

**DATE:** August 21, 2023

**TO:** Rental Housing Committee

**FROM:** Anky van Deursen, Program Manager  
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**SUBJECT: Study Session: Rent and the Treatment of Utilities in the CSFRA and Ratio Utility Billing Systems**

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**RECOMMENDATION**

- Receive a presentation on the definition of “rent” and the treatment/inclusion of utilities as part of the rent as stipulated in the Community Stabilization and Fair Rent Act (CSFRA).
- Receive information about the use of Ratio Utility Billing Systems (RUBS) by landlords to separately bill utilities for CSFRA tenants, causing monthly fluctuations in rent.
- Receive a summary of the results of the stakeholder meetings held February 28, 2023 (Landlord meeting), March 2, 2023 (Tenant meeting), and March 21, 2023 (General Session) as well as the feedback received during individual meetings.
- Provide initial input on and parameters for developing regulations for consideration by the Rental Housing Committee on the use of RUBS to provide consistent application of the CSFRA requirements regarding lawful rents and rent increases.

**BACKGROUND**

In early 2022, the Rental Housing Committee (RHC) and staff received multiple inquiries from tenants during the COVID-19 state of emergency about the legality of monthly fluctuating utility bills. Tenants explained that instead of receiving one bill and one cost, inclusive of both rent and utility costs, they receive two separate charges from the landlord—one for rent and another for utility costs. While the charge for the “rent” portion in these dual-billing situations did reflect the rent as stipulated in the lease agreement and remained constant for the term of the lease, the separate charge for utilities was a cost in addition to the rent bill and typically fluctuated (sometimes widely) from month to month. Oftentimes, these utility costs are calculated and charged through Ratio Utility Billing Systems (RUBS), which will be discussed later in this report.

In some situations, lease agreements include requirements for the tenant to pay separate utility charges without stipulating a specific amount in the lease itself. In some instances, these monthly utility charge fluctuations are significant, causing housing instability and hardship for lower-income tenant households. These fluctuations in monthly housing costs run counter to the requirements in the Community Stabilization and Fair Rent Act (CSFRA), which defines “rent” to include utility charges. Rent, including utilities charges that are paid to or for the benefit of the landlord, is subject to limited rent increases as allowed by the CSFRA.

The RHC directed staff to analyze the issue of fluctuating monthly utility charges in connection with CSFRA requirements and to return to the RHC to discuss the issue at a later date. On January 31, 2023, the RHC conducted a Study Session where they viewed a presentation on the treatment of utilities in the CSFRA, RUBS, and the impacts of using RUBS. In this meeting, the RHC directed staff to hold stakeholder meetings to receive more detailed information from landlords, tenants, and interested parties. A landlord stakeholder meeting was held on February 28, 2023, a tenant stakeholder meeting was held on March 2, 2023, and a general session for all stakeholders was held on March 21, 2023. Staff reported back on the two other stakeholder meetings to inquire if the summarization was correct and to solicit further comments, if any. Since the current RHC is almost entirely comprised of new members, this memo summarizes the key items as discussed in the January 31, 2023 meeting and summarizes the findings of the stakeholder meetings.

### **Payment of Utilities**

CSFRA units in Mountain View are commonly serviced by a combination of utility and/or housing service billings. Typically, there are three ways for the payment of utilities.

1. Utility Payments Paid Directly to Utility: The first scenario involves tenants paying utility services directly to the utility provider (such as gas and electricity to PG&E). Utilities are individually metered for each unit and reflect actual usage by the tenant. In this case, the utilities are not considered part of rent within the context of the CSFRA because they are not paid to the landlord.
2. Utility Payments Paid Directly or Indirectly to the Landlord
  - a. *Utility Payment Paid Directly to the Landlord*—In this scenario, utilities are included in the total amount of rent and paid directly to the landlord, with a single fixed monthly amount of rent that includes utilities as well as charges associated with any other housing services. The landlord pays the service provider(s) for the utilities and other services from the rent payments collected. For most properties, some utilities are not separately metered, such as water, sewer, and trash. Therefore, tenants’ rent payments are expected to cover the costs of these services.

- b. *Utility Payment Paid Indirectly to the Landlord*—In this scenario, the landlord receives the propertywide utility bill for some or all the utilities and uses a third-party billing service, often called RUBS, that allows the landlord, or vendor hired by the landlord, to allocate the propertywide utility costs among the tenants and bill each tenant separately for monthly utility charges. The payments are still paid to the landlord but pass through this third-party billing service. Monthly costs for utilities are not fixed but fluctuate from month to month. RUBS uses a calculation methodology to distribute propertywide utility costs among tenants. The distribution is not based on actual usage by each unit, but rather by an algorithm using factors such as square footage of the unit, number of bedrooms in the unit, how many members of the household live in the unit, as well as vacancy rates in the building or on the property.

Therefore, RUBS typically includes two components: (1) a billing system; and (2) a methodology for allocating propertywide utility costs to individual units. RUBS is a common and established national industry practice, especially in cases where no submeters or individual meters are installed. However, this may present a problem in rent-stabilized jurisdictions, such as in the City of Mountain View, which define rent as any periodic payment from a tenant to or for the benefit of the owner, connected with the use or occupancy of the rented residential premises.

This memo explores the requirements in the CSFRA regarding rent and the treatment of utilities as well as commonly used methodologies for charging utilities in Mountain View. The information contained herein is intended to be a starting point to discuss potential strategies for addressing current issues related to the use of RUBS, largely arising out of questions that have been posed by tenants.

**NOTE:** RUBS is not an issue in the context of the City’s Mobile Home Rent Stabilization Ordinance because the State Mobile Home Residency Law addresses the treatment of utilities as a part of rent and explicitly provides that separately billed utilities are not part of rent or a rent increase for purposes of any local rent stabilization ordinance (Civil Code Section 798.41).

## **ANALYSIS**

### **Rent and Treatment of Utilities under the Community Stabilization and Fair Rent Act**

#### **Purposes**

The CSFRA is contained in Article XVIII of the Mountain View City Charter. Sections 1700 and 1701 of the CSFRA establish the purpose of and findings supporting the Act. Specifically, CSFRA Section 1700 provides as follows:

“This Amendment shall be known as the Mountain View Community Stabilization and Fair Rent Charter Amendment. The purpose of this Amendment is to promote neighborhood

and community stability, healthy housing, and affordability for renters in the City of Mountain View by controlling excessive rent increases and arbitrary evictions to the greatest extent allowable under California law, while ensuring Landlords a fair and reasonable return on their investment and guaranteeing fair protections for renters, homeowners, and businesses.”

Section 1701 identifies findings that support the Act’s purpose as established in Section 1700. In summary, Section 1701 includes findings about the high cost of housing in Mountain View, the prevalence of low-income households in the City, the affordability gap, the concern about excessive rent increases, the concern regarding the housing and economic conditions that create a detrimental effect on a substantial number of renters in the City, and the concern about evictions and displaced tenants.

