

From: Shanna Dion <sdion@egr.com>
Sent: Tuesday, May 10, 2022 9:16 AM
To: Rental Housing Committee <RHC@mountainview.gov>; susynalmond@yahoo.com;
matt.grunewald.rhc@gmail.com; nmhl.rhc@gmail.com; julian.pardo.de.zela@gmail.com;
emily00@gmail.com; grosas730@gmail.com; ktiedemann@goldfarbclipman.com; McCarthy, Kimbra
<Kimbra.McCarthy@mountainview.gov>; Quinn, Jannie <Jannie.Quinn2@mountainview.gov>; van
Deursen, Anky <Anky.vanDeursen@mountainview.gov>
Cc: Joshua Howard <JHoward@caanet.org>
Subject: April 28th, 2022 Stakeholder Meetings

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Dear Rental Housing Committee,

While I appreciate the efforts by the RHC staff to engage stakeholders at the April 28, 2022 landlord stakeholder meeting, housing providers did not walk away from that meeting with any confidence that the feedback would be reflected in any proposal to redefine “base rent” that comes before the RHC. I oppose any resolution that would include discounts, concessions, incentives, and credits in determining base rent.

Rent concessions are important to reduce up-front move in costs, help reduce financial barriers that may prevent one from moving into a new rental home, allow flexibility, and attract residents. These are generally one-time or temporary benefits we give with no expectation that they will be averaged into monthly rent or affect the annual rent increase.

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Thank you again for your service on the RHC. We hope that the RHC will use this as an opportunity to foster a culture of collaboration and feedback between the RHC and the stakeholders who work to provide quality housing to Mountain View residents.

Sincerely,

Shanna Dion

Vice President Property Management | **San Francisco**
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San Francisco CA 94107
Ph: 415-767-7175

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From: Michael Pierce <Michael.Pierce@eprodesse.com>

Sent: Monday, May 9, 2022 4:04 PM

To: Rental Housing Committee <RHC@mountainview.gov>; susynalmond@yahoo.com; matt.grunewald.rhc@gmail.com; nmhl.rhc@gmail.com; julian.pardo.de.zela@gmail.com; emily00@gmail.com; grosas730@gmail.com; ktiedemann@goldfarbclipman.com; McCarthy, Kimbra <Kimbra.McCarthy@mountainview.gov>; Quinn, Jannie <Jannie.Quinn2@mountainview.gov>; van Deursen, Anky <Anky.vanDeursen@mountainview.gov>

Cc: Joshua Howard <JHoward@caanet.org>

Subject: April 28, 2022 Stakeholder Meetings

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Dear Rental Housing Committee Members,

I own as well as operate rental housing in Mountain View who is directly affected by any changes made by the RHC. While I appreciate the efforts by the RHC staff to engage stakeholders at the April 28, 2022 landlord stakeholder meeting, housing providers did not walk away from that meeting with any confidence that the feedback would be reflected in any proposal to redefine “base rent” that comes before the RHC. I oppose any resolution that would include discounts, concessions, incentives, and credits in determining base rent.

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Take care,

Michael

Michael D. Pierce, President
CA DRE License #01190465
Prodesse Property Group
Prodesse Investments, Inc.
1065 E. Hillsdale Boulevard, Suite 317
Foster City, CA 94404
(650) 578-9661 ext. 222
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Visit our rental portal at <http://residential.eprodesse.com>



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From: Yvonne Hill <yhill1@egr.com>

Sent: Monday, May 9, 2022 3:15 PM

To: Rental Housing Committee <RHC@mountainview.gov>; susynalmond@yahoo.com; matt.grunewald.rhc@gmail.com; nmhl.rhc@gmail.com; julian.pardo.de.zela@gmail.com; emily00@gmail.com; grosas730@gmail.com; ktiedemann@goldfarbclipman.com; McCarthy, Kimbra <Kimbra.McCarthy@mountainview.gov>; Quinn, Jannie <Jannie.Quinn2@mountainview.gov>; van Deursen, Anky <Anky.vanDeursen@mountainview.gov>

Cc: jhoward@caanet.org

Subject: April 28, 2022 Stakeholder Meetings

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Sincerely,

Yvonne Hill, ARM

Regional Manager | San Francisco

Equity Residential

333 Third Street, Suite 210

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650.246.4975 office

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From: Soroosh Pourmehraban <spourmehraban@eqr.com>

Sent: Monday, May 9, 2022 3:09 PM

To: Rental Housing Committee <RHC@mountainview.gov>; susynalmond@yahoo.com; matt.grunewald.rhc@gmail.com; nmhl.rhc@gmail.com; julian.pardo.de.zela@gmail.com; emily00@gmail.com; grosas730@gmail.com; ktiedemann@goldfarbclipman.com; McCarthy, Kimbra <Kimbra.McCarthy@mountainview.gov>; Quinn, Jannie <Jannie.Quinn2@mountainview.gov>; van Deursen, Anky <Anky.vanDeursen@mountainview.gov>

Cc: jhoward@caanet.org

Subject: Subject Line: April 28, 2022 Stakeholder Meetings

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Sincerely,

--

Soroosh Pourmehraban
Senior Analyst, Investments
415-425-1167 cell
Spourmehraban@eqr.com

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San Francisco, CA 94107
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From: Heather Martinez <hmartinez1@eqr.com>

Sent: Monday, May 9, 2022 3:04 PM

To: Rental Housing Committee <RHC@mountainview.gov>; susynalmond@yahoo.com; matt.grunewald.rhc@gmail.com; nmhl.rhc@gmail.com; julian.pardo.de.zela@gmail.com; emily00@gmail.com; grosas730@gmail.com; ktiedemann@goldfarbclipman.com; McCarthy, Kimbra <Kimbra.McCarthy@mountainview.gov>; Quinn, Jannie <Jannie.Quinn2@mountainview.gov>; van Deursen, Anky <Anky.vanDeursen@mountainview.gov>

