From: Sara Wright <Sara.Wright@eprodesse.com>
Sent: Friday, May 20, 2022 3:10 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@goldfarblipman.com; McCarthy, Kimbra <Kimbra.McCarthy@mountainview.gov>; Quinn, Jannie <Jannie.Quinn2@mountainview.gov>; van Deursen, Anky <Anky.vanDeursen@mountainview.gov>
Cc: jhoward@caanet.org; Lisa Dixon <Lisa.Dixon@eprodesse.com>
Subject: April 28, 2022 Stakeholder's Meeting

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.

At the April 28, 2022 meeting, rental housing providers shared thoughts and feedback opposing the notion that concessions should be factored into base rent. However, when many stakeholders asked to have a chance to respond and react to a specific proposal before it goes to the RHC, we were left feeling that the only chance we'd have to react to a specific proposal would be after it is published as part of the RHC meeting agenda 72 hours before the meeting. This is unacceptable.

If the RHC is looking to bring forward a regulation similar to the draft proposal that was on the March 28, 2022 RHC agenda, it would be a legally questionable proposal that would impose a radical change to a rental housing provider's business operations.

We respectfully request that the RHC staff hold a stakeholder meeting to review a specific proposal, solicit feedback and include that feedback in the staff's report to the RHC on the item. Only then will we have a chance to fully understand, respond, and comment to the proposal and not be rushed to do so with only 72 hours' notice and then in three-minute increments before the RHC at their meeting.

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,
Sara J. Wright

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From: David Gutierrez <David.Gutierrez@eprodesse.com>
Sent: Monday, May 23, 2022 3:23 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@goldfarblipman.com; McCarthy, Kimbra <Kimbra.McCarthy@mountainview.gov>; Quinn, Jannie <Jannie.Quinn2@mountainview.gov>; van Deursen, Anky <Anky.vanDeursen@mountainview.gov>
Cc: jhoward@caanet.org; Michael Pierce <Michael.Pierce@eprodesse.com>
Subject: Efforts To Factor In Concessions Into Base Rent

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.

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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,

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May 23, 2022

Via Electronic Mail Only

Nicole Haines-Livesay
Chairperson
Mountain View Rental Housing Committee
500 Castro Street
Mountain View, CA

RE: RHC May 23, 2022 Agenda Item 9.1 – Proposed CSFRA Regulations re Base Rent and Concessions

Dear Chair Haines-Livesay and Committee Members:

The California Apartment Association (CAA) opposes the staff recommendation for the RHC to direct staff to draft amendments to Chapter 2 of the Community Stabilization and Fair Rent Act (CSFRA) Regulations to "clarify" the definition and calculation of "Base Rent."

CAA and its outside legal counsel in two letters dated March 28 – copies of which are enclosed herein – raised numerous reasons why the proposal to effectively prohibit the use of rent concessions is not only bad policy, but also legally fraught. In response to these serious concerns raised by CAA and other stakeholders, the RHC directed staff to conduct stakeholder outreach. Staff followed the letter, if not the spirit, of this direction by holding a single stakeholder meeting with rental housing providers. CAA previously expressed its unease with the conduct of this stakeholder outreach in a letter dated May 6, a copy of which is also enclosed herein.

Staff now brings the same flawed proposal back to the RHC without having addressed *any* of the concerns raised by CAA in its March 28 letters. Accordingly, CAA must continue to strongly oppose the proposal for all of the reasons stated in its March 28 letters. In addition, the staff report includes several comments which appear to be in response to the concerns raised by CAA in its March 28 letters. These comments however misconstrue CAA's concerns and, therefore, fail to address them. These items are addressed below.

The Definitions of Base Rent and Rent in the CSFRA Are Not Mutually Exclusive

The staff report includes several comments that appear to be in response to the March 28 letter from CAA's outside counsel, Christopher Skinnell of the firm Nielsen Merksamer Parinnello Gross & Leoni. In that letter Mr. Skinnell noted that the definition of "base rent" must be read in conjunction with the definition of "rent" provided in the CSFRA, which is defined to include "[a]ll periodic payments," indicating that rent should be considered with respect to the periods in which rent is paid (typically months). This issue was likewise raised during the single stakeholder meeting held with rental housing providers, as acknowledged on page 9 of the staff report under the section entitled "Landlord Questions."

In response to this concern – that comes directly from the text of the CSFRA itself – the staff report states:

"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 – rather than the definition of Rent – is the relevant definition to use regarding concessions and AGA."

This response misses the mark. First, it ignores the CSFRA's – and CAA's – reference to "periodic payments," and instead seemingly focuses on the portion of the definition of "rent" related to non-monetary consideration. In other words, it ignores entirely the concern raised by CAA and instead responds to an issue that was never raised. Second, the statement that "the definition of Base Rent – rather than the definition of Rent – is the relevant definition," implies that the two dentitions are mutually exclusive of one another, and that "rent" is not part of "base rent." This is not only absurd on its face given that the term "rent" is literally part of the term "base rent," but it ignores the language of the CSFRA itself which clearly indicates that the definition of "rent" is applicable to "base rent" as it capitalizes the term "rent" when it is used – identifying it as a defined term. See Section 1702(b), which states in relevant part: "The term "initial rental rate" means only the amount of Rent actually paid by the Tenant for the initial term of the tenancy."

