California Apartment Association

Quality Housing • Ethics • Professionalism

January 11, 2022

Kristine Ridge, City Manager
Santa Ana City Hall
20 Civic Center Plaza
Santa Ana, CA 92710

Re: Request for Guidance Regarding Recently Enacted Rent Stabilization and Just Cause Eviction Ordinances

Dear City Manager Ridge,

On behalf of the members of the California Apartment Association (CAA), I am writing to request that the City immediately issue guidance to clarify several of the most problematic ambiguities in the rent stabilization ordinance (RSO) and just cause eviction ordinance (collectively "the Ordinances") adopted by the City Council on October 19, 2021.

CAA is a non-profit trade organization providing services to rental housing providers across the state and proudly represents Santa Ana housing providers including "mom and pop" operators who rely on their rental investments to sustain their retirement.

As CAA stated while the Ordinances were being considered by City Council, the Ordinances suffer from numerous legal defects, ambiguities, and practical issues that inhibit the ability of property owners to make an earnest attempt toward compliance. Compounding the issues with the Ordinances themselves, are the City's informational materials provided to the public on the City's website. These informational materials (including FAQs, flyer, and mandatory notices) contain misstatements of state law, are inconsistent with the Ordinances and have only caused more confusion for Santa Ana rental providers and tenants. The issues CAA highlights in this letter are technical in nature and would benefit from guidance issued by the City. 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 many Santa Ana housing providers and tenants to be unclear as to their rights and responsibilities. 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 City can take steps to address without amending or repealing the ordinance.

I. RSO and RSO-related City Materials

CAA requests clarification and guidance on the following ambiguities, inconsistencies, and misstatements within the RSO and RSO-related City materials:

A. Misleading Separately Alienable Exemption

The Costa-Hawkins Rental Housing Act ("Costa-Hawkins") limits the ability of local governments to enact rent control on certain types of properties, namely housing that is alienable separate from the title to any other dwelling unit (e.g. single-family homes and condominiums) regardless of ownership and properties constructed after February 1, 1995. See Civil Code § 1954.52(a).

Section 8-1998.4(a) of the RSO exempts pursuant to Costa-Hawkins, "any residential property that has a certificate of occupancy issued after February 1, 1995 (California Civil Code Section 1954.52(a)(1); and, any other provisions of the Costa-Hawkins Rental Housing Act addressing exemptions, as applicable." Thus, the RSO is technically compliant with both Costa-Hawkins exemptions. However, the exemption for separately alienable housing is not expressly stated but is only vaguely implied by the general verbiage of "any other provisions of the Costa-Hawkins Rental Housing Act addressing exemptions, as applicable." Additionally, the separate exemption for a subset of separately alienable properties based on ownership status (Section 8-1998.4(c)(4)) is misleading because it suggests that only those properties that are not corporately owned are exempt from the RSO which would conflict with Costa-Hawkins.

The failure of the RSO to clearly establish this long-standing exemption creates significant confusion for housing providers. The City has added to the confusion by misleading the public by only discussing the exemption for non-corporately owned separately alienable properties and not the outright, much broader exemption for all separately alienable properties, guaranteed by Costa-Hawkins, in the City's materials and during the City's workshop presented on 11/17/21. The City must issue guidance to alleviate the confusion its actions have caused. To this point, CAA implores the City to make clear in its informational materials, such as its FAQ, that all separately alienable properties are exempt from the RSO regardless of ownership.

B. Incorrect Notice Period for Rent Increases in City Materials

While not stated in the RSO itself, many of the City's informational materials related to the RSO contain incorrect statements of law regarding the required notice period for rent increases. Specifically, the City states that a 60-day notice must be provided for month-to-month or yearly leases with tenants that have lived in a rental unit for more than one year and that a 30-day notice must be provided for all month-to-month leases for tenants that have lived in a rental unit for less than a year.