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Sincerely,

Heather Martinez
Community Manager
650.967.1424

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870 E. El Camino Real Mountain View, CA 94040

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From: Nazar Elwazir <nelwazir@egr.com>

Sent: Monday, May 9, 2022 2:59 PM

To: Rental Housing Committee <RHC@mountainview.gov>; susynalmond@yahoo.com; matt.grunewald.rhc@gmail.com; nmhl.rhc@gmail.com; julian.pardo.de.zela@gmail.com; emily00@gmail.com; grosas730@gmail.com; ktiedemann@goldfarbblipman.com; McCarthy, Kimbra <Kimbra.McCarthy@mountainview.gov>; Quinn, Jannie <Jannie.Quinn2@mountainview.gov>; van Deursen, Anky <Anky.vanDeursen@mountainview.gov>

Cc: Joshua Howard <jhoward@caanet.org>

Subject: April 28, 2022 Stakeholder Meetings

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Sincerely,

Nazar

Nazar Elwazir

First Vice President - Investments

415-767-7179

nelwazir@eqr.com

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From: Ron Granville <rgranville@wres.com>

Sent: Monday, May 9, 2022 2:34 PM

To: Rental Housing Committee <RHC@mountainview.gov>; susynalmond@yahoo.com; matt.grunewald.rhc@gmail.com; nmhl.rhc@gmail.com; julian.pardo.de.zela@gmail.com; emily00@gmail.com; grosas730@gmail.com; ktiedemann@goldfarbblipman.com; McCarthy, Kimbra <Kimbra.McCarthy@mountainview.gov>; Quinn, Jannie <Jannie.Quinn2@mountainview.gov>; van Deursen, Anky <Anky.vanDeursen@mountainview.gov>

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Sincerely,

Ron Granville, CPM®

CEO

Woodmont Real Estate Services

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May 5, 2022

VIA EMAIL

City of Mountain View	
Rental Housing Committee	rhc@mountainview.gov
Susyn Almond, Chair	susynalmond@yahoo.com
Nicole Haines-Livesay, Vice Chair	nmhl.rhc@gmail.com
Julian Pardo de Zela	julian.pardo.de.zela@gmail.com
M. Guadalupe Rosas	grosas730@gmail.com
Matthew Grunewald, Alternate	matt.grunewald.rhc@gmail.com
Emily Ramos	emily00@gmail.com

Re: Stakeholder Meetings April 28, 2022

Dear Chair Almond and Members of the Rental Housing Committee:

We write to provide key points for your consideration regarding the stakeholder meetings on April 28, 2022 regarding the proposed amendment to the CSFRA Regulations, Chapter 2 on the definition and calculation of Base Rent.

Staff's Presentation

Staff's PowerPoint presentation and discussion at the stakeholder meetings did not present a neutral perspective, rather the information was selected and presented to support rewriting CSFRA by including "concessions" into an "averaged" rent, even though neither concept is included in CSFRA.

For example, Staff's PowerPoint ignored relevant sections of CSFRA and referenced only Section 1702(b) (definition of Base Rent) without also referencing Section 1702(p) (definition of Rent)). Staff ignored subsection (p) entirely, which states that the definition of Rent includes "*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 a Rental Housing Agreement concerning the use or occupancy of a Rental Unit and premises and attendant Housing Services...." Staff's omission is telling as it informs the definition of Base Rent contrary to Staff's proposed amendment. (Please see attached March 28, 2022 letters submitted by Prometheus and CAA, for more discussion on this point.)

As a further example, Staff's PowerPoint presentation contained inaccuracies, ignored the state-wide rent control law and excluded other local jurisdictions that do not support Staff's position. Staff referenced four jurisdictions that purportedly support Staff's change to the definitions in CSFRA. However, Staff and RHC legal counsel did not point out that each of these jurisdictions has an ordinance and regulations, each with distinct language, and each driven by the unique circumstances of that particular jurisdiction, in many instances very different from CSFRA and Mountain View. For example, the Richmond voter-approved ordinance does not refer to reduced, discounted or free rent, rather the regulations adopted thereafter by the rent

board added that language, presumably in accordance with due process. The PowerPoint slide mistakenly refers to Sec. 11.100.070 of the *ordinance*, but really it is the Rent Board's *regulation* 700 that contains the referenced language. Why does this matter? It matters because the RHC and Mountain View stakeholders deserve accuracy and fairness in these presentations. Staff's presentation also ignored the state-wide rent control law (AB 1482) as well as other jurisdictions like Oakland, Alameda, and L.A. with language that do not support Staff's position. The important policy considerations for excluding discounts, incentives, concessions and credits from rent have not yet been addressed by Staff. Remarkably, at Tenant's stakeholder meeting, an attorney for RHC seemed initially not to know that the State of California's rent control law excluded concessions in the calculation of rent, and then gave a convoluted response on this point.

A final example, after having heard many reasons from housing providers during the morning stakeholders meeting as to why concessions were a benefit for residents and housing providers alike, at the evening stakeholders' meeting for residents, RHC Staff stated only that housing providers liked concessions "to entice people to come to the apartment, that's what we heard..." and then stated "but why not just lower rent overall."

Based on the foregoing, it appears that Staff and RHC legal counsel had already made the decision as to how it would summarize the stakeholder meetings and the content of its recommendation to the RHC, regardless of the information provided by stakeholders.

