



MEMORANDUM

CSFRA, Community Development Department

DATE: June 18, 2018

TO: Rental Housing Committee

FROM: Karen M. Tiedemann, Special Counsel to the Rental Housing Committee
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SUBJECT: Adoption of Tenant Hardship Regulations

RECOMMENDATION

Consider the potential options for tenant hardship procedures.

BACKGROUND

At its April 23 and May 21, 2018 meetings, the Rental Housing Committee (RHC) requested that staff provide for a tenant hardship procedure.

In accordance with this direction, staff has drafted two amendments to Regulations Chapters 6 (Fair Return) and 7 (Banking Procedures for Annual General Adjustments). The first section of this staff report discusses the draft amendment to Chapter 7, describing the tenant hardship provisions as applied to banked annual general adjustments (AGAs). The second section of this staff report explains how the tenant hardship procedure would be incorporated into the petition for upward adjustment of rent—fair return. The third section of this memo discusses criteria, or standards, by which a hearing officer and/or the RHC could find a tenant household eligible for tenant hardship, as well as potential responses to the tenant hardship. Finally, Section 4 discusses policy issues and potential variants related to tenant hardship.

ANALYSIS

1. Banked Annual General Adjustments (Regulation Chapter 7)

CSFRA Section 1705(d) provides for banking of unimplemented AGAs and states: “The Committee may issue rules and regulations that modify, restrict, or prohibit the ability of Landlords to impose accumulated increases upon a finding that the

banking of Annual General Adjustments causes undue hardship on Tenants, provided that Landlords retain their right to a fair return.” The draft amendments to Chapter 7 are one method of implementing this text.

As drafted, after a tenant received notice of a rent increase in excess of that year’s AGA, the tenant could claim that the noticed rent increase would cause undue hardship. The tenant household would be required to provide supporting evidence of the hardship. Staff would confirm whether or not the petition was complete and accompanied by supporting documentation, but would not provide an opinion regarding the adequacy of any supporting documentation. Upon acceptance of the Petition, notice of acceptance would be sent to the petitioner-tenant and landlord, and the parties would be encouraged to discuss the noticed rent increase and alleged hardship in a prehearing settlement conference.

If the issues were not resolved in a prehearing settlement conference, the landlord could do one or more of the following: (a) contest the validity of the alleged tenant hardship; (b) file a fair-return petition; (c) withdraw the noticed rent increase; or (d) await a decision of the hearing officer. If necessary, a hearing officer would review the petition and supporting documentation to confirm or deny the existence of one or more tenant hardships (as discussed in Section 3 of this staff report), and provide a decision regarding any potential relief from the noticed rent increase. Importantly, submission and acceptance of a tenant hardship petition would not alter the effective date of duly noticed rent increase; tenants would be expected to pay duly noticed rent increases if the hardship request is not resolved by the effective date. As described in Section 3 of this staff report, the hearing officer would have discretion to determine whether and to what extent the hardship tenant household should be relieved from the impacts of the banked, unimplemented AGA(s). Moreover, that decision could be appealed to the RHC.

2. Petition for Upward Adjustment of Rent (Regulation Chapter 6)

CSFRA Section 1709(a) creates a Petition for Upward Adjustment—Fair Rate of Return procedure, which includes a nonexclusive list of factors that must be considered (CSFRA § 1709(a)(2)) and may not be considered (CSFRA § 1709(a)(3)) when ensuring that a landlord may earn a fair rate of return. As drafted, the Chapter 6 (Fair Return) Regulations would be amended to include a new potential tenant hardship as one factor that must be considered when ensuring that a landlord may earn a fair rate of return.

Similar to the tenant hardship petition process described in Section 1 of this staff report, a tenant potentially affected by a fair-return petition could claim that the

fair-return petition would cause an undue tenant hardship by submitting a response to the fair-return petition to the hearing officer and supporting documentation prior to the hearing for the fair-return petition. In addition to deciding the underlying fair-return petition, the hearing officer would review the tenant hardship information and determine its validity based on information presented at the hearing. The hearing officer's determination on the fair-return petition would address the hardship and note the conclusion in the decision on the underlying fair-return petition. The hearing officer would be obliged to consider valid tenant hardships, but would retain their discretion to both calculate any rent increase and the fair and reasonable allocation of any rent increases among units affected by the fair-return petition.

