May 6, 2021

Helen N. Robbins-Meyer, Chief Administrative Officer
San Diego County Chief Administrative Office
1600 Pacific Highway, Room 209
San Diego, CA 92101

Re: Request for Guidance Regarding Recently Enacted Rent Control and Just Cause Eviction Ordinance

Dear Chief Administrative Officer Robbins-Meyer:

On behalf of the members of the California Apartment Association (CAA) I am writing to request that the County immediately issue guidance to clarify several of the most problematic ambiguities in the rent control and just cause eviction ordinance adopted by the Board of Supervisors on May 4, 2021 ("the Ordinance").

CAA is a non-profit trade organization providing services to rental housing providers across the state and is proud to represent thousands of San Diego County housing providers, especially "mom and pop" operators who rely on their rental investments to sustain their retirement.

The Ordinance is poorly drafted and suffers from numerous legal defects, ambiguities, and practical issues. Unfortunately, the Board of Supervisors chose to adopt the Ordinance despite these many issues, ignoring the concerns raised by CAA and the hundreds of rental housing providers who spoke against the ordinance during the May 4 meeting.

Many of these issues – such as limiting its application to the unincorporated areas, as demanded by CAA's April 6, 2021 letter – can be addressed only by making substantive changes to the text of the ordinance. Other issues, however, are more technical in nature and would benefit from guidance issued by the County. Case law has clearly established the ability of local agencies to provide guidance regarding the interpretation of their ordinances. *See Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 434.

Failure to issue this clarifying guidance will cause thousands of San Diego County housing providers and tenants to be unclear as to their rights and responsibilities, and will leave the Ordinance vulnerable to legal challenge. To be clear, these issues in no way represent the entirety of the concerns, both as a matter of law and policy, that CAA has with the Ordinance. They are, however, the issues the County can take steps to address without amending or repealing the ordinance.

Compliance with the Costa-Hawkins Rental Housing Act

Section 4 of the Ordinance limits, until July 1, 2021, the ability of landlords to increase a tenant's rent. Exempted from Section 4 are residential properties exempt from Civil Code § 1947.12, the statewide rent control law enacted by AB 1482 in 2019. Generally speaking, this means housing that has been issued a certificate of

occupancy within the previous 15 years, single family homes and condominiums not owned by corporations, and specified categories of affordable housing are not subject to the Ordinance's rent caps.

However, this exemption is insufficient for compliance with the Costa-Hawkins Rental Housing Act ("Costa-Hawkins"). Costa-Hawkins limits the ability of local governments to enact rent control on certain types of properties, namely single-family homes and condominiums (regardless of ownership) and properties constructed after February 1, 1995. *See* Civil Code § 1954.52(a).

The failure of the Ordinance to recognize these long-standing exemptions creates significant confusion for housing providers and should be clarified to avoid conflict with state law.

Unclear Definition of CPI

As discussed above, Section 4 of the Ordinance limits the ability of landlords to increase a tenant's rent. It does this by providing that "no Landlord may increase a Tenant's rent by any amount greater than the CPI for the previous year." Section 2(a) of the Ordinance provides that "'Change in CPI' means the percentage change from April 1 of the prior year to April 1 of the current year in the regional Consumer Price Index for the San Diego area, as published by the United States Bureau of Labor Statistics." These provisions are unclear for a multitude of reasons.

As a preliminary matter, Section 4(a) refers to a landlord being prohibited from increasing rent by more than *the* CPI, while the definition in Section 2(a) refers to *change in* CPI. This creates confusion as the consumer price index and the change in the consumer price index are two different values. CAA assumes the Ordinance intends for landlords to be limited to rent increases based on the change in the CPI from 2020 to 2021, as that is consistent with how rent control ordinances typically work. However, this is not entirely clear from the text of the ordinance itself.

Even assuming that section 4(a)'s reference to "the CPI" actually means *the change in* the CPI, as defined in Section 2(a), the definition provided in Section 2(a) is wholly inadequate for several reasons.

First, the definition in section 2(a) does not specify which index should be relied upon. The United States Bureau of Labor Statistics ("BLS") publishes several sets of CPI data, the most common of which are the CPI for All Urban Consumers (CPI-U) and CPI for Urban Wage Earners and Clerical Workers (CPI-W). Section 2(a) provides no indication of which data set should be used. The CPI for All Urban Consumers (CPI-U) is the more broadly applicable data set and is the one most often referenced in rent control laws, including the statewide rent control law. *See* Civil Code § 1947.12(g)(1).