Important Points from Housing Providers' Perspective

At the housing providers' stakeholder meeting, many housing providers spoke in favor of excluding discounts, incentives, concessions and credits in determining rent. Important policy considerations of CSFRA are consistent with this exclusion. The proposed amendment harms housing providers and residents by deterring housing providers from modifying rent to account for hardships. Concessions and other discounts encourage housing providers to be flexible and help residents in need, without being penalized. Also, concessions remove barriers to entry to housing by increasing affordability and reducing the amount of money required at move in, also important policy considerations of CSFRA. Housing providers also raised concern that if the definition of rent is changed six years after CSFRA was adopted as Staff is proposing, how would six years of past rents be addressed.

Staff stated that its regulation as to existing tenancies addressed these concerns, but that is not accurate. Chapter 7, subpart D addresses only Covid, only for tenancies commencing before April 30, 2020, and expires with the statewide emergency declaration. Chapter 7, subpart E addresses reductions in rent only for major construction or capital improvements.

Important Points from Residents' Perspective

Residents voiced concerns that concessions were misleading or predatory, and that it is simplest to just base it on what is paid. Regarding residents understanding as to what comprises the rent, people are smart and understand the use of one-time or limited concessions, rebates, incentives and credits as this occurs in many businesses. In addition, any concerns in that regard can be addressed by adding disclosure language to the CSFRA notices already required with

every Lease of a covered unit. (There is currently a 6-page notice, and, as set forth in my April 25 email to RHC, there is an additional notice proposed, which we have opposed, but language could be added to the current 6-page notice.) Regarding the comment that it is simplest to calculate based on what is paid, that ignores the language of CSFRA, the rent established by agreement of the parties in the lease contract, and also the practical reality of the myriad reasons for non-payment of rent including refusal to pay, or inability to pay, statutory set-off for habitability, or due to hardship like Covid etc.

Procedural Concerns

Housing providers raised procedural issues, which were not addressed by Staff. For example, stakeholders requested that Staff invite stakeholders to review the draft resolution prior to the RHC meeting, so that RHC is given feedback before being asked to vote on it at the RHC meeting. Stakeholders noted that this would be a useful practice, so as to avoid “on the dais” drafting during the RHC meeting, benefitting both RHC members and the public. Housing providers again voiced concern about the lack of advance notice, and Staff indicated that 72 hours was what is required. Staff also did not address the lack of notice of “amended” agendas, which are often published the day of the RHC meeting.

Closing

Thank you for considering this information, as well as the information in March 28, 2022 letters from Prometheus and CAA attached. We appreciate your time and service on the RHC.

Very truly yours,

DocuSigned by:



C7A11941B38147E Theresa "Tessa" McFarland

General Counsel

Attachments

cc: Karen Tiedemann, Esq., Special Counsel to the RHC (ktiedemann@goldfarbblipman.com)
Nazanin Salehi, Esq., Special Counsel to the RHC (nsalehi@goldfarbblipman.com)
Kimbra McCarthy, City Manager (kimbra.mccarthy@mountainview.gov)
Anky van Duersen, Staff to RHC (Anky.vanDeursen@mountainview.gov)



California Apartment Association
1530 The Alameda, Suite 100
San Jose, CA 95126
408.342.3500 • caanet.org

May 6, 2022

Via Electronic Mail Only

City of Mountain View Rental Housing Committee
Nicole Haines-Livesay, Chair
Emily Ramos
Susyn Almond
Julian Pardo de Zela
M. Guadalupe Rosas
Matthew Grunewald, Alternate

rhc@mountainview.gov
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matt.grunewald.rhc@gmail.com

Dear Chair Haines-Livesay and Rental Housing Committee Members:

The California Apartment Association (CAA) remains extremely concerned about the proposal to amend Chapter 2 of the Community Stabilization and Fair Rent Act (CSFRA) Regulations to change the definition and calculation of “Base Rent.”

At the March 28 RHC Meeting, staff recommended the RHC adopt a rushed amendment to Chapter 2 of the Regulations to re-define how rent concessions are treated when calculating an annual rent increase. Due to both the late hour and the stakeholder objections, the item was tabled with the intent that RHC staff would conduct stakeholder meetings on the proposal. Those meetings occurred on April 28, 2022.

While CAA appreciated the RHC staff hosting stakeholder meetings on April 28, 2022, these meetings did not yield any productive outcomes but rather continued to foster the ongoing frustration and distrust with the RHC staff.

Stakeholder Meetings Demonstrated Lack of Neutrality

Interestingly, at the April 28, 2022, stakeholder meeting no reference was made to the March 28 draft proposal or the significant practical, operational, and legal issues raised by CAA and rental housing providers on that draft. Since the March 28 proposal was published, landlords came to the April 28 meeting prepared to discuss their specific concerns with the March 28 draft.

Staff instead framed the stakeholder meeting as a session to hear from landlords how they defined “base rent” and what items should be included in “base rent” especially when related to the use of rent concessions, discounts, or bonuses. This was not necessary. The term “base rent” is clearly defined in the CSFRA which the Mountain View voters adopted in November

2016; any efforts to amend the definition of “base rent” are outside the jurisdiction of the RHC and rest exclusively with the Mountain View voters.

In the brief background staff offered on the issue of rent concessions, RHC staff chose to highlight four other California rent-controlled jurisdictions that require landlords recognize a concession or discount as part of the base rent. Staff completely ignored that several rent control cities in California either exclude concessions from base rent or have laws that are silent on the issue. To attempt to equate the Mountain View law with Berkeley, Santa Monica, West Hollywood, and Richmond ignores cities like Oakland, Alameda, and Los Angeles which have ordinances that do not require the inclusion of rent concessions in base rent or otherwise permit rent concessions being excluded from base rent. The exclusion of some cities and omission of the fact that not all rent controlled jurisdictions treat concessions in the same manner (or in the same manner RHC staff wants to) fails to present an objective analysis and background on the issue. Additionally, RHC staff never once mentioned that AB 1482, the state rent and eviction control law, clearly excludes concessions when calculating base rent, so long as the concessions are separately listed and identified in the lease or rental agreement.