3. Potential Tenant Hardship Criteria and Relief

Two sections of the CSFRA identify specific tenant populations that may warrant specific assistance. First, CSFRA Section 1705(b)(3) provides for relocation assistance to tenant households with household incomes that do not exceed one hundred twenty percent (120%) of the median household income for Santa Clara County (AMI), as adjusted for household size. Second, CSFRA Sections 1705(a)(7)(F) and 1705(a)(8) provide specific assistance to tenant households where one or more tenants are at least 62 years old, disabled (as defined in Government Code Section 12955.3), or certified as being terminally ill by the tenant's treating physician. Moreover, the RHC had discussed potentially providing additional protections to families with school-age children. Accordingly, each of these categories of tenant households, are specifically identified in Chapter 7 for potential inclusion under the definition of hardship. The criteria identified in Subsection (C)(2) of draft Chapter 7, as summarized in the table below.

Hardship Condition	Potential Household Income Limit	Potential Additional Criteria
a. Inadequate Household Income	100% of AMI	N/A
b. Families with Children	120% of AMI	Primary residence of one or more persons under the age of 18
c. Senior Household	120% of AMI	Primary residence of individual who is 62 or older
d. Persons with Disabilities	120% of AMI	Primary residence of person who is disabled
e. Persons Who are Terminally Ill	120% of AMI	Primary residence of person who is certified as terminally ill
f. Other	120% of AMI	Other extenuating circumstances

CSFRA Section 1707(d) contemplates potential relief for tenant hardships to include modifying, restricting, or prohibiting the ability of landlords to impose banked rent increases. Accordingly, these potential options are described in draft Subsection (C)(6) of the Chapter 7 Regulations. Among the options for relief, the draft regulations would allow for a hearing officer to require a phase-in period of rent increases for tenant households with verified hardships.

4. Policy Issues and Potential Policy Variants

The draft tenant hardship regulations raise numerous policy issues and, as drafted, include one specific policy variant included in Chapter 7.

First, the CSFRA requires that hearings be open to the public (CSFRA Section 1711(e)). The criteria for tenant hardship are likely to be sensitive topics for the tenant households who may qualify. Accordingly, the draft regulations encourage discussion of the hardship issues during prehearing settlement conferences, which are private and not subject to disclosure to the public under Regulation Chapter 3, Section N. This option would best maintain the privacy of potential hardship tenant households and would work best with respect to rent increases based on banked AGAs. However, in the fair-return petition context, hardship households might be reluctant to provide information until they are certain to face a rent increase, and so draft Chapter 6 regulations encourage hardships to be discussed at prehearing settlement conferences but allow for hardships to be claimed with the final submission of documents prior to the scheduled hearing (e.g., at least 10 days prior to the hearing per Regulation 5(C)(6)).

Similar to the tension between privacy and certainty, Subsection (C)(1)(b) of Chapter 7 provides for two alternative deadlines for submission of hardship petitions. Option (i) requires petitions be submitted prior to the effective date of the rent increase. Option (ii) would allow submissions after the effective date of the rent increase, but would only alter future rent payments (e.g., a tenant could pay the increased rent and then file a petition for relief, but would never receive a refund even if the household experienced a bona fide hardship—only future rent payments could be affected by the hardship). Accordingly, staff seeks guidance from the RHC regarding the best means of balancing the interests of tenants who may face a hardship as well as landlords.

Second, the draft tenant hardship criteria require verification of household income but do not consider the amount of rent paid as a percentage of the tenant household's income. For instance, the U.S. Census Bureau considers households who spend more than thirty percent (30%) of their combined household income on

rent and select utilities as “rent burdened,” households that spend more than fifty percent (50%) of their household income on rent and utilities are considered “severely rent burdened.” This metric is not currently included in the draft regulations. Adding rent burden to the criteria for relief would offer one way of better targeting tenants in need of relief but would add complexity to the tenant hardship process.