#### CSFRA Definition of “Rent” and Rent Increases

The CSFRA’s definition of “rent” (codified at Section 1702(p)) regulates all periodic payments for the use and occupancy of a covered unit and related Housing Services (Section 1702(h)), including, but not limited to, utility charges paid to the landlord:

“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, including **all payment and consideration demanded or paid for** parking, **Utility Charges**, pets, furniture, and/or subletting.”

“Utility charges” are defined in the CSFRA Section 1702(v) as:

“Any charges for gas, electricity, water, garbage, sewer, telephone, cable, internet, or other service relating to the use and occupancy of a Rental Unit.”

CSFRA Section 1702(h) provides:

“Housing Services include, but are not limited to, repairs, maintenance, painting, providing light, hot and cold water, elevator service, window shades and screens, storage, kitchen, bath and laundry facilities and privileges, janitor services, **Utility Charges that are paid to the Landlord**, refuse removal, furnishings, telephones, parking, the right to have a specified number of occupants, and any other benefit, privilege or facility connected with the use or occupancy of any Rental Unit. Housing Services to a Rental Unit shall include a proportionate part of services provided to common facilities of the building in which the Rental Unit is contained.”

To protect tenants from excessive rent increases, the CSFRA generally limits rent increases to

- a. The Annual General Adjustment (AGA) of rent, which is equal to 100% of the percentage increase in the Consumer Price Index (CPI) of the Bay Area Region from March to March of each year; and/or
- b. Those imposed pursuant to a Petition for Upward Adjustment of Rent.

In either case, no more than one rent increase per 12 months is permitted (CSFRA Section 1707(b)).

The inclusion of utility charges in the CSFRA's definition of rent means that if the landlord charges utility costs to the tenant, whether separately billed through a third-party service provider for the benefit of the landlord, or through a billing process implemented by the landlord themselves, the utility charge is considered part of rent and is subject to the limitations for rent increases in the CSFRA as outlined above. Since the utility charge is being paid to or for the benefit of the landlord, as opposed to being paid directly to the utility provider in both of those scenarios, a landlord cannot merely label the utility charge as something else or include the requirement that the tenant pay the utility charges separate from the tenant's lease to avoid treating the utility charge as rent. If the charge is rent, it is included in the amount to which a limitation on any permitted annual rent increase applies. If the annual general adjustment is 5%, for example, a landlord cannot lawfully increase the amount designated in the lease as "rent" by 5% and add to that an additional charge or an increase in an existing charge for water, sewer, or other utilities that exceeds 5% of the existing charge.

### **Ratio Utility Billing Systems (RUBS)**

RUBS refers a method of allocating utilities costs amongst tenants at a property. RUBS are used by landlords to charge tenants a portion of the propertywide utility costs. Landlords choose the RUBS method if only one meter is installed on the property (i.e., the property is master-metered) for a particular utility, which displays the usage of that utility for the entire building. Such properties do not have individual meters or submeters to track actual usage in each unit.

RUBS typically distribute propertywide utility charges to individual units by using an algorithm that may include one or more of the following factors: square footage of the unit, number of bedrooms in the unit, how many members of the household live in the unit, or the number of units occupied in a building. RUBS can be used to recover water, gas, electricity, trash, or any other cost involved in the operation of a property. The charges to the tenants fluctuate as the total property bill changes from month to month.

RUBS may be used regardless of whether utilities charges are paid directly or indirectly to the landlord. However, landlords most often choose to use a third-party billing service, such as

Conservice or Multifamily Utility Company, to process the propertywide invoice and to allocate and bill the property utility charges among the tenants. These third-party billing services typically charge tenants, not the landlords, a service fee for the utility allocation and billing service at the time that they collect the utility charges from the tenants. Thereafter, the third-party billing service either deposits the funds collected into the landlord's account or pays the landlord's utility bill on behalf of the landlord. In both scenarios, the landlord, not the third-party billing service, is the intended recipient of the funds collected.

### **RUBS and the CSFRA**

As outlined in the previous section, using RUBS causes monthly utility charges to fluctuate. Since the CSFRA includes utilities in the definition of rent, the result of these monthly fluctuating utility charges constitutes a monthly change of rent. Since the CSFRA only allows rent increases once in any 12-month period and limits rent increases to the increase in the CPI (2023 AGA = 5%), the use of RUBS is inconsistent with the CSFRA if the cost of utilities fluctuates regularly.

Although charging of utilities through RUBS may not comport with the CSFRA, many landlords have continued to use RUBS even after the effective date and implementation of the CSFRA. The result has been confusion for both landlords and tenants about the legality of RUBS utility charges as well as misunderstandings about the calculation of base rent and imposition of the AGA.

As reported to staff, the monthly fluctuations in utility charges may also be inconsistent with the rent increase limitations imposed by the CSFRA. For instance, the Rental Housing Committee set the AGA for 2023-24 at 5%. However, utility charges within a 12-month period have been reported to fluctuate in excess of the allowed percentage from one month to the next. As such, even if the CSFRA did permit more than one rent increase per 12-month period, use of RUBS would still be inconsistent with the CSFRA because increases in monthly utility charges often exceed the amount permitted by the established AGA.

Finally, the fluctuations of rent that inherently arise out of the use of RUBS methodology also appear to violate the noticing requirements in the CSFRA. Specifically, Section 1707(c) of the CSFRA requires that rent increases pursuant to the AGA only become effective "after the landlord provides written notice to the tenant in the manner prescribed by law, with at least thirty (30) days' advance written notice." Tenants who are billed for utilities pursuant to RUBS are provided no advance notice and are unaware of what their utilities charges will be in any given month until they receive the bill from the landlord or the third-party service provider.

Though staff does not have the exact number of master-metered properties for all types of utilities in Mountain View, the following table shows that for water utilities almost all CSFRA properties are being master-billed, meaning that water supplied to an apartment building passes through only a single meter. This gives a sense how widespread the use of RUBS may be.

**Table 1: City of Mountain View Number of Master-Metered (Water) CSFRA Properties**

Property Size	3-5 Units	6-10 Units	11-20 Units	>20 Units	Total
Number of Properties with One Master Meter	233	150	103	156	642
Total Number of Units with One Master Meter	912	1,106	1,518	10,931	14,467
Number of Properties with Multiple Master Meters	9	12	10	14	45
Total Number of Units with Multiple Master Meters	46	68	147	1683	1,944

To help landlords comply with the CSFRA, staff recommends outlining a clear, transparent, and consistent framework in the CSFRA regulations that will serve to increase understanding of lawfully imposed rent increases, including utilities. Having regulations might also help tenants better understand that their total monthly rental costs include utility charges and are subject to annual rent increase limitations under the CSFRA.

**RUBS in California and Treatment of Utilities in Other Rent-Stabilized Jurisdictions**

The State of California does not prohibit the use of RUBS. The California Public Utilities Commission has reviewed the issue and determined it lacks jurisdiction to regulate landlords’ activity regarding utility billing of tenants.