This is wrong. There are no 60-day notices for rent increases under state law. Pursuant to Civil Code section 827, for an increase in rent that is 10% or less, owners must provide tenants with at least 30-days' advanced notice. For an increase in rent that is greater than 10%, owners must provide tenants with at least 90-days' advanced notice.[1] The City does not have the power to change rent increase notice periods because doing so "impermissibly conflicts with statewide legislation by invading an area preempted by the Legislature." (*Tri County Apartment Assn. v. City of Mountain View* (1987) 196 Ca.App.3d 1283, 1298) (holding city's ordinance requiring a 60-day notice for rent

[1] CAA recognizes that such a rent increase would not be permitted for units subject to the RSO except pursuant to an approved fair rate of return petition.

increases was unconstitutional because fully preempted by state law: "[T]he timing of landlord-tenant transactions is a matter of statewide concern not amenable to local variations.")

This incorrect statement of law is stated throughout the City's materials including: the mandatory notice owners must provide to residents regarding the RSO, the City's FAQ about the RSO, the City's flyer regarding both Ordinances, and in the City's workshop presented on 11/17/21. The City should clarify that the information it provided regarding the required notice for rent increases was incorrect and provide the correct information to avoid conflict with state law and confusion for both housing providers and tenants.

C. Incorrect RSO Exemptions in FAQ

The FAQ regarding the RSO lists certain categories of properties as exempt from the RSO that are not, in fact, exempt from the RSO. It appears that the exemptions for the just cause provisions of the just cause ordinance were mistakenly used in the FAQ, instead of the exemptions for the RSO. For example, "housing accommodations in which the tenant shares bathroom or kitchen facilities with the owner who maintains their principal residence at the residential real property" is listed as a category of property that is exempt from the RSO. This category is not exempt from the RSO but is exempt from the City's just cause requirements. This needs to be corrected to avoid confusion regarding the basic and essential question of what properties are and are not subject to the RSO.

D. Pending Rent Increase Notices

The RSO leaves open the question of whether rent increase notices issued before the effective date of the RSO but set to take effect after the RSO is in effect are valid under the RSO, or whether the RSO effectively voids those notices. This confusion is because the RSO's language is ambiguous regarding when a landlord violates the rent cap. Section 8-1998.1(a) prohibits rent increases in excess of the RSO's rent cap and states that it is a violation of the RSO to either serve a notice for a prohibited rent increase or demand a prohibited increase in rent. Serving a rent increase notice for an amount above the RSO's cap before it took effect, in and of itself, should not be considered a violation because the amount of the rent increase is not a prohibited rent increase until the RSO went into effect (which the City has essentially acknowledged in its FAQ, as discussed below). Logically, it follows that attempting to collect the increased rent (in an amount above the RSO's rent cap) after November 19, 2021 should also not be considered a violation because the rent increase amount is not prohibited as it was permitted when noticed. To interpret Section 1998.1(a) 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 ("Legislative enactments are generally presumed to operate prospectively and not retroactively unless the Legislature expresses a different intention.") However, due to poor drafting, section 1998.1(a) could also be susceptible to another interpretation which may consider collecting or attempting to collect the increased rent after November 19, 2021 as a

violation because that could be considered a "demand for a prohibited increase in rent" under the RSO at that point.

The City's FAQ states that rent increases issued prior to November 19th are not subject to the ordinance but fails to answer the pressing question regarding whether those rent increases can actually be collected once the RSO is in effect. We note multiple participants at the City's workshop on November 17th asked this specific question and the City was unable to provide a definitive response, except to say that there might be a challenge as to those rent increase notices because the RSO is vague on this point.

This issue is a basic question about how the ordinance applies that affects many landlords and tenants. It is unacceptable for the City to leave the question unanswered. The City must make clear whether rent increase notices served before November 19th but set to take effect after are permissible under the RSO to protect both landlords and tenants' rights under the RSO.