During the tenant focused stakeholder meeting, a participant asked a question in the Chat/Q&A boxes. The premise of the question sought to understand if a tenant did not pay rent for one month during their lease term or did not pay rent due to a COVID protected hardship whether their failure to pay rent affected the base rent.

The RHC legal counsel responded with something to the effect of “this is what the RHC will have to deal with in the regulation.” The accurate answer to this question is that tenants are generally contractually obligated to pay their rent on time each month, with some exceptions. Legal counsel’s response implied that rent need not be paid and implied that this will be addressed in regulation, demonstrating a bias on the part of the RHC counsel to develop a regulation that not only favors one side, but substantively disadvantages rental housing providers.

Legal Issues Not Addressed, No Responses to Major Concerns

Notwithstanding the issues mentioned above, CAA, CAA’s legal counsel, and several rental housing providers outlined issues with the staff’s March 28, 2022, proposal. Two of those letters are attached to this email for reference. RHC staff did not address any of these issues at the April 28, 2022, meetings. Among these issues include:

- **What legal authority does the RHC have to re-define base rent?**
The CSFRA’s current definition of base rent does not require that rent concessions, rebates, or discounts offered to a tenant be included in its calculation. Rent concessions, discounts or rebates are nowhere mentioned in the definition of base rent (or anywhere within the CSFRA), nor is there any reference to the monthly averaging calculation as is cited in the March 28, 2022, proposed regulation.
- **The March 28, 2022, Regulation Could Violate Constitutional Rights**
The proposed March 28, 2022, regulation 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. Landlords could also be required to pay rent credits for those

seven years if the rent increases are rolled back – which could be a very large sum given the number of years and units owned. Adding insult to injury, landlords could also face administrative penalties, and civil liability, including attorney’s fees, for issuing rent increases that are now deemed to not comply with the CSFRA.

One must ask what justification does the RHC have to bring this issue forward nearly six years after the adoption of the CSFRA?

- **State Law Provides a Standard to Address Concessions**

Perhaps most shocking at the April 28, 2022 tenant focused stakeholder meeting was the RHC legal counsel’s lack of knowledge on AB 1482 (Chiu), the statewide framework for tenant protections which included rent and eviction protections for most California renters. When asked how AB 1482 treated rent concessions, RHC legal counsel attempted to dance around the issue, discussed how AB 1482 defined “base rent” and then gave a very complicated answer to explain how AB 1482 treats concessions. In fact, the CAA letter of March 28, 2022 clearly outlined this for the RHC and one must assume that the RHC staff and legal counsel understand the intersection between state and local rent control laws.

Stakeholder Engagement Remains Major Concern

While the meeting on April 28 provided a venue for stakeholders to share information with the RHC staff, a larger issue remains—a clearly defined, engaged stakeholder engagement process. The first time many stakeholders learn of important items coming before the RHC is when the agenda is posted and then, the only opportunity for input is an email to RHC prior to the meeting or in two-minute segments as part of public comment on an agenda item before the RHC.

At the last two RHC meetings, CAA voiced significant concerns on lack of outreach on major items (March 28, 2022-base rent calculation; April 25, 2022-tenant disclosures). As a result of the issues raised, the RHC sent the items back to staff citing significant revisions necessary to ensure the proposed regulations were not only consistent with the CSFRA but also to address the lack of engagement by stakeholders. It was therefore shocking when, at the April 28, 2022 stakeholder meeting, landlords asked for an opportunity to comment on any draft regulation in advance of it going to the RHC in order to provide meaningful feedback on a specific proposal and the RHC staff responded “RHC items are made available at least 72 hours in advance.”

Conclusion

Rental housing providers aim to comply with the letter of the CSFRA. The lack of formalized outreach and not notifying landlords of significant regulations until 72 hours prior to their adoption is not collaborative and does not create a positive relationship. The city council holds two public hearings and then waits 30 days before ordinances take effect. These regulations have the same affect in many cases as a council adopted ordinance.

At a very minimum, the RHC should develop a clear process for outreach, engagement, and plan for drafting, publicizing and then implementing new or amended regulations. These regulations, no matter how trivial they may seem to the RHC staff, require landlords to change processes and

procedures. And, failure to ensure strict compliance with them may result in a landlord being deemed unable to implement their Annual General Adjustment.

CAA encourages the RHC to carefully consider the practical and legal implications of not only the proposal to amend Chapter 2 of the Regulations but any new regulation and have a clear outreach process for consulting stakeholders prior to placing a regulation on the RHC Agenda.

Sincerely,

A handwritten signature in black ink, appearing to read "Joshua Howard". The signature is fluid and cursive, with a small flourish at the end.

Joshua Howard
Executive Vice President, Local Government Affairs
California Apartment Association



California Apartment Association

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March 28, 2022

Via Electronic Mail Only

Susyn Almond
Chairperson
Mountain View Rental Housing Committee
500 Castro Street
Mountain View, CA

RE: RHC March 28, 2022 Agenda – Draft Amendments to Chapter 2 of CSFRA Regulations

Dear Chair Almond and Committee Members:

The California Apartment Association (CAA) opposes the proposed amendment to Chapter 2 of the Community Stabilization and Fair Rent Act (CSFRA) Regulations to clarify the definition and calculation of “Base Rent.”

This regulation, as drafted, is a monumental shift in policy that is not only ill considered, but also deceptively framed as nothing more than a technical clarification. The proposed regulation is bad policy that disincentivizes landlords from reducing barriers to housing and is inconsistent with California’s statewide rent control law which uses a commonsense approach for calculating Base Rent when a landlord provides a concession.