Recognizing the need for water conservation in the State of California and submetering as an effective methodology to achieve that, the California State Legislature adopted Senate Bill (SB) 7 (California Water Submeter Requirements for Multi-Family Housing), requiring all *new* multi-family construction to include water submeters. SB 7 went into effect on January 1, 2018. However, this bill does not mandate submetering for existing properties. Installing individual meters for existing rental properties may also be cost prohibitive.

Staff reviewed the treatment of utilities and RUBS in the following rent-stabilized jurisdictions in California. Table 2 below shows an overview of rent-stabilized jurisdictions and how utilities and RUBS are treated. For a more detailed overview of these jurisdictions, see Attachment 1.

**Table 2: Rent Stabilized Jurisdictions in California and Treatment of Utilities.**

Jurisdiction	Utilities Defined as Part of Rent and Subject to Increase Limitations	RUBS Allowed	RUBS Not Allowed	Rubs Not Allowed, but Exemptions Apply
Alameda <sup>1</sup>	X	X		
Berkeley <sup>2</sup>				X
Culver City	X		X	
East Palo Alto	X		X	
Hayward <sup>3</sup>				X
Los Angeles	X		X	
Oakland	X		X	
Richmond	X		X	
San Francisco <sup>4</sup>				X
San Jose	X		X	
Santa Monica	X		X	
West Hollywood	X		X	

### **STAKEHOLDER INPUT**

In its meeting on January 31, 2023, the RHC directed staff to hold stakeholder meetings to receive more detailed information from landlords, tenants, and interested parties.

Three virtual stakeholder meetings were held on the following dates:

1. February 28, 2023—Landlord stakeholder meeting
2. March 2, 2023—Tenant stakeholder meeting
3. March 21, 2023—General session

Staff performed the following outreach prior to the stakeholder meetings:

- Created and distributed flyers throughout the community;

<sup>1</sup> Alameda: Utilities are part of rent, but using RUBS is exempt from rent increase limitations per ordinance.

<sup>2</sup> Berkeley: Utilities are not part of rent, but determination of whether RUBS is permitted is made on a petition-by-petition basis. The Analysis section below does not examine Berkeley since there is no written policy.

<sup>3</sup> Hayward: Utilities are not part of rent, and using RUBS, if included in lease, is exempt from rent increase limitations per ordinance. However, additional protections apply for utility charge increases greater than one percent (1%) of total rent.

<sup>4</sup> San Francisco: Utilities are not part of rent, and using RUBS, if included in lease, is exempt from rent increase limitations per ordinance.



- Mailed multilingual postcards to all CSFRA-covered tenants and property owners;
- Emailed all property owners registered in MV Rent Portal and all Constant Contact members;
- Posted information online and on City calendars; and
- Coordinated with community organizations to engage vulnerable stakeholders.

At each virtual stakeholder meeting, staff presented information to attendees about utility billing, the CSFRA and RUBS, potential conflicts between the CSFRA and RUBS, as well as possible policy options. The policy options presented to stakeholders for feedback at the direction of the RHC were as follows:

1. No longer allow RUBS but include a one-time rent adjustment for landlords to compensate for previous pass-through of utility costs, possibly through a petition process.
  - a. Policy Option 1a: Allows landlords the opportunity to file a petition for upward adjustment of rent with the RHC to implement the one-time increase.
  - b. Policy Option 1b: Allows landlords to independently implement the one-time increase using the defined parameters. Tenants can file a petition with the RHC if they disagree with the amount of the increase.
2. Only allow RUBS if lease states both amount of rent and maximum amount charged for utilities.
3. Other options as presented by stakeholders to staff.

Using interactive polling, participants were asked about a variety of relevant topics during each stakeholder meeting. Participants were also provided the opportunity to respond to questions posed by staff, give feedback on the policy options presented, and provide any additional comments.

The general session allowed staff to report back to the community about the information received during the other stakeholder meetings, inquire if the summarization was correct, and solicit further comments, if any.

Staff also conducted individual meetings with landlords, tenants, the California Apartment Association (CAA), and Conservice (a utility billing company frequently contracted by landlords to provide RUBS services). The results of the stakeholder meetings as well as the feedback

received during individual meetings are summarized by stakeholder type in alphabetical order and provided below in Tables 3 and 4. Table 3 shows the general feedback from the stakeholders grouped by major themes. Table 4 below shows the feedback received regarding the policy options. Please see Attachment 3 for additional stakeholder input details as well as the stakeholder meeting polling results. The major themes include:

- Allocation of Utility Charges and Transparency of Charges.
- Conservation of Resources.
- Definition of Rent.
- Submetering.
- Utility Charges.
- Utility Rate Increases.

**Table 3: Summary of Feedback Themes from Stakeholder Input**

Feedback Theme	Landlord Feedback	Tenant Feedback	Conservice and CAA
<p><b>A</b></p> <p><b>Allocation of Utility Charges and Transparency of Charges</b></p>	<ul style="list-style-type: none"> <li>Allocation of utility charges between units varies by property; landlords determine how the averaged costs are split between units.</li> <li>Landlords determine which factors they prefer for cost-sharing between units, whether or not vacancy rates are included in the calculation, and how much, if any, of the usage of utilities in common spaces are passed on to tenants. Once they determine this, they inform the RUBS provider of how they would like the utilities charges to be allocated, and RUBS then implements the billing calculations.</li> </ul>	<ul style="list-style-type: none"> <li>There is little to no transparency about how utility costs are allocated with RUBS; Tenants need clarity on how RUBS allocates utilities, including how vacancy rates affect the fluctuations in charges.</li> <li>The RUBS cost allocation and fees charged to tenants should be accurately disclosed in the lease and monthly bills and clearly state the amount charged to tenants.</li> <li>Tenants should be able to file a downward adjustment in rent petition with the RHC if they have overpaid utilities.</li> </ul>	<ul style="list-style-type: none"> <li>Most frequently used per unit formula is 50% occupancy/ 50% square footage.</li> <li>Some properties include vacancy rates in their per-unit calculations.</li> <li>For Common Areas, most properties use a deduction between 5% and 25%, depending on the property.</li> </ul>
<p><b>B</b></p> <p><b>Conservation of Resources</b></p>	<ul style="list-style-type: none"> <li>RUBS promotes conservation of valuable resources like water by making units accountable for their usage.</li> <li>Tenants have an ability to conserve collectively through RUBS, which contributes to a 5% to 27% of reduction in water usage. If a fixed utility cost is included in rent, landlords feel tenants will not pay attention to usage.</li> </ul>	<ul style="list-style-type: none"> <li>Conservation of resources like energy and water is important and should be incentivized through government programs that require properties to be more energy-efficient and to utilize less nonrenewable resources.</li> </ul>	<ul style="list-style-type: none"> <li>Water conservation with RUBS is over 15%; with submeters it is 40%.</li> </ul>