II. Just Cause Eviction Ordinance and related City Materials

CAA requests clarification and guidance on the following ambiguities, inconsistencies, and misstatements within the Just Cause Eviction Ordinance ("the Ordinance") and related City materials:

A. Inclusion of Immigration Information in Termination Notices

Section 8-1995(a) of the Ordinance states the requirements for notices terminating tenancies for rental units protected by the just cause provisions of the Ordinance. There is no provision in Section 8-1995(a) or anywhere else in the Ordinance requiring notices of termination of tenancies to include information about **protections related to immigration or citizenship status.**

Without any statutory authorization or support, the City has stated in its "Owner Required Written Notice to Tenants," available on the City's website which landlords must provide to tenants, that "[a]n Owner's Notice to Terminate the Tenancy shall include information about protections related to immigration or citizenship status of tenant found under Civil Code section 1940.35 and Code of Civil Procedure section 1161.4, as may be amended." This appears to be another error resulting from the City conflating distinct requirements. Section 8-1994(a)(1) requires owners to post in a conspicuous place at the rental property "a notice on a form prescribed by the City," providing information about the Ordinance, "including protections related to immigration or citizenship status of tenant found under Civil Code section 1940. 35 and Code of Civil Procedure section 1161. 4, as may be amended." An entirely different provision of the ordinance, Section 8-1995, governs the content of notices terminating the tenancy. Section 8-1995 does not include any requirement for the notice of termination to provide information regarding protections related to immigration or citizenship status of tenant found under Civil Code section 1940. 35 and Code of Civil Procedure section 1161.4. It is axiomatic that a City-prepared notice is not law and the Ordinance, which is law, controls. Therefore, the City should revise its informational

materials to remove any statement that information about protections related to immigration or citizenship status must be included in termination notices.

CAA further urges the City to consider whether the City-prepared notice that must be posted at covered rental properties should include additional information on such protections. As discussed above, Section 8-1994(a)(1) requires the City-prescribed posting to include information about "protections related to immigration or citizenship status of tenant found under Civil Code section 1940. 35 and Code of Civil Procedure section 1161. 4, as may be amended." Yet, the only portion of the City-prepared notice that even references such protections simply states: "The property owner is required to provide this written notice to tenants of their rights under the Ordinance, on a form prescribed by the City, providing information about the existence of the Just Cause Eviction Ordinance including protections related to immigration or citizenship status of tenant…" (emphasis added). In other words, the City's own materials merely restate the requirement of the ordinance rather than substantively providing the information the ordinance requires. In doing so, it appears the City is shifting the burden to rental property owners to provide the substantive information. Not only are owners under no obligation under the ordinance to identify and provide this information, it is in fact impossible for rental property owners to do so and be in compliance with the ordinance given that the ordinance requires the information to be on a "form prescribed by the City." If the City's goal is to ensure that information about these protections is provided, the City should provide that information rather than erroneously stating that rental housing providers are required to do so.

B. Method of Service of Termination Notices on the City

Section 8-1995(a)(4) of the Ordinance requires landlords to submit copies of notices of termination of tenancies to the City within five (5) after serving the termination notice on the tenant and requires landlords to mail proof of service on the City as evidence of their compliance with this section. The Ordinance does not specify or require a method of service.

CAA received an email from the City on December 6, 2021 which attached two letters prepared by the City which the City stated would be mailed "to every rental property owner in Santa Ana with information on how to comply with our Rent Stabilization Ordinance and Just Cause Eviction Ordinance." The letter regarding the just cause eviction ordinance requests notice of terminations to be provided to the City by certified mail.

Given that service by certified mail is not required by the Ordinance and the City's letter is merely requesting service by certified mail, CAA requests written confirmation that notices of termination may be mailed to the City by regular first class mail. Requiring landlords to serve termination notices by certified mail would greatly increase the time and expense of complying with this Ordinance's requirement to serve termination notices on the City. Landlords would have to go to the post office and pay the extra charge to serve by certified mail each and every time they issue a termination notice. Under current USPS rates, there is an additional cost of $3.75 per piece of mail sent certified mail. That is a hefty cost to attach to attach to the service of every termination

notice, particularly given that not every notice will actually result in the termination of the tenancy. For example, 3-day notices to pay rent or quit are commonly served when rent is not paid on time. However, those 3-day notices will only result in the termination of the tenancy if the tenant fails to cure the notice by paying the past-due rent. We assume this was not an intended consequence by the City.