The amendment is also subject to significant legal scrutiny as it conflicts with the plain language of the CSFRA and infringes upon the procedural due process rights and contracts rights of rental housing providers throughout the City.

The Proposed Regulation Discourages Housing Affordability

The stated purpose of the CSFRA was to reduce displacement and promote community stability. Far from serving these goals, the proposed amendment does the opposite and disincentivizes the use of a key tool to reduce the cost of accessing housing. A tool that, it’s worth noting, costs the City nothing. The proposed amendment would, at best, discourage housing providers from working with their residents to remain in their homes by reducing balances owed or reducing the upfront costs for families to move into vacant units through the use of move-in specials. At worst, the regulation penalizes landlords for these practices.

Rent concessions are a critical tool housing providers use to lease-up vacant units and increase access to housing. As the CSFRA itself recognizes, moving can be costly. See CSFRA Section 1701(s), which states in relevant part, “nearly all rental housing requires that prospective tenants pay three months’ rent up front in order to secure a lease - generally representing the first month’s rent, last month’s rent, and security deposit.” Rent concessions help to offset these costs,

as they often take the form of a one-time rent discount that minimize the upfront costs a tenant must pay when moving into a new unit.

The proposed amendment penalizes housing providers who offer these one-time bonuses to promote housing stability and security. By adopting the amendment as written, many rental owners will likely discontinue the use of rent concessions in rent negotiations as they will be forced to treat such discounts as permanent reductions rather than a one-time cost. The proposed regulation also discourages housing providers from working with tenants who are struggling, as any reduction in the amount a tenant owes is then considered a permanent rent reduction.

In short, far from serving the CSFRA's goals of making housing more affordable and secure, the proposed regulation punishes housing providers who provide discounts and flexibilities that help renters access and stay in rental housing.

The Proposed Regulation Conflicts with the Plain Language of the CSFRA

In addition to being bad policy that is diametrically opposed to the stated purposes behind the passage of CSFRA – and which is being adopted with zero input from stakeholders – the proposed regulation is also susceptible to serious legal challenges. First, the proposed regulation is not simply a “clarification” as characterized by the staff report but would instead serve to rewrite the definition of “base rent” in a way that is inconsistent with the language of the CSFRA itself.

To be clear, the CSFRA's current definition of base rent does not require that rent concessions, rebates, or discounts offered to a tenant be included in its calculation. Rent concessions, discounts or rebates are nowhere mentioned in the definition of base rent (or anywhere within the CSFRA), nor is there any reference to the monthly averaging calculation as is cited in the proposed regulation. CAA understands that RHC's position is that the definition of base rent has always required the inclusion of rent concessions and the proposed regulation would simply clarify and confirm this requirement. The RHC's own actions, however, belie that conclusion. Indeed, the very fact that the RHC is considering this regulation demonstrates that the current definition of base rent does not currently require the factoring in of rent concessions, or at the very least, is unclear as to whether rent concessions must be included.

Additionally, the CSFRA's definition of base rent suggests, if not requires, rent concessions to not be included in the calculation of base rent. Section 1702(b) provides the Base Rent for tenancies commenced on or after October 19, 2015, is the "initial rent rate charged upon initial occupancy," and that "initial rental rate" means "only the amount of Rent actually paid by the Tenant for the initial term of the tenancy." Additionally, the accompanying definition of “rent,” is “[a]ll 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 a 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.” (Section 1702(p)).

The definition of “rent” informs what base rent is to include in two important ways. First, base rent includes “all nonmonetary consideration.” A concession like free rent is a non-monetary consideration received by a landlord in exchange for the value of a tenant moving into the unit or remaining in the unit. Thus, rent concessions should be added to the “amount of rent actually paid” by the tenant, not discounted from that amount as the proposed regulation would. Second,

the definition of base rent is based on periodic payments, typically months, within the initial term of tenancy. Thus, if a tenant pays their monthly rental rate, even if they do not pay some months because they were given concessions, their base rent is still their monthly rental rate they “actually pay” when they do pay. The base rent in such a circumstance does not turn into an averaged amount, accounting for the concessions, as the proposed regulation and staff report outlines (e.g., a tenant with a monthly rental rate of \$1,000 who received two months of rent concessions, still actually pays \$1,000 when he or she makes monthly payments; the tenant never “actually paid” \$833.33 per month).

Indeed, even Section 1702(b)’s reference to only the rent “actually paid” – which appears to be the authority on which the RHC is relying for the proposed amendment – lends at least as much support to the opposite conclusion as it does to the position taken by the RHC, as it requires the base rent to be adjusted based on what was *not* paid rather than what was *actually* paid. Reducing the base rent by the amount of any concession provided would adjust the base rent based on amounts the tenant did not pay rather than looking to the monthly rental rate actually paid by the tenant. Moreover, taking the RHC’s interpretation of this language (i.e. an average of the exact amount tendered by a tenant to the landlord over the entire initial rent term) to its logical end would lead to untenable and unintended results. Specifically, tenants who were delinquent on their rent or otherwise did not pay the full amount of their rent – either without their landlord’s approval or because the landlord agreed to write off some portion of delinquent payments – would be rewarded with a lower base rent calculation because they would have “actually paid” less rent. This would be unfair to paying tenants and landlords alike and clearly was not intended by the CSFRA.

All this is to say, the current definition of base rent does not require rent concessions be included in its calculation, and therefore the proposed regulation is in conflict with the CSFRA. “[R]egulations that alter or amend the statute or enlarge or impair its scope are void.” ([Physicians & Surgeons Laboratories, Inc. v. Department of Health Services \(1992\) 6 Cal.App.4th 968, 982](#)). The proposed regulation should be rejected on this basis.