Feedback Theme		Landlord Feedback	Tenant Feedback	Conservice and CAA
C	Definition of Rent	<ul style="list-style-type: none"> <li>The definition of rent in the CSFRA and accompanying regulations should only cover charges that originate from the landlord.</li> <li>Landlords have no control over utility charges and should not be responsible for mitigating utility charges.</li> <li>RUBS is a cost-sharing mechanism without any service fee assessed to the resident and zero profit to housing provider, and all of the resident's payment for sewer, trash, and water are ultimately passed through to the City of Mountain View.</li> </ul>	N/A	N/A
D	Submetering	<ul style="list-style-type: none"> <li>Installing individual submeters for all utilities is cost-prohibitive and, therefore, not a viable option.</li> </ul>	<ul style="list-style-type: none"> <li>Submetering could be made mandatory through City policy.</li> </ul>	
E	Utility Charges	<ul style="list-style-type: none"> <li>Monthly utility charges fluctuate based on usage, and landlords feel that the fluctuations are not cost-prohibitive to tenants on a monthly basis (anecdotally \$10 to \$50 per month).</li> </ul>	<ul style="list-style-type: none"> <li>Fluctuating utility charges affect monthly rent predictability</li> </ul>	<ul style="list-style-type: none"> <li>Higher monthly fluctuations may stem from COVID, when home usage as well as vacancy rates increased. In small properties, water leaks may also contribute to fluctuations.</li> </ul>
F	Utility Rate Increases	<ul style="list-style-type: none"> <li>The City of Mountain View sets utility rates for water, garbage, and sewer; these increases are not controlled by landlords and could increase by more than the AGA. Landlords should not have to absorb the costs associated with rate increases.</li> </ul>	N/A	N/A

	Feedback Theme	Landlord Feedback	Tenant Feedback	Conservice and CAA

**Table 4: Summary of Policy Option Feedback from Stakeholder Input**

Feedback Theme	Landlord Feedback	Tenant Feedback	Conservice and CAA
Policy Option 1—No Longer Allow RUBS	<ul style="list-style-type: none"> <li>Paperwork associated with Options 1a and 1b is challenging. Additional paperwork, especially if a landlord-initiated petition process is required, is burdensome to landlords and City staff.</li> </ul>	<ul style="list-style-type: none"> <li>Tenants would know exactly what their monthly costs are, including utilities. This is similar to what San Jose has adopted.</li> </ul>	N/A
Policy Option 2—Allow RUBS if Lease States Maximum Rent and Maximum Amount Charged for Utilities	<ul style="list-style-type: none"> <li>Defining a maximum amount of utility charges in the lease is feasible for landlords. Some property-management companies already utilize this option, and Conservice can accommodate the request. This option should allow for a revision if additional tenants move into the unit.</li> </ul>	<ul style="list-style-type: none"> <li>Tenants would be able to understand the different amounts for both rent and utility costs.</li> <li>Tenants expressed concern that landlords may be able to create irrelevant maximum amounts (like \$1,000) in the lease if the regulations are unclear.</li> </ul>	<ul style="list-style-type: none"> <li>Conservice can accommodate this option.</li> <li>Conservice shared that they are familiar with all policy options and that other rent-controlled jurisdictions have similar systems.</li> </ul>

**ANALYSIS**

In order to assist the RHC in providing direction to staff about the option(s) that RHC members would like to further explore, this section of the memo: (1) outlines the legal limitations given the relevant provisions of the CSFRA; and (2) addresses the approaches taken by other jurisdictions.

**Legal Framework**

As explained, the CSFRA’s definitions of “rent” and “housing services” both explicitly reference “utilities.” When comparing the approaches available to Mountain View versus those taken by some other rent-controlled jurisdictions, this is one of several key factors that limits how Mountain View may address the RUBS issues.

Pursuant to Section 1702(p) of the CSFRA, rent means: “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, including all payment and consideration demanded or paid for parking, utility charges, pets, furniture, and/or subletting.***

Section 1702(h) of the CSFRA provides: “Housing Services include, but are not limited to, repairs, maintenance, painting, providing light, hot and cold water, elevator service, window shades and screens, storage, kitchen, bath and laundry facilities and privileges, janitor services, ***Utility Charges that are paid to the Landlord***, refuse removal, furnishings, telephones, parking, the right to have a specified number of occupants, and any other benefit, privilege or facility connected with the use or occupancy of any Rental Unit. Housing Services to a Rental Unit shall include a proportionate part of services provided to common facilities of the building in which the Rental Unit is contained.”

The CSFRA’s definitions of “rent” and “housing services” clearly evidence an intent that utilities charges demanded by and/or paid to the landlord of a covered unit be regulated in the same manner as any payments or nonmonetary consideration demanded and/or paid for the use and occupancy itself of a covered unit. Given that the CSFRA requires regulation of utility charges, it is not only within the RHC’s jurisdiction to, but is also staff’s recommendation, that the RHC issue regulations to clarify how RUBS interact with the requirements of the CSFRA.

Both at the January 31, 2023 RUBS Study Session of the RHC and the stakeholder meetings, some landlords expressed that the RHC should take no action to regulate utilities charges billed pursuant to RUBS through a third-party billing service, such as Conservice or Multifamily Utility Company. These landlords argued that the CSFRA did not intend to regulate utility charges allocated via RUBS and billed by a third-party billing service because: (1) the utilities are not “for the benefit of the landlord” under the definition of “rent”; and (2) the definition of “housing services” covers “utility charges that are paid to the landlord.”

The landlords’ focus on the phrase “for the benefit of the landlord” in the definition of “rent” is misplaced. The relevant phrase is intended to modify “labor performed or services rendered,” not “all periodic payments and all nonmonetary compensation.” Removing the other intervening language, “rent” under the CSFRA includes “all nonmonetary compensation, including but not limited to, labor performed and services rendered...for the benefit of the Landlord under a Rental Housing Agreement....” Therefore, the phrase “for the benefit of the landlord” is not relevant to the instant analysis regarding whether and which utility charges are covered by the CSFRA’s definition of “rent.”

Furthermore, the CSFRA does not distinguish between utilities charges paid *directly or indirectly* to a landlord for a covered unit. The third-party billing services who administer RUBS on behalf of landlords (by calculating each unit’s share of the utilities charges and billing each tenant accordingly) are merely acting on behalf of the landlord. These third-party billing services are analogous to a property-management company or online rent payment system that charges and collects rent from tenants on behalf of a landlord. Ultimately, it is the landlords who are billed

by the utility company for water, sewer, trash, and other utilities, not third-party billing services. After the third-party billing services has billed and collected payment from the tenants in accordance with the landlord's chosen RUBS algorithm, the landlord either pays their own utility bills from the amounts collected, or the third-party billing services makes such payment on behalf of the landlord. As such, the CSFRA does not establish any grounds for treating utility charges paid indirectly to the landlord from those paid directly to the landlord.