Clarifying that Missed Rent Payments Do Not Reduce the Base Rent Validates, Rather Than Neutralizes, CAA's Concern Regarding What "Actually Paid" Means

Page 1 of the staff report recommends that the RHC direct staff to draft a regulation that includes several elements. The fourth element to be included is listed as: "Excludes any rent payment that a tenant may fail to pay from being factored into the calculation of Base Rent." Staff notes in its report that this could be done by emphasizing in the regulations 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" instead of "rent actually paid" as used in the CSFRA's definition of Base Rent. (staff report, p. 12). This consideration, though not acknowledged as such, appears to be in response to another point made in Mr. Skinnell's letter – namely, that the phrase "actually paid," which is included in the definition of "base rent" and forms the basis for the staff proposal, is not as clear-cut as it may first appear. In his letter, Mr. Skinnell noted that strict interpretation of the phrase "actually paid" could result in the absurd situation in which, for example, the base rent is reduced due to a tenant's default in payment of rent. In other words, the issue was raised to be illustrative of the problems with how the term "actually paid" is interpreted, rather than being CAA's only concern.

Thus, while CAA appreciates staff's recognition that allowing a tenant to benefit from their own breach of contract would be unjust and contrary to the intent of the CSFRA, it does not address the underlying concern CAA expressed. To the contrary, recognizing that such clarification is necessary actually validates CAA's point: that adopting the proposed interpretation of the phrase "actually paid" will result in absurd results never intended by the CSFRA. And more importantly, this regulatory change conflicts with the actual text of the CSFRA itself which the RHC has no power to do. These problems could be avoided if base rents were determined as the CSFRA intended and mandates which is focusing on whether a given rental rate was lawfully paid in any given period during the initial term of the tenancy.

The Staff Report Misrepresents Due Process Requirements and Misdirects the RHC

Among other objections raised in CAA's March 28 letters was that the retroactive application of the proposed regulation would violate rental housing providers' due process rights. The rationale for this objection is expressed in detail and with legal citations in Mr. Skinnell's letter, and so this letter will not repeat that analysis. In response to Mr. Skinnell's letter, the staff report concludes that "adoption of regulations implementing a voter approved law do not deprive landlords of substantive due process rights" because the RHC must comply with open-government standards, including the posting of an agenda, consideration at a public meeting, and receiving public comment. With no legal citations whatsoever to support its statement, the staff report has effectively represented to the RHC that so long as it complies with the Brown Act it is unconstrained by constitutional due process standards. This conclusion is as breathtaking as it is wrong. Not only does this conclusion confuse the *process* by which a regulation is adopted with the *substance* of that regulation, it is also unresponsive to specific due process issues identified by CAA, which were not based on the process followed by the RHC but on the retroactive effect of the regulation.

Staff's disregard of the fundamental unfairness that retroactive application of the regulation would cause rental housing providers - namely reopening seven years of rent increases issued in good faith, paying rent credits for those seven years in the case of rollbacks and facing administrative and civil liability - is equally shocking. Staff shirked these very troubling concerns brought forward by rental housing providers, in the report by stating:

"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."

Through this statement, staff undermines the harm that would result if the proposed regulation is applied retroactively by essentially saying that rental housing providers could be subject to the same harm even without the proposed regulation, presumably based on staff's position that the definition of base rent already requires rent concessions be included when calculating base rents. This does nothing to assuage rental housing providers' concerns and instead adds insult to injury by insinuating that rental housing providers should have known that rent concessions had to be included when determining base rent. First, as explained in CAA's March 28 letters, the CSFRA's current definition of base rent does not require that rent concessions be included in its calculation. Additionally, staff itself acknowledges multiple times in the report that both landlords and tenants have questions and are confused on the issue of concessions and that the current definition of base rent has led to different interpretations. Indeed, the very fact that this regulation is being considered belies staff's insinuation. To be clear, because staff is being anything but clear, rental housing providers have serious and valid due process concerns regarding the retroactive application of the proposed regulation that have not been addressed.

The staff report seeks to further justify the regulation by stating:

"There is ample case law that addresses the impact of rent stabilization ordinance, 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."