The Proposed Regulation Could Reopen Seven Years of Rent Increases in Violation of Constitutional Rights

Additionally, the proposed regulation 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. Landlords could also be required to pay rent credits for those seven years if the rent increases are rolled back – which could be a very large sum given the number of years and units owned. Adding insult to injury, landlords could also face administrative penalties, and civil liability, including attorney’s fees, for issuing rent increases that are now deemed to not comply with the CSFRA. (Section 1714). Landlords would be put in this fundamentally unfair position through no wrongdoing of their own but because the proposed regulation altered the definition of base rent in a way they could not have reasonably foreseen, and in violation of their constitutionally protected contract and due process rights.

The United States Constitution prohibits the government from passing any law “impairing the [o]bligation of [c]ontracts.” (United States Constitution, Article 1, Section 10). The proposed regulation, however, would do just that. The proposed regulation would reopen for negotiation and possible modification seven years of rent increases, despite the fact that the rental rates were agreed to and contracted for in the lease agreements. It is industry standard for leases that include rent concessions, for the “initial rental rate” to be stated as the monthly gross rent. The landlord and tenant understand that there is a contractual monthly amount and concessions are

not included in that amount because the concessions are treated as a credit or rebate on the initial rental rate.

The “threshold inquiry” when evaluating whether a law violates the Contract Clause asks whether the law substantially impairs an existing contractual relationship. (*Energy Reserves Grp., Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 411). The proposed regulation certainly does that. Indeed, the proposed regulation would render meaningless the agreed to rental rate term in the contractual agreement between the landlord and tenant, allowing that term to now be challenged and modified. Accordingly, the proposed regulation would severely impair landlords’ contractual rights to both rely on and enforce the terms of their lease agreements in violation of the Contracts Clause, and should be rejected on this basis.

In addition to infringing on constitutionally protected contract rights, the proposed regulation would work a profound unfairness on landlords in violation of due process. A fundamental pillar of the due process protections afforded by the California and United States Constitution is that before the government can infringe on a person’s life, liberty or property interests, a fair procedure must be used - at a minimum reasonable notice and an opportunity to respond must be provided. ([Cal. Const., Art. I § 1; U.S. Const. Amend. XIV § 1, *Nasir v. Sacramento County Off. of the Dist. Atty.* \(1992\) 11 Cal.App.4th 976, 985\).](#)

The proposed regulation is poised to significantly impair landlords’ property interests without providing adequate procedural protections. Specifically, landlords could be placed in the untenable position of having seven years of rent increases issued in good faith reopened for negotiation, paying rent credits for those seven years in the case of rollbacks, and fighting administrative and civil actions and paying any resulting liability - all through no fault of their own and without any reasonable notice that the RHC would materially alter the definition of base rent. Landlords should not now be punished for this unanticipated change in the law. To do so would be manifestly unfair and violate constitutionally guaranteed due process protections.

State Law Provides a Reasonable Standard to Address Concessions

In 2019, the California State Legislature adopted AB 1482 (Chiu), which established a statewide framework for tenant protections including, but not limited to: (1) statewide rent control that limits rent increases to 5% plus inflation, and (2) eviction protections that apply to most rental properties in the state. Recognizing move-in and lease renewal concessions as a critical and vital tool to promote access to housing and housing stability, AB 1482 included a provision that concessions may be excluded from the calculation of base rent when the landlord calculates a rent increase under AB 1482 so long as these discounts are separately listed and identified in the lease or rental agreement. AB 1482 therefore strikes a reasonable balance by allowing housing providers to preserve their base rent exclusive of one-time discounts or concession, while ensuring transparency by requiring these amounts to be separately identified in the rental agreement.

Although rental units subject to the CSFRA are, in many respects, exempt from the requirements of AB 1482, the RHC should give consideration to the language in AB 1482 which provides a framework for calculating rent increases when a landlord and tenant agree to a concession.

AB 1482 states, in pertinent part, “an owner of residential real property shall not, over the course of any 12-month period, increase the gross rental rate for a dwelling or a unit more than 5 percent plus the percentage change in the cost of living, or 10 percent, whichever is lower, of the lowest gross rental rate charged for that dwelling or unit at any time during the 12 months prior

to the effective date of the increase. *In determining the lowest gross rental amount pursuant to this section, any rent discounts, incentives, concessions, or credits offered by the owner of such unit of residential real property and accepted by the tenant shall be excluded. The gross per-month rental rate and any owner-offered discounts, incentives, concessions, or credits shall be separately listed and identified in the lease or rental agreement or any amendments to an existing lease or rental agreement.*” (emphasis added)

To provide the clarity the RHC is seeking to offer under the proposed amendment to Chapter 2, **CAA recommends that the RHC follow the approach taken by AB 1482 which provides an allowance for rental concessions, transparency for the concession, and clearly recognizes that it is a one-time incentive, not an ongoing component of the base rent.**

Using this approach, the RHC will create a consistent standard across Mountain View for *all* rental units even those not subject to the CSFRA’s rent stabilization component as units built between 1995-2007 would be included under AB 1482. This approach further eliminates the risk that tenants will lose access to rent discounts and concessions that are both popular and help reduce barriers to housing, while at the same time ensuring that such discounts and concessions are clearly disclosed so there is not future confusion.

Lack of Stakeholder Engagement is a Chronic Problem

While the concerns with the proposed amendment are serious in and of themselves, perhaps most concerning is that they are symptomatic of a larger issue: the RHC’s lack of engagement with stakeholders, both on the proposed amendment and nearly every other matter that comes before it. When the CSFRA was being implemented in 2017, the City went to great lengths to work closely with landlords, tenants, and the rental housing industry to seek feedback on the pending regulations that were being developed. However, once seated, the RHC and its staff have never once reached out to the California Apartment Association or its members for input or feedback on any matter coming before the RHC. The first time many stakeholders learn of important items coming before the RHC is when the agenda is posted and then, the only opportunity for input is in two-minute segments as part of public comment on an agenda item before the RHC.