Similarly, the fact that utility charges allocated and billed via RUBS are merely a pass-through is largely irrelevant to analyzing how these utility charges should be regulated. As outlined above, there are only three ways that tenants are charged utilities: (1) directly by the company that provides the utility (e.g., PG&E) based on the tenant's actual usage as established via individual or submeter; (2) as part of a single fixed monthly amount of rent that includes all charges for housing services, including utility charges, paid directly to the landlord; or (3) via RUBS. In the first scenario, the CSFRA evidences no intent to regulate the utility charge, in large part because the RHC lacks jurisdiction to regulate public utility companies. In both other two scenarios, the utility charges are pass-throughs; the landlord is charged by the public utility company for their tenants' usage of the service and, in turn, charges the tenants to recover for having to pay this expense on their behalf. The CSFRA merely provides that utility charges demanded by and/or paid to the landlord are rent for the purposes of the CSFRA's limitations on rent increases. The CSFRA does not distinguish between or exempt a utility charge demanded by and/or paid to a landlord based on the manner in which the landlord chooses to recover the cost from their tenants. There is no basis in the CSFRA for treating utilities charged as a monthly flat rate differently than utilities charged via RUBS.

### **Peer Analysis: Jurisdictions Allowing RUBS**

The prior section of this memo, —RUBS and the CSFRA, outlines the ways in which RUBS is incompatible with the CSFRA. To summarize, RUBS violates the CSFRA because: (1) it may result in more than one rent increase per 12-month period; (2) the fluctuations in utility charges billed through RUBS may exceed the AGA; and (3) the fluctuations in utility charges billed through RUBS violate the CSFRA's rent increase noticing requirements. Therefore, staff's conclusion is that RUBS violates the CSFRA. Nonetheless, property owners have pointed to other rent-controlled jurisdictions that allow the use of RUBS. To provide the RHC with an understanding of why this approach is neither permissible nor recommended under the CSFRA, this section of the memo provides further explanation of the statutory schemes in three rent-controlled jurisdictions—Alameda, Hayward, and San Francisco—that allow RUBS.

Alameda. The City of Alameda first enacted rent control and just cause on September 17, 2019. Unlike Mountain View, which enacted rent control via a voter-approved charter amendment, Alameda adopted rent control via a city council-adopted ordinance. As a result, Alameda's rent control ordinance can be amended at any time by its city council without the need to put the proposed changes up for a vote on the ballot.



Similar to the CSFRA, Alameda's rent control ordinance limits rent increases to one increase per 12-month period (Alameda Muni. Code § 6-58.50(A)). Further, rent increases are limited to the AGA, which under Alameda's law, is calculated as 70% of the percentage change in the CPI for the period from April to April of each year and rounded to the nearest one-tenth percent (Alameda Muni. Code § 6-58.15.). The AGA is never to be more than 5% or less than 1% (*Id.*). Alameda's ordinance defines "rent" and "housing services" as follows:

"Rent means periodic compensation, including all non-monetary compensation, that a Tenant provides to a Landlord concerning the use or occupancy of a Rental Unit, **including any amount included in the Rent for utilities**, parking, storage, pets or **for any other fee or charge associated with the tenancy for** the use or occupancy of a Rental Unit and **related Housing Services**.

...

Housing Services means those services provided and associated with the use or occupancy of a Rental Unit not exempt from rent control under State Law including, but not limited to, repairs, replacement, maintenance, effective waterproofing and weather protection, painting, providing light, heat, hot and cold water, elevator service, window shades and screens, laundry facilities and privileges, janitorial services, **utilities that are paid by the Landlord**, refuse removal, allowing pets, telephone, parking, storage, the right to have a specified number of Tenants or occupants, computer technologies, entertainment technologies, including cable or satellite television services, and any other benefits, privileges or facilities connected with the use or occupancy of such Rental Unit including a proportionate share of the services provided to common facilities of the building in which such Rental Unit is located and/or of the property on which such Rental Unit is located." (*Id.* (emphasis added).)

Unlike Mountain View's definition of rent, Alameda's definition of rent specifies that only amounts "included in the Rent for utilities" are considered rent for the purposes of rent control. This distinction is important because it allows Alameda to treat utility charges bundled with and paid to the landlord as part of the rent differently from those utility charges billed separately. In fact, Alameda's ordinance directly does so. Pursuant to Alameda's law, "as to any Rental Agreement or any Rental Agreement that has been converted to a month-to-month Tenancy in which charges or fees for utilities...that is included in the Rent," a landlord cannot "increase any of such fees or charges except for increased charges paid directly to the Landlord for utilities that are separately metered or for charges for utilities that are pro-rated among the Tenants pursuant to a Ratio Utility Billing System or similar cost allocation system." (Alameda Muni. Code § 6-58.45(A)(2).) Therefore, Alameda can allow for RUBS not only because its definition of rent expressly covers only utility charges bundled with the rent payments, but also because its ordinance specifically exempts RUBS from limitations on rent increases.

Hayward. The city council for the City of Hayward adopted rent control and just cause on June 25, 2019. Like Alameda, Hayward can amend its rent control ordinance at any time via action of its city council; it is not required to seek voter approval of any proposed amendments to its rent control and just cause ordinance.

Like both Alameda and Mountain View, Hayward's ordinance limits rent increases to one increase per 12-month period (Hayward Muni. Code § 12-1.05(a)). Unlike Alameda and Mountain View, Hayward does not limit the rent increases to an AGA; rather, Hayward's ordinance provides that the rent increase may be in an amount equal to or less than 5% of the existing total monthly rent (*Id.*). Hayward defines "rent" and "housing services" in the following manner:

**"Rent."** The total consideration, including any bonus, benefit, gratuity, demanded or received by the Landlord for or in connection with the use or occupancy of a Rental Unit, or the assignment of a lease for such unit, including Housing Services or subletting, but excluding any amount demanded or received by a Landlord as a Security Deposit." (Hayward Muni. Code § 12-1.04(r).)

**"Housing Service."** A service provided by the Landlord related to the use or occupancy of a Rental Unit, including but not limited to, insurance, repairs, replacement, maintenance, painting, lighting, heat, water, elevator service, laundry facilities, janitorial services, refuse removal, furnishings, parking, security service, and employee services." (Hayward Muni. Code § 12-1.04(k).)

Unlike Mountain View's (and Alameda's) definition of rent, Hayward's definition of rent does not explicitly address payments demanded and/or paid for utilities. Nor does the reference to "total consideration...demanded or received by the Landlord for or in connection with the use or occupancy of a Rental Unit...including Housing Services" address the issue of utilities. Hayward's definition of "housing service" does not expressly enumerate utilities. Taken together, these definitions seemingly indicate Hayward's ordinance is not intended to regulate utility charges.

