, incentives, concessions, or credits offered by the owner and accepted by the tenant are excluded. Therefore, the State provision is materially different than the CSFRA definition of base rent.

Comparison with Other California Jurisdictions with Rent-Stabilization Programs

Thirteen (13) jurisdictions in the State, including Mountain View, have apartment rent stabilization programs. Staff reviewed all of the other 12 jurisdictions to determine if and how their programs handle rent concessions. Out of the 12 cities, staff identified four jurisdictions that adopted regulations to address rent concessions. The programs in these four jurisdictions also did not initially have language specifically regarding how to handle concessions when they were first adopted. The table below cites the regulations directly from the four jurisdictions that address rent concessions. Of note, the City of Richmond includes a definition of base rent that is identical to the CSFRA. This information was provided during the April 28 stakeholder meetings.

Jurisdiction	Adopted Regulations
Berkeley	<p>“Where the rental agreement includes periods for which the tenant pays reduced, discounted or “free” rent, the monthly market rent is calculated as the average of the monthly payments made during the initial term of the agreement or, in the case of a month-to-month tenancy, during the first 12 months of the tenancy.” (Regs. 1013(A)(3))</p>
Richmond	<p>“Where the rental agreement includes periods for which the Tenant pays reduced, discounted or “free” rent, the Maximum Allowable Rent is calculated as the average of the monthly payments made during the initial term of the agreement or, in the case of a month-to-month tenancy, during the first 12 months of the tenancy.” (Regs. CH7.700)</p>
Santa Monica	<p>“The new base rent after vacancy shall be the actual initial rent in effect on the initial date of tenancy, regardless of whether it is denominated a discounted rent in the rental agreement. (i) If the rental agreement provides for a period of “free” rent within its initial term, the base rent shall be reduced to account for the “free” period...The base rent will only include those charges that are specified as a dollar amount at the commencement of the tenancy and actually paid by the tenant during the initial term.” (Regs. 3301)</p>
West Hollywood	<p>“The maximum allowable rent shall be the initial rental rate established for the tenancy, based upon the monthly amount actually demanded, received or collected.” (Regs. 17.32.010).</p> <p>“Procedures for Monitoring Upward Rent Adjustments Following a Vacancy and Recording New Maximum Allowable Rents. (c) In order to determine the monthly rental rate actually demanded, received or collected when recording the initial rental rate, the Rent Stabilization Department shall consider any discount(s) or move-in concession(s) by calculating the total amount actually intended to be collected during the initial term of the tenancy and dividing that total by the number of months in the initial term.” (Regs. 41001.c)</p>

EVALUATION

Based on the preceding discussion of the purposes of the CSFRA, the authority of the RHC to establish regulations to further the purposes of Article XVIII, the definition of base rent in the CSFRA, stakeholder input, a review of the other California jurisdictions with rent stabilization programs that have adopted regulations to address concessions, and the purpose of adopting such regulations in Mountain View, staff's conclusion is that the AGA should be based off of the base rent actually paid in a tenant's initial tenancy factoring in any rent concession, discount, or reduction. The summary of the evaluation is as follows:

- **Purposes of the CSFRA:** As stated in Section 1700, the purpose of the CSFRA is to control excessive rent increases and arbitrary evictions to the greatest extent allowable under California law while ensuring landlords a fair and reasonable return on their investment and guaranteeing fair protections for renters, homeowners, and businesses. Section 1701 provides findings underscoring the high cost of housing in Mountain View, the prevalence of low-income households in the City, the affordability gap, the concern about excessive rent increases, the concern regarding the housing and economic conditions that create a detrimental effect on a substantial number of renters in the City, and the concern about evictions and displaced tenants.
- **RHC Authority:** The CSFRA includes three sections that provide the RHC the authority to further the purposes of the Act, of which controlling excessive rent increases is a priority purpose as stated in Section 1700 and supported by Section 1701.
- **Definition of Base Rent:** As discussed, the CSFRA defines base rent as the "initial rental rate charged upon initial occupancy, provided that amount is not a violation of this Article or any provision of state law. The term 'initial rental rate' means only the amount of Rent actually paid by the Tenant for the initial term of the tenancy." As such, when a concession is provided during initial tenancy, the plain language "rent actually paid" by the tenant for the initial term must include the concession. If the concession is not included in the calculation, then the "rent" is not the actual rent paid by the tenant and would, therefore, conflict with the definition of base rent.