Moreover, certified mail is not necessary to comply with Section 8-1995(a)(4)'s requirement that landlords maintain proofs of service of termination notices on the City. As the language of the Ordinance itself provides, a proof of service signed under penalty of perjury can be used and maintained by landlords to document their service on the City. Given that courts accept proofs of service as evidence that a document was timely delivered, the City should have no objection to recognizing proofs of service as complaint with the ordinance's documentation requirement.

Please confirm that landlords are not required to serve notices of termination via certified mail and that service by regular first-class mail will suffice.

C. Required Notice Period for Notices to Cease

Section 8-1994(c) requires that before a landlord of a rental unit protected by just cause may serve a notice of termination of tenancy for behavior that is a curable lease violation, the landlord must first give notice of the violation to the tenant with an opportunity to cure pursuant to Section 1161(3) of the Code of Civil Procedure. Section 1161(3) of the Code of Civil Procedure requires tenants be given three days' notice, excluding Saturdays, Sundays and judicial holidays, to cure lease violations. Accordingly, per the Ordinance's reference to Section 1161(3) of the Code of Civil Procedure, the Ordinance appears to require notices to cease to provide tenants with three days' notice, excluding Saturdays, Sundays and judicial holidays, to cure lease violations.

The City's FAQ, however, muddies the water on this issue because it uses different language when describing the required notice period for notices to cease. The FAQ states that notices to cease must give the tenant an opportunity to cure within a "certain period of time" instead of referring to Section 1161(3) of the Code of Civil Procedure. Again, while the Ordinance is law and the FAQ is not, the inconsistencies between the two has created confusion. The City needs to clarify and confirm that notices to cease that provide tenants with three days' notice, excluding Saturdays, Sundays and judicial holidays, to cure lease violations are complaint with the Section 8-1994(c) and amend its FAQ to prevent further confusion.

D. Incorrect Statement of Separately Alienable Exemption in FAQ

The FAQ incorrectly states the exemption from the Ordinance's just cause provisions for separately alienable property that is not corporately owned. The FAQ states property that is alienable separate from any other dwelling unit is exempt if the owner is not any of the following: "a real estate investment trust, a corporation, or a limited liability company and the tenants have been provided written notice that the residential property is exempt."

The exemption as stated in Ordinance, however, which is in conformance with state law just cause eviction protections, applies to owners that are limited liability companies, so long as none of its members is a corporation. The FAQ should be revised to avoid confusion regarding eligibility requirements for this exemption.

E. Service of City's Just Cause Notice with Rent Increase Notices

Section 8-1994(a)(2)(B) of the Ordinance requires property owners to provide the city-prepared notice regarding the Ordinance to residents protected by the just cause provisions "upon serving any notice of change in terms of Tenancy." The term "change in terms of Tenancy" is not defined by the Ordinance, leaving it unclear whether this section also applies to notices of rent increases. Compounding this ambiguity is the fact that the RSO specifically discusses notices to increase rent and provides specific requirements for what they must include (see Section 8-1998.6(b)) which intimates that the City views rent increase notices and changes in terms of tenancy notices as different terms. Logically, it follows that if the City had intended to require property owners to provide the city-prepared notice regarding the just cause ordinance with rent increase notices, the City would have simply stated that in the Ordinance. Additionally, requiring property owners to attach the city-prepared notice regarding the Ordinance with every rent increase notice would be more burdensome on property owners than only requiring the notice be included with notices of change in terms of tenancies. Rent increase notices are generally served routinely (e.g. allowed once every 12 months under the RSO) while notice of changes in terms of tenancy are not as routine. Moreover, while there is arguably some rational connection between the RSO requiring a city-prepared notice regarding the RSO be attached to rent increase notice (because the RSO regulates rent increases), the same nexus is not present between rent increase notices and the just cause ordinance. A different interpretation would be unreasonable but given that the language of the just cause ordinance is ambiguous, this matter should be clarified so landlords are aware of their responsibilities when serving both types of notices.

In the very short time since the Ordinances were 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 Ordinances apply to their situations. CAA urges you to, at the very least, provide accurate guidance on these basic issues of the interpretation of the Ordinances.

Sincerely,

CALIFORNIA APARTMENT ASSOCIATION

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Policy and Compliance Counsel