This indication is confirmed when looking at the ordinance's exemptions to the rent increase threshold, which include "[a]n increase for Government-Utility Service costs in accordance with Section 12-1.05(d) [of the Ordinance]." (Hayward Muni. Code § 12-1.05(b)(4).) "Government-Utility Services" are defined as "[s]ervices provided by a public agency, public utility, or quasi-public or utility, including but not limited to water, sewer, gas, electric, and rubbish removal" (Hayward Muni. Code § 12-1.04(g)). Hayward's ordinance further provides that a landlord may only pass through Government-Utility Service costs "through a ratio utility billing system (RUBS) or similar unmetered allocation arrangement, pursuant to the terms of a written lease" (Hayward Muni. Code § 12-1.05(d)). If provided for in a written lease, these costs "shall not be considered Rent, and shall not be increased when Rent Increases, nor shall they be considered rent for the purposes of calculating an increase under the Rent Increase Threshold..." (*Id.*). Furthermore, if

Government-Utility Service costs are increased more than 1% above the tenant's existing total rent, then the tenant may request, and the landlord is required to provide, documentation supporting the level of increase (Hayward Muni. Code § 12.1-05(d)(1).). The landlord's failure to provide the documentation demanded by the tenant is both grounds for a petition to review the increase and a defense in an action to recover possession of the unit or to collect the disputed Government-Utility Service cost (Hayward Muni. Code § 12.1-05(d)(2)-(3).).

Both implicitly pursuant to the ordinance's definitions of rent and housing service and explicitly pursuant to the ordinance's exemption for Government-Utility Service costs from the rent increase threshold, Hayward's ordinance establishes that increases in utility charges allocated and billed via RUBS are not limited or restricted. As such, Hayward is able to allow landlords to continue to use RUBS without running afoul of its rent control law.

San Francisco. The City and County of San Francisco have one of the oldest rent control programs in the state, having first enacted its ordinance on June 13, 1979. Since that time, the Board of Supervisors has amended the ordinance on a number of occasions as unaddressed issues have arisen. In addition, the San Francisco Residential Rent Stabilization and Arbitration Board has adopted comprehensive regulations over the years to administer and enforce the law.

As with all the other rent control ordinances discussed herein, San Francisco's ordinance allows one rent increase each year (S.F. Muni. Code § 37.3(a)(1).). The allowable annual rent increase in San Francisco is 60% of the increase in the CPI from February to February of each year (*Id.*). In no event can the annual rent increase exceed 7% (*Id.*). Below are San Francisco's definitions of "rent" and "housing service":

"Rent. The consideration, including any bonus, benefits or gratuity, demanded or received by a landlord for or in connection with the use or occupancy of a rental unit, or the assignment of a lease for such a unit, including but not limited to monies demanded or paid for parking, furnishings, food service, housing services of any kind, or subletting." (S.F. Muni Code § 37.2(p).)

"Housing Services. Services provided by the landlord connected with the use or occupancy of a rental unit including, but not limited to: quiet enjoyment of the premises, without harassment by the landlord as provided in Section 37.10B; repairs; replacement; maintenance; painting; light; heat; water; elevator service; laundry facilities and privileges; janitor service; refuse removal; furnishings; telephone; parking; rights permitted the tenant by agreement, including the right to have a specific number of occupants, whether express or implied, and whether or not the agreement prohibits subletting and/or assignment; and any other benefits, privileges or facilities." (S.F. Muni. Code § 37.2(g).)

Like Hayward, San Francisco's definitions of rent and housing service do not expressly reference utilities or utilities charges. Even more significantly, San Francisco's ordinance also provides a

definition of “rent increase” which means “[a]ny additional monies demanded or paid for rent as defined in item (p), or any reduction in housing services without a corresponding reduction in the monies demanded or paid for rent, **provided, however, that: (1) where the landlord has been paying the tenant’s utilities and the cost of those utilities increases, the landlord’s passing through to the tenant of such increased costs...does not constitute a rent increase....**” (S.F. Muni. Code § 37.2(q); see also S.F. Muni. Code § 37.3(a)(4) (“A landlord may impose increases based upon the cost of utilities as provided in Section 37.2(q) above.”).) Because San Francisco’s ordinance exempts all utility charges paid by the landlord on behalf of the tenants’ use from the limitations on rent increases, San Francisco continues to allow use of RUBS by landlords.

Both the distinctions between these jurisdiction’s definitions of “rent” and “housing service” and those in the CSFRA and the express exemptions of RUBS in these jurisdictions’ ordinances are the reasons these jurisdictions can continue to allow the use of RUBS. The RHC Is more restricted in the approaches it can take to the RUBS issues (namely, it cannot continue to merely allow the unrestricted use of RUBS) because the CSFRA expressly provides for the regulation of increases to Utility Charges.

### **Analysis of Stakeholder Input**

#### **A. Allocation of Utility Charges and Transparency of Charges**

*Input:* Tenants report that RUBS causes monthly fluctuations in utility charges that are hard for tenants to predict.

*Analysis:* Variations in monthly charges occur for a variety of reasons and are often due to factors beyond the control of individual tenants. Variations in charges can include:

- Changes in weather and/or seasons.
- Increases or decreases in the number of members residing in a household.
- Vacancy rates in a building or on the property as a whole.
- A water leak in a unit or on the property.
- Excessive usage by one unit or by the apartment complex.

These unexpected variations in cost may result in a tenant not being able to pay their monthly rent. The CSFRA’s purpose is to protect tenants from unpredictable and frequent rises in rent charges to promote housing stability. The CSFRA provides that tenants can only receive one rent increase per 12 months to achieve housing stability and rent payment predictability.

*Key Takeaway:* RUBS is incompatible with the CSFRA’s purpose of promoting rent predictability and housing stability.

## B. Conservation and RUBS

*Input:* Landlords state that the use of RUBS is an effective tool for conservation by tenants. When tenants review their bill for water use, it is more likely they report any leakage and use less water to lower the bill.

*Analysis:* RUBS calculations are not based on individual usage or issues within a specific unit. Instead, they are based on a variety of factors, including:

- The number of occupants in a unit.
- Unit square footage.
- Number of bedrooms not on actual usage.
- Vacancy rates of buildings and/or the property as a whole.

The apportionment of the usage is determined by the landlord and then dictated to RUBS for billing purposes; individual unit usage does not determine how much monthly utility costs increase or decrease.

*Key Takeaway:* Little evidentiary support has been provided for the landlords' conclusion that RUBS results in greater conservation efforts by tenants.

## C. Submetering

*Input:* The RHC should consider requiring submetering of all CSFRA-covered units both to ensure tenants pay for their individual usage and to promote conservation efforts.

*Analysis:* Submeters are water, electric, or gas meters installed for individual units within a multi-family property. Submeters allow measurement and billing of actual tenant utility usage. A Santa Clara County Valley Water study found that complexes that installed submeters for water reduced water use by 15% to 30%. However, most multi-family buildings in Mountain View are master-metered, and the installation of submeters usually includes repiping an entire building, which might prove cost-prohibitive for landlords. In addition, submetering may require temporary displacement of tenants in order to allow for the required replumbing of a building.