Going forward, the RHC needs to adopt a better mechanism to engage stakeholders on major regulations before they’re posted to the agenda. Failure to do so will only further perpetuate additional animosity, acrimony, and distrust between the rental housing owners and the RHC. The continued failure to seek out the feedback of those whom the RHC seeks to regulate denies the RHC from receiving critical input that could be helpful in drafting regulations that both protect renters and balance the operational needs of the rental housing providers.

Conclusion

Like many businesses, housing providers have struggled over the past two years to provide an essential service while grappling with increased costs, supply shortages, and constantly changing public health orders. Housing providers have been asked to serve as the first line of defense against housing insecurity as two crises – a global pandemic and long-running housing shortage – have collided. They have been asked to have compassion, be flexible, work with tenants, and reduce barriers to housing. The RHC proposes to repay those efforts with a policy that directly penalizes the precise actions housing providers were asked to take.

The RHC's actions are not only deeply unfair to housing providers, they seemingly serve nobody's interests. Tenants will not benefit from their landlords being disincentivized from offering concessions and discounts. The proposed regulation is nothing more than regulation for regulation's sake. It is a deeply flawed, legally questionable solution in search of a problem that does not exist. CAA urges the RHC to reject the proposed regulation.

Sincerely,

A handwritten signature in black ink, appearing to read "Joshua Howard". The signature is fluid and cursive, with a large initial "J" and "H".

Joshua Howard
Executive Vice President, Local Government Affairs
California Apartment Association

CC:

Kimbra McCarthy, Mountain View City Manager
Jannie Quinn, Mountain View City Attorney
Karen M. Tiedemann, Special Counsel to the Rental Housing Committee
Anky vanDeursen, CSFRA Program Manager

March 28, 2022

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**Re: Proposed Amendment to CSFRA Regulations,
Chapter 2, to Change the Definition of “Base Rent”**

Dear Chair Almond and Members of the Committee:

I write on behalf of the California Apartment Association to object to the Committee’s proposed adoption of a new definition of “base rent” that would exclude temporary rent concessions or rebates from the base rent calculation. That regulation, despite being characterized by the staff report as merely a “clarification” of existing law, is actually an improper substantive alteration of the CSFRA.

A. The Regulation Is Inconsistent with the Plain Language of the CSFRA.

Currently “base rent” for tenancies commencing after October 19, 2015, is defined by Section 1702(b)(2)¹ 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.”

Essential to a proper understanding of this term, however, is the accompanying definition of “rent,” which is “[a]ll *periodic* payments

¹ Section references herein are to the CSFRA unless otherwise noted.

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 a 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.” (Section 1702(p), emphasis added.)

The proposed Regulation would define the initial rental rate as the sum total of compensation across the entire initial term, whereas the Ordinance itself defines “rent” with respect to individual “periods” (typically months) within the initial term of the tenancy. Thus—contrary to the proposed regulatory amendment—the construction of “base *rent*” that more fully comports with the language of these two provisions of the Ordinance is that if a tenant is lawfully charged and “actually” pays a given rental rate for any “period[]” within the initial term, that rental rate is the “base rent.” Thus, if a tenant’s rent is \$1,000 per month and the tenant pays that amount for ten of the twelve months but is given a concession for two months, the “base rent” would nevertheless be \$1,000 per month.

To hold otherwise would lead to absurd and deeply unfair results, the avoidance of which is a fundamental rule of statutory construction. *Collins v. Woods*, 158 Cal. App. 3d 439, 443 (1984) (“We must avoid this interpretation as it leads to an unfair and absurd result.”).

For example, if a tenant defaults on a given month’s rental payment, and therefore does not “actually” pay it, is the tenant to be rewarded, and the landlord punished, for that failure by an ongoing limitation on the landlord’s ability to raise rental rates in subsequent years? While such a scenario might normally seem implausible, the last two years have demonstrated its salience. State law has prevented landlords from evicting tenants who default on rent in many instances, at least if those tenants pay 25% of the rent due. Civ. Code § 1179.03(g)(2)(B). If a tenant paid the first six months of rent under a new tenancy, and from there on out paid only the minimum necessary to

avoid eviction, the proposed regulation would purport to reduce the unit's "base rent" by the tenant's deficiency, effectively compounding the effect of that failure year after year, by limiting the amount by which the landlord can increase rents in subsequent years.

As another example, it is well-established that tenants are permitted to withhold some or all of the rent due for the duration of any period during which there are substantial habitability issues with the unit, so long as the issues are not attributable to the tenant or the tenant's guest. *See Green v. Superior Court of San Francisco*, 10 Cal. 3d 616 (1974). But such issues need not be attributable to malfeasance by the landlord either, and it would be manifestly unfair to punish the landlord in perpetuity for temporary harm to a rental unit. For example, if a rental unit is damaged by a fire through no fault of the landlord or tenant, and it takes two months to fully remedy the damage, the tenant may be entitled to a reduction in rent during that period. That reduction is justifiable on a temporary basis as a means of compensation for the reduced consideration that the tenant received under the lease during those months. *See id.*; Section 1710(c). But the Committee's proposed Regulation would effectively make that reduction permanent—it would automatically² reduce the landlord's ability to lawfully increase rents in *every subsequent year* by 16.67% (two months divided by twelve months). This, too, would be an unfair and absurd result.