To this point, staff has contacted other rent control jurisdictions and reviewed publicly available information regarding potential tenant hardship procedures. It appears that Berkeley, San Francisco, Santa Monica, West Hollywood, and Alameda allow tenants to petition for potential relief under hardship circumstances. West Hollywood and Alameda* do not define criteria for hardship. The jurisdictions with hardship criteria are briefly summarized in the table below. Notably, San Jose previously accommodated tenant hardships as one factor in its fair-return calculations; it appears this factor is no longer explicitly contemplated in the city’s rent ordinance.†

City	Hardship Criteria	Additional Notes
Berkeley	<p><u>Eligibility depends on type of rent increase:</u></p> <ol style="list-style-type: none"> 1. For landlord’s “Vega Adjustment” petition to increase historically low rents, tenant must show increased rent would create rent burden in excess of 30% of household income and either tenant receives public assistance or household income is less than 80% of AMI and no unrelated dependents reside in household. 2. Tenants over age 62 with a household income not exceeding 30% of AMI or 150% of SSI payment, and tenants receiving public assistance may petition for relief from rent increases for capital improvements. 3. If landlord seeks to impose previously lost AGA, tenants may seek relief if the increase exceeds 20% of the current rent and demonstrates the increase would cause financial hardship if implemented at once. 	Tenant petitions for phase-in of rent increase.

* The City of Alameda only offers nonbinding mediation of rent increases, which is legally distinct from mandatory rent control programs such as the CSFRA in Mountain View.

† *Pennell v. San Jose* (1988) 485 U.S. 1.

City	Hardship Criteria	Additional Notes
Santa Monica	Household income less than 120% of AMI and rent increase would increase rent burden beyond 30% of household income.	Tenant petitions for phase-in of rent increase.
San Francisco	<p><u>Three Forms of Eligibility:</u></p> <ol style="list-style-type: none"> 1. Public assistance recipient. 2. Household income less than 80% of AMI; and rent burden greater than 33% of household income; and household assets do not exceed \$60,000. 3. Undefined extenuating circumstances (i.e., medical bills, etc.) 	Tenant does not pay increase rent until hardship petition is resolved, but is liable for entire increase based on the notice of increase if petition is unsuccessful. Verified hardship may be indefinite or for limited time.

5. Conclusion

Staff drafted the Chapter 6 and Chapter 7 regulations to conform to both the text of the CSFRA, as well as the expressed desires of the RHC for options to address tenant hardships. Again, CSFRA Section 1707(d) expressly authorizes the RHC to “issue rules and regulations that modify, restrict, or prohibit the ability of Landlords to impose accumulated increases upon a finding that the banking of Annual General Adjustments causes undue hardship on Tenants, provided that Landlords retain their right to a fair return.” Moreover, CSFRA Section 1709(a)(2) provides a nonexclusive list of factors to be considered during petitions for upward adjustments of rents. The U.S. Supreme Court has upheld the ability of a rent control ordinance to consider tenant hardships as a legitimate factor in a fair-return context.

Accordingly, it appears the RHC has broad discretion to regulate AGA banking, whether allowing, modifying, or prohibiting it. Because rent regulation and banking are new, staff recommends an individual hardship hearing process, as opposed to communitywide rule (like the AGA) or purely administrative process (such as landlords submitting notices of termination to the RHC). The proposed individual hardship hearing process will allow dialogue among the parties in prehearing settlement conferences, and allow hearing officers to individually balance tenant hardships and landlord interest on a case-by-case basis. As the RHC and the community gain experience with banking, the rules can be modified for either individual or communitywide hardship procedures.

FISCAL IMPACT

Adoption of amended Chapters 6 and 7 of the Regulations, as drafted, would create a new factor to be considered during fair-return petitions and provide for a new petition process, respectively. Adding tenant hardship as a new potential factor to the fair-return petition process and as a stand-alone petition are new processes, but staff does not anticipate a significant increase in petitions. Still, administering the new hardship procedures would require time from staff, as well as that of third-party consultants, which may have a fiscal impact on the RHC. Likewise, adoption of revised Chapter 6 and/or Chapter 7, as drafted, could lead to litigation, which would have separate, additional fiscal impacts.

PUBLIC NOTICING – Agenda posting.

KMT-JDB-AvD/AK/7/CDD/RHC
895-06-18-18M

Attachment: 1. Resolution Adopting Amendments to Regulations Chapters 6 and 7
Exhibit A – Draft Amendments to Chapter 6
Exhibit B – Draft Amendments to Chapter 7