This statement, though not supported by a single legal citation, has at least some kernel of truth. Courts have, in some instances, upheld various laws that regulate the residential landlord-tenant relationship. Though it is equally true that courts have also found such laws (including a law in the City of Mountain View) to be illegal or preempted. See e.g., *Tri County Apartment Assn. v. City of Mountain View* (1987) 196 Cal.App.3d 1283 (finding local ordinance extending rent increase notice period to be preempted by state law); *Levin v. City and County of San Francisco* (N.D. Cal. 2014) 71 F.Supp.3d 1072, appeal dismissed and remanded (9th Cir. 2017) 680 Fed.Appx. 610 (finding requirement for landlord to pay relocation assistance equal to 2-year market-differential to be unconstitutional); *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129 (finding, among other things, municipal rent control law's mechanism for adjusting maximum rents to be constitutionally deficient).

The veracity of the statement is, in any event, beside the point. The statement, which seems to be put forward to lend a veneer of credibility to the proposed regulation, in fact does no such thing. In truth, it does not address the concern raised in any way, shape, or form. The fact that variousforms of laws regulating the landlord-tenant relationship have been, in a general sense, found to be valid does not respond to or remedy the specific due process issue created by retroactive application of this proposed regulation.

The Staff Report Urges an Approach Followed in a Minority of Rent Controlled Jurisdictions

The staff report highlights four 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. With little discussion, the staff report recommends that Mountain View align its policy with Berkeley, Santa Monica, West Hollywood, and Richmond while ignoring the fact that cities like Oakland, Alameda, and Los Angeles have ordinances that do not require the inclusion of rent concessions in base rent or otherwise permit rent concessions being excluded from base rent. Moreover, though the report notes that the four highlighted jurisdictions have programs that also did not initially have language addressing the specific issue of concessions, the report, again, fails to address whether those cities applied their later-enacted policies retroactively despite the fact that the staff report recommends doing so in Mountain View.

The Report Is Blatantly One-sided

CAA's concerns regarding the conduct and quality of the staff's stakeholder outreach expressed in its May 6th letter were confirmed by the blatant one-sidedness of the report. In addition to the issue described directly above, the report is riddled with further instances of staff representing the interest of tenants while ignoring issues raised by rental housing providers. For example, the report states that a question raised by rental housing providers was "[w]hat are the benefits or drawbacks from including or excluding concessions when calculating Base Rent?" In response, the staff only states the purported benefits of including rent concessions and drawbacks of not doing so. (Staff report, p. 10). Staff completely ignores the other side of the question regarding the benefits and drawbacks of excluding concessions despite the ample feedback from rental housing providers on this very issue (see CAA's March 28th letters).

In response to another question raised by rental housing providers regarding whether the revised definition of base rent could include certain clarifying language, staff stated: "The language in the CSFRA cannot be modified because it is a voter approved Amendment of the City's Charter." (Staff report, p. 10). While that statement is true, staff seems to only be abiding by it when it

comes to refusing requests from rental housing providers. Indeed, staff has no issue recommending that the RHC modify the definition of base rent both by including new requirements the CSFRA was previously silent on and revising the actual text of the CSFRA (changing "rent actually paid" as used in the CSFRA's definition of Base Rent to "actually required to be paid") through regulation and without voter approval.

Finally, staff states in the report that "the CSFRA does not include in the definition of Base Rent or anywhere else in the Ordinance the words or concept of 'stated rent,' 'contract rent," or 'asking rent,'" in support of its position that the plain meaning of base rent requires rent concessions be included. It is remarkable that staff finds the omission of these terms from the CSFRA to be instructive but not the omission of the terms "rent concessions," "rebates," "bonuses" or "discounts" themselves or the monthly averaging calculation the proposed regulation seeks to insert -as CAA and other stakeholders have pointed out several times.

CAA genuinely wants to engage in meaningful and productive conversations with the RHC but the quality of stakeholder engagement to date, as reflected in this most recent report, calls into serious question whether the RHC staff shares the sentiment. The glaringly one-sided presentation of the information in the report is both disturbing and disappointing and is another reason the RHC should reject the proposed regulation.

Conclusion

CAA continues to encourage the RHC to carefully consider the practical and especially the legal implications of the proposed regulation. Unfortunately, the outreach to stakeholders and response to specific concerns to date has been woefully inadequate and there has been no acknowledgement of the serious legal issues raised by CAA and other stakeholders.

CAA urges the RHC to reject the proposed regulation.

Sincerely,

Joshua Howard
CAA Executive Vice President, Local Government Affairs

Whitney Prout
CAA Policy and Compliance Counsel

Enclosures (3)

March 28, 2022

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

[CES2223.010]

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 automatically[2] 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.

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.

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

cc: Kimbra McCarthy, City Manager (kimbra.mccarthy@mountainview.gov)
Jannie Quinn, City Attorney (jannie.quinn@mountainview.gov)
Karen Tiedemann, Counsel to the RHC (ktiedemann@goldfarblipman.com)
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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 deceivingly 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 <u>not</u> 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,

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

CC:
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May 6, 2022

Via Electronic Mail Only

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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.

<u>Legal Issues Not Addressed, No Responses to Major Concerns</u>
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.

<u>Stakeholder Engagement Remains Major Concern</u>
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."

<u>Conclusion</u>
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 now 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,

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