Cost-recuperating mechanisms do exist to incentivize the installation of submeters; however, the reach of these programs is limited. Cost-recovery mechanisms currently available to property owners include:

- Santa Clara Valley Water District Rebate Program: Offers \$150 per installed submeter.

- **CSFRA Specified Capital Improvement Petition Process:** Provides landlords the ability to file a petition for the pass-through of costs related to specific capital improvement. Submeters are allowed capital improvements.

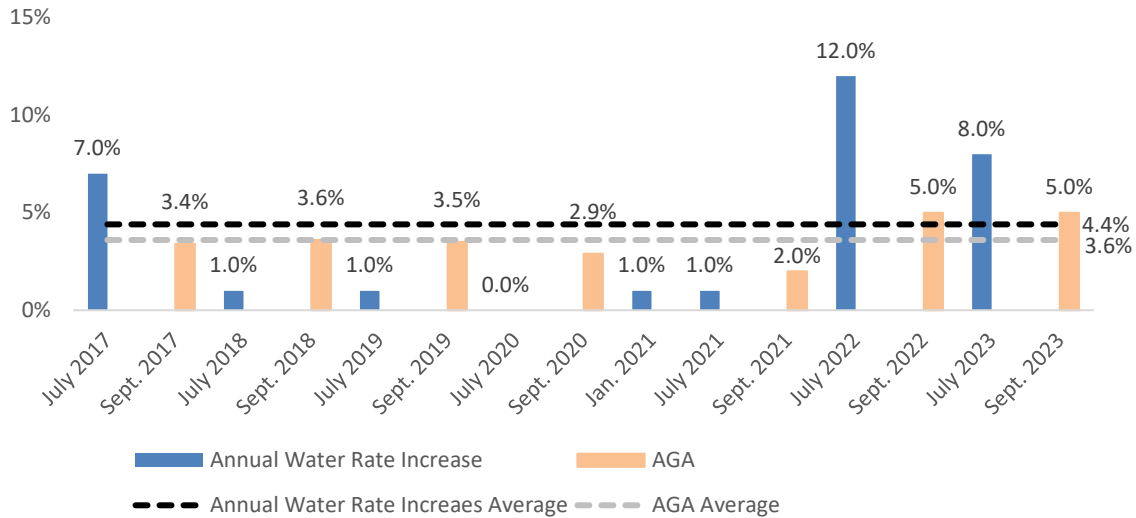
*Key Takeaway:* Requiring submetering would be cost-prohibitive for landlords and may prove to be disruptive for tenants. Further, it is unclear whether the RHC has jurisdiction to require submetering of all CSFRA-covered units.

**D. City Utility Rate Increases are Historically Higher than the AGA**

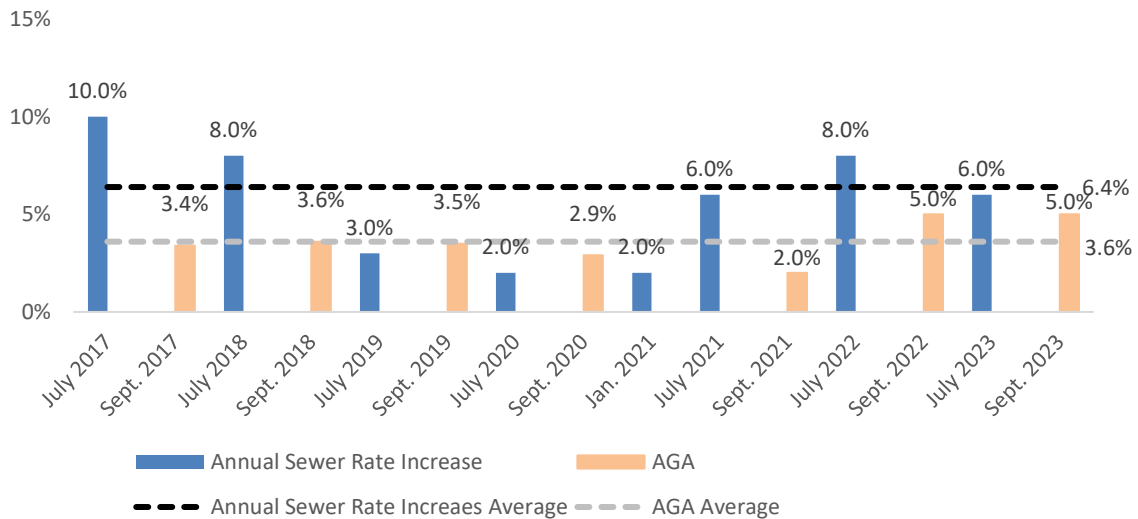
*Input:* Landlords argue that the City of Mountain View sets utility rates for water, garbage, and sewer and has increased rates for each of these services annually. Landlords should not have to absorb the costs associated with rate increases.

*Analysis:* Staff analyzed historical City of Mountain View utility rate increase data since the implementation of the CSFRA. On average, during the past seven years, the water rate increased annually by 4.4%, the sewer rate increased by 6.4%, and the trash rate increased by 5.3%, while the AGA increased by 3.6%. Charts 6, 7, and 8 below show the increases in the annual water, sewer, and trash rates, respectively, compared with the increase in the AGA since the start of the CSFRA.

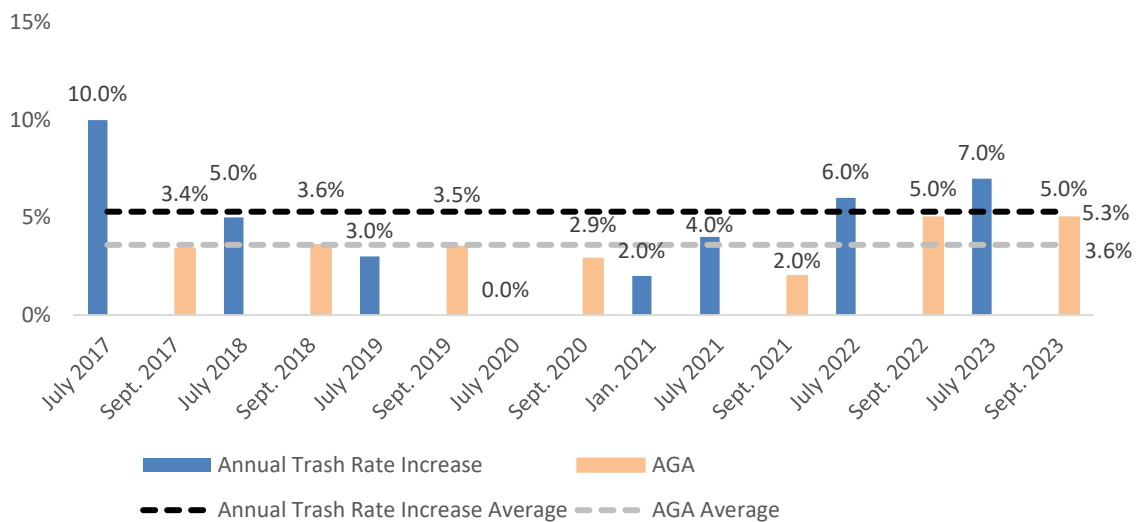
**Chart 6: Annual Water Rate Increases Compared to AGA Increases**