Second, section 2(a)'s reference to "regional Consumer Price Index for the San Diego area" is ambiguous. BLS does not publish "regional" CPI numbers for the San Diego area. Rather, it publishes CPI numbers for the West *region* and the San Diego-Carlsbad *metro area*. Data for the West region, which covers 11 of the western states, including California, is published monthly, though April 2021 numbers are not yet available. CPI data for the San Diego-Carlsbad metro area, on the other hand, are not published for the month of April. Instead, CPI numbers for the San Diego-Carlsbad metro area are published for odd numbered months (January, March, May, July, September, and November). March 2021 CPI numbers are available for the San Diego-Carlsbad metro area. Guidance indicating that housing providers should use the percentage change in the CPI-U for the

San Diego-Carlsbad metro area from March of 2020 to March of 2021 would be consistent with the requirements of Civil Code § 1947.12, with which all of the properties subject to the rent cap provision of the Ordinance are all required to comply.

The County must make clear to both landlords and tenants what the permissible rent increase limit under the Ordinance is.

Application of Rent Increase Limits to Previously Noticed or Agreed to Increases

It is also unclear whether the limitations of Section 4 apply to rent increases that were noticed or agreed to prior to the effective date of the Ordinance, but which are to take effect during the time Section 4 remains in effect. Section 4(a) simply provides that a landlord may not "increase" a tenant's rent during the effective period of that section. However, this language is ambiguous when considered in the context of how rent increases actually work.

In general, there are two ways in which a tenant's rent is increased depending on whether the tenant rents the premises on a month-to-month basis or pursuant to a fixed term lease.

If a tenant rents the premises on a month-to-month basis, then the landlord can increase the rent by serving a 30-day notice of rent increase. *See* Civil Code § 827. The rent increase becomes effective upon the expiration of that 30-day notice, though it is common for landlords to give more than 30 days' notice.

If a tenant has a fixed term lease (such as a 1-year lease), the rent is typically increased when the lease is renewed. The landlord will typically send a lease renewal offer 60 to 90 days prior to expiration of the current lease and will offer the tenant one or more renewal terms with the monthly rent amount indicated for each term. If the tenant agrees to a renewal term, then a renewal lease agreement will be signed and the new rent amount will take effect when the new lease term starts. In other words, *the transaction* that results in the rent increase takes place well before *the rent increase itself* becomes effective. Considered in this context, the language of Section 4(a) is ambiguous because it is unclear whether the "increase" that is prohibited refers to the landlord's action to increase the rent (i.e., sending the notice of rent increase or executing the renewal lease) or the rent increase itself taking effect.

Rent increases that were noticed and/or agreed to prior to the effective date of the Ordinance, in some cases even prior to adoption of the Ordinance, should not be affected by Section 4 of the ordinance because the action taken by the landlord to increase the rent was taken prior to the effective date of the Ordinance. To interpret Section 4 otherwise would be to find that it is retroactive, despite having no express retroactivity provision as required by law. *See Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208 ("[L]egislative enactments are generally presumed to operate prospectively and not retroactively unless the Legislature expresses a different intention.") However, given that the language of the Ordinance is ambiguous this matter should be clarified so that both landlords and tenants can be aware of their rights and responsibilities.

Compliance with the Ellis Act

Section 3 of the Ordinance limits the ability of a landlord to terminate a tenancy or take any other steps in an eviction action unless either: (a) the tenant is an imminent health or safety threat, or (b) the eviction is for non-payment of rent and is government by SB 91. This means that landlords who

seek to exit the rental market, such as by selling their property or moving into it as their own residence, are prohibited from doing so. This limitation is a violation of state law.

The Ellis Act (Government Code § 7060, et seq.) protects the right of rental housing owners to exit the rental market. Government Code § 7060(a) states that "No public entity, as defined in Section 811.2, shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease…." Government Code § 811.2 defines the term "public entity" to include "a county." Thus, the County of San Diego is clearly subject to Government Code § 7060.

By prohibiting landlords from regaining possession of their units for the purpose of exiting the rental market, the Ordinance clearly violates the Ellis Act. *See San Francisco Apartment Assn. v. City and County of San Francisco* (2016) 3 Cal.App.5th 463, 477 ("[T]he Ellis Act provides real property owners the absolute right to exit the residential rental business.") The County must recognize property owners' right to withdraw units from the rental market to avoid conflict with state law.

In very short time since the Ordinance was adopted, CAA has already been inundated by questions on these very issues. Without guidance on these issues, rental housing providers and tenants alike will be placed in the impossible position of having to guess as to whether and how the Ordinance applies to their situation. Not only is this bad policy, it also makes the Ordinance even more susceptible to legal challenge than it otherwise would be. CAA urges you to, at the very least, provide guidance on these basic issues of the Ordinance's interpretation.

Sincerely,

CALIFORNIA APARTMENT ASSOCIATION

Whitney Prout
Policy and Compliance Counsel

Cc: County Counsel, Board of Supervisors