Perhaps in recognition of such problems, staff proposes another subtle amendment to Chapter 2, section (b)(2), of the Committee's regulations. Currently, that regulation tracks the language of the CSFRA itself exactly, providing that "[t]he term 'initial rental rate' means only the amount of Rent actually paid by the Tenant for the initial term of the tenancy." The proposed amendment, however, alters this to provide, "The term 'initial rental rate' means only the amount of Rent

² This automatic effect further highlights the inconsistency with the CSFRA. Rent reductions for a decrease in housing services are to be granted by petition. (Section 1710(c).) By enacting the amended Regulation, the Committee would bypass this petitioning requirement, at least in a subset of cases.

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actually required to be paid by the Tenant for the initial term of the tenancy.” (Emphasis added.)

The problems with this amendment, however, are two-fold. First, while this modification *might* address the failure to pay rent during the COVID period, discussed above, it doesn’t necessarily solve the “withholding” example. And, more importantly, this regulatory change conflicts with the actual text of the CSFRA itself. “An agency invested with quasi-legislative power to adopt regulations has no discretion to promulgate regulations that are inconsistent with the governing statute, in that they “alter or amend the statute or enlarge or impair its scope.” *Colmenares v. Braemar Country Club, Inc.*, 29 Cal. 4th 1019, 1029 (2003) (quoting *Carmel Valley Fire Protection Dist. v. State of Cal.*, 25 Cal. 4th 287, 300 (2001)).

That Staff felt the need to add the highlighted language seems to hint at a recognition of the problems that their proposal to average rent across an entire year creates, but that is a problem of the Regulation’s own making. Focusing on whether a given rental rate was lawfully paid in any given “period” during the initial term of the tenancy, as Section 1702(p), directs, avoids these problems in the first place.

Simply put, the proposed amendments are inconsistent with the plain language of the CSFRA itself and should be rejected.

B. Retroactive Application of the Amendment Violates Housing Providers’ Right to Due Process.

We are concerned that Staff’s characterization of this amendment as merely a “clarification” is an attempt to justify its retroactive application. But any effort to apply it retroactively, when landlords were not reasonably on notice of this unprecedented interpretation, would work a fundamental unfairness in violation of due process. *See, e.g., Myers v. Philip Morris Cos., Inc.*, 28 Cal. 4th 828, 845-47 (2002) (declining to apply a statute retroactively where it would raise serious constitutional questions under the due process clause) (citing *Eastern Enters. v. Apfel*, 524 U.S. 498, 548-49 (1998) (Kennedy, J., concurring)); *Eastern Enters.*, 524 U.S. at 557 (Kennedy, J., concurring)

“administrative order [w]as ‘arbitrary, capricious, an abuse of discretion,’ [citation] because ‘the inequity of . . . retroactive policy making . . . is the sort of thing our system of law abhors’ (ellipses in original) (quoting *Nat’l Lab. Rel. Bd. v. Guy F. Atkinson Co.*, 195 F.2d 141, 149, 151 (9th Cir. 1952))). Retroactive application of the proposed regulatory amendment would call into question as many as *seven years* of rent increases, imposed in good faith, based on an interpretation that landlords cannot reasonably have been expected to anticipate.³

We recognize that in some narrow circumstances, regulations that seek to “clarify” the law may be given retroactive effect if they are (2) adopted shortly after the interpretive question arises and (2) close enough in time to reasonably suggest that the “clarification” comports with the intent of the original enacting body, *see W. Sec. Bank v. Superior Court*, 15 Cal. 4th 232, 243-44 (1997); *Hunt v. Superior Court*, 21 Cal. 4th 984, 1008 (1999). Those conditions are not present here, given that seven years have elapsed since the adoption of the CSFRA. *See, e.g., Peralta Cmty. Coll. Dist. v. Fair Empl. & Hous. Comm’n*, 52 Cal. 3d 40, 52 (1990) (rejecting legislative attempt, during 1987-1988 session, to “clarify” the meaning of former § 12970 of the Fair Employment & Housing Act, adopted in 1980, *see Cal. Stats. 1980, ch. 992, § 4*).

And even when such circumstances are present, “a legislative declaration of an existing statute’s meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts.” *W. Sec. Bank*, 15 Cal. 4th at 244.

Moreover, such purported “clarifications” will not be applied retroactively if they fill gaps that “had not previously been spelled out” by elaborating in detail on topics about which the law was previously silent. *See Lee v. Amazon.com, Inc.*, __ Cal. App. 5th __, No. A158275,

³ The staff report indicates that some landlords and tenants have been advised in accordance with the proposed regulatory amendment when they “have reached out with questions.” At best, this would amount to an improper “underground regulation” and cannot provide the notice to landlords more generally that the due process clause would require.

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2022 Cal. App. LEXIS 202, at *46-48 (Ct. App. Mar. 11, 2022) (rejecting retroactive application of purportedly “clarifying” regulations of California Environmental Protection Agency’s Office of Environmental Health Hazard Assessment).

That is undeniably the case here. Landlords in Mountain View have not previously been apprised of the fact that the monthly rent that they lawfully charged tenants during the initial term of the tenancy, in accordance with the Costa-Hawkins Rental Housing Act, Civ. Code § 1954.50 et seq., and which the tenant “actually paid” (Section 1702(b)) as one of the “*periodic* payments” of “rent” (Section 1702(p)), would be subject to reduction based on temporary concessions or—especially—rebates. This is a substantive, unanticipated change in the law that would work a fundamental unfairness if applied to rent increases imposed prior to the effective date of the Regulation.

C. Conclusion.

We urge you to reject the proposed Regulation, which is inconsistent with the plain language of the CSFRA. At the very least, however, we urge you to delay consideration of the amendment and conduct stakeholder outreach to work towards a regulation that is more equitable and does not deprive housing providers of their right to due process.

Sincerely,



Christopher E. Skinnell

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