Additionally, the CSFRA does not include in the definition of base rent or anywhere else in the Act the words or concept of "stated rent," "contract rent," or "asking rent," nor does the Act refer to industry practices, however common, as the reference point by which to determine base rent. Based on the leases that have been provided by tenants requesting guidance from staff, the stated rent in the lease is not the rent that is actually paid by the tenant. In some leases, the concessions may not be addressed at all.

Finally, concessions result in the tenant paying less than the contract rent if the contract rent is the asking rent. Applying the AGA to the base rent that excludes a concession would

cause the tenant's rent to increase significantly in the second year and potentially displace the tenant, which would conflict with the CSFRA's purpose of controlling excessive rent increases and promoting stability.

- Review of Other Jurisdictions with Rent-Stabilization: Staff reviewed the 12 other jurisdictions in the State with rent stabilization programs. Four of the 12 jurisdictions have adopted regulations to help address rent concessions in some manner. These jurisdictions have programs that also did not initially have language addressing the specific issue of concessions. Of note is the City of Richmond, which has a very similar program to Mountain View's and the identical definition of base rent.

The CSFRA is not subject to the State rent stabilization provisions contained in AB 1482, nor is the State language regarding the definition of rent applicable to the CSFRA's definition of base rent, which is the rent actually paid by a tenant during initial tenancy.

- Intent of Adopting Regulations Addressing Concessions: Many questions have been raised by both landlords and tenants about how to appropriately apply the AGA to the base rent when there has been a concession during initial tenancy. Adopting regulations to clarify that the base rent shall factor in rent concessions will reduce confusion, help landlords comply with the CSFRA, limit excessive rent increases, promote stability, and further the purposes of the CSFRA. Regulations can provide clear requirements and instructions without having landlords and tenants resort to the petition process to resolve confusion over this issue.

CONCLUSION

Based on the evaluation above, it is recommended that the RHC direct staff to draft regulations for its consideration that:

1. Clarifies that rent concessions, discounts, or reductions provided during a tenant's initial tenancy shall be factored into the base rent calculation when determining the rent actually paid.
2. Sets the methodology for calculating the base rent as the sum of the rent actually paid by the tenant over the term of the initial tenancy and dividing the sum by the number of months in the initial tenancy, as illustrated in the two examples provided in the Analysis section, which would yield the average monthly base rent actually paid.
3. Defines the term of the initial tenancy as the actual number of months of the initial tenancy, or, in the case of a month-to-month tenancy or a lease longer than 12 months, the initial term will be 12 months.

4. Excludes any rent payment that a tenant may fail to pay from being factored into the calculation of base rent.

ALTERNATIVES

1. Provide guidance to staff to draft regulations to clarify the calculation of base rent when rent concessions are provided during the initial term of the tenancy but using different parameters than staff's recommendation above.
2. Provide other recommendations.

NEXT STEPS

If the RHC supports staff's recommendations, staff will bring draft regulations for RHC consideration during its next meeting, currently scheduled for June 20, 2022.

FISCAL IMPACT

The review and feedback on options to clarify the calculation of base rent where rent concessions, discounts, or reduction of rent was provided during the initial term of the tenancy is not anticipated to impact the budget of the RHC.

PUBLIC NOTICING—Agenda posting.

KMT-NS-AVD/JS/6/CDD/RHC

814-05-23-22M-1

- Attachments:
1. March 28, 2022 RHC Memo on Proposed Regulations to Clarify the Definition of "Base Rent" and Address Concessions
 2. April 28, 2022 Summary of Stakeholder Meetings