**Chart 7: Annual Sewer Rate Increases Compared to AGA Increases**



**Chart 8: Annual Trash Rate Increases Compared to AGA Increases**



Landlords expressed the unreasonableness of these increases if they only can be recuperated within the confines of the allowed annual rent increases (AGA) under the CSFRA. However, these utility costs have a limited impact on the overall expenses related to ownership of a rental property and make up only a small fraction of the operating costs. If properties are unable to maintain a fair and reasonable return on investment due to the increases in utility costs, the option of filing a petition for upward adjustment of rent is available. Also, vacancy decontrol allows landlords to reset the rent (including utilities) to

market rate when tenants vacate the property. On average, apartments turn over within a five-year period.

Finally, although the RHC is a division of the Housing Department of the City of Mountain View, it does not have any jurisdiction over the utilities provided by the City of Mountain View, nor does it have the authority to set the utility rates charged to property owners.

*Key Takeaway:* While increases in utility rates charged by the City of Mountain View have exceeded the AGA in some years, the costs of utilities make up only a fraction of the costs of operating a rental property. If utility rates increase to such a degree that a landlord is no longer making a fair rate of return, the landlord may petition for an upward adjustment of rent.

### **INITIAL POLICY CONSIDERATIONS AND POTENTIAL APPROACHES**

Utility charges are part of the CSFRA definition of rent and subject to the rent increase limitations in the CSFRA. The CSFRA limits rent increases to the AGA and limits rent increases to one time per 12 months. Based on staff's evaluation of the CSFRA, RUBS practices that do not adhere to these limitations violate the CSFRA.

Criteria for solutions to achieve compliance with the law:

- a. Would result in predictable monthly costs for tenant (provide housing stability), and
- b. Would provide an opportunity for landlords to recuperate costs for utilities (provide a fair and reasonable return on their investment).

Staff would like to provide the following for consideration to bring properties using RUBS utility charges into compliance with the CSFRA.

1. Develop regulations to clarify that utility charges are considered part of rent and are subject to the CSFRA rent increase limitations. Regulations could also require that the monthly utility cost charged to the tenant by the landlord must be included in the lease and is considered part of the base rent for purposes of calculating the AGA. Regulations would also have to address the calculation of annual increases based on the stated amount of utility charges in the lease.
2. In addition to the above potential regulations clarifying that utilities are part of the definition of rent, the RHC could also consider adding further stipulations to potential regulations to facilitate the transition of noncompliant practices into compliance, such as:



- 2.a In case noncompliant RUBS or similar methods are being used, landlords would be allowed a one-time rent adjustment to partially offset previous separately charged fluctuating utilities by determining the lesser of the average of charged utility costs over the past 12 months or the sum of the Santa Clara County Housing Authority Utility Allowances. For an overview of the Santa Clara County Housing Authority Utility Allowances, see Attachment 2.

Certain parameters would be included, such as exclusion for charges for common areas or, if common areas are not separately charged, a specified percentage (such as 10% to 20%). An expedited petition process administered by staff could be included in the regulations to approve these adjustments.

- 2.b The second option would be to allow for a one-time rent adjustment as mentioned under option 2.a, but allowing landlords to make their own adjustment using a formula approved by the RHC with an added process to allow tenants to file an unlawful rent petition if the tenants disagree with the landlord's calculation of the rent increase.

If the landlord's utilities' costs increase at a rate greater than what they are permitted to recover from their tenants pursuant to the annual general adjustment of rent (AGA) such that the landlord is not receiving a fair rate of return, the landlord can file a maintenance of net operating income (MNOI) petition for upward adjustment of rent. These two options would bring landlords into compliance with the CSFRA and incorporate utility charges into rent.

### **Other Options**

1. Another option would be to continue to allow RUBS methodologies in such instances where the lease states both the amount of rent and a maximum amount separately charged for utilities. Separate utility costs per month can be less than the maximum amount stated in the lease but not more. Certain parameters could be included, such as a certain percentage of common area utility costs (10% to 20%) to be excluded and a limit to the maximum amount of utility charges per month as deemed reasonable, such as the amount of the Santa Clara County Housing Authority Utility Allowances (see Attachment 2) or based on actual average monthly utilities cost per tenant for the past three years.

Not only is this methodology difficult for tenants to understand, it continues to perpetuate fluctuating monthly rents and uncertainty for tenants. Furthermore, this is only feasible during the initial term of the tenancy because of the definition of base rent. Section 1702(b)(2) provides that for tenancies commencing after October 19, 2015, the base rent is the amount from which the lawful rent for a covered unit is calculated and is defined as the initial rental rate charged upon initial occupancy, with "initial rental rate"

meaning “only the amount of Rent **actually paid by the Tenant for the initial term of the tenancy.**” Therefore, after the initial term of the tenancy, the AGA can only be imposed on the base rent, which would have to be calculated by taking the actual amounts of rent (including utilities charges) paid by the tenant during the initial term of the tenancy and dividing by the number of months in the initial term of the tenancy. Thereafter, the fluctuations allowed under this potential option would run afoul of both the base rent requirement and the CSFRA’s limitations on rent increases.

Finally, CSFRA Section 1713 states: “Any provision of a Rental Housing Agreement, whether oral or written, which purports to waive any provision of this Article established for the benefit of the Tenant, shall be deemed to be against public policy and shall be void.” Further analysis is required to determine whether this option would run afoul of this nonwaivability requirement.

2. One option proposed by landlords includes either taking no action or adopting regulations to explicitly allow RUBS and regulations to increase predictability and transparency by adding mandatory disclosure requirements so tenants can understand how utilities are charged and what RUBS formula is used. However, as explained above, this is not a viable option legally because of the CSFRA’s express intent to restrict increases to utility charges.
3. Other options could include other approaches that the members of the RHC direct staff to explore, which may include a different set of options.

### **NEXT STEPS**

Staff provides the following recommendations for the RHC to consider as next steps:

1. The RHC provides input and recommendations regarding preferred potential options in today’s meeting.
2. Staff returns to the RHC in a subsequent meeting detailing RHC input and recommendations.
3. If requested by the RHC, staff provides draft regulations in a subsequent meeting.

**PUBLIC NOTICING**—Agenda posting.

AVD-KMT-NS/KG/4/HSN/RHC

847-08-21-23M-3

- Attachments:
1. RHC Memo (January 31, 2023)
  2. Overview of Rent Stabilized Jurisdictions in California and Treatment of Utilities
  3. Summary of Stakeholder Feedback
  4. 2022 Santa Clara County Housing Authority Utility Allowances