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Re: Proposed Amendment to CSFRA Regulations, Chapter 2, to Change the Definition of "Base Rent"

Dear Chair Almond and Members of the Committee:

I write on behalf of the California Apartment Association to object to the Committee's proposed adoption of a new definition of "base rent" that would exclude temporary rent concessions or rebates from the base rent calculation. That regulation, despite being characterized by the staff report as merely a "clarification" of existing law, is actually an improper substantive alteration of the CSFRA.

A. The Regulation Is Inconsistent with the Plain Language of the CSFRA.

Currently "base rent" for tenancies commencing after October 19, 2015, is defined by Section 1702(b)(2)[1] as "the initial rental rate charged upon initial occupancy, provided that amount is not a violation of this Article or any provision of state law. The term 'initial rental rate' means only the amount of Rent actually paid by the Tenant for the initial term of the tenancy."

Essential to a proper understanding of this term, however, is the accompanying definition of "rent," which is "[a]ll *periodic* payments

[1] Section references herein are to the CSFRA unless otherwise noted.

[CES2223.010]

and all nonmonetary consideration including, but not limited to, the fair market value of goods, labor performed or services rendered to or for the benefit of the Landlord under a Rental Housing Agreement concerning the use or occupancy of a Rental Unit and premises and attendant Housing Services, including all payment and consideration demanded or paid for parking, Utility Charges, pets, furniture, and/or subletting." (Section 1702(p), emphasis added.)

The proposed Regulation would define the initial rental rate as the sum total of compensation across the entire initial term, whereas the Ordinance itself defines "rent" with respect to individual "periods" (typically months) within the initial term of the tenancy. Thus—contrary to the proposed regulatory amendment—the construction of "base *rent*" that more fully comports with the language of these two provisions of the Ordinance is that if a tenant is lawfully charged and "actually" pays a given rental rate for any "period[]" within the initial term, that rental rate is the "base rent." Thus, if a tenant's rent is $1,000 per month and the tenant pays that amount for ten of the twelve months but is given a concession for two months, the "base rent" would nevertheless be $1,000 per month.

To hold otherwise would lead to absurd and deeply unfair results, the avoidance of which is a fundamental rule of statutory construction. *Collins v. Woods*, 158 Cal. App. 3d 439, 443 (1984) ("We must avoid this interpretation as it leads to an unfair and absurd result.").

For example, if a tenant defaults on a given month's rental payment, and therefore does not "actually" pay it, is the tenant to be rewarded, and the landlord punished, for that failure by an ongoing limitation on the landlord's ability to raise rental rates in subsequent years? While such a scenario might normally seem implausible, the last two years have demonstrated its salience. State law has prevented landlords from evicting tenants who default on rent in many instances, at least if those tenants pay 25% of the rent due. Civ. Code § 1179.03(g)(2)(B). If a tenant paid the first six months of rent under a new tenancy, and from there on out paid only the minimum necessary to

avoid eviction, the proposed regulation would purport to reduce the unit's "base rent" by the tenant's deficiency, effectively compounding the effect of that failure year after year, by limiting the amount by which the landlord can increase rents in subsequent years.

As another example, it is well-established that tenants are permitted to withhold some or all of the rent due for the duration of any period during which there are substantial habitability issues with the unit, so long as the issues are not attributable to the tenant or the tenant's guest. *See Green v. Superior Court of San Francisco*, 10 Cal. 3d 616 (1974). But such issues need not be attributable to malfeasance by the landlord either, and it would be manifestly unfair to punish the landlord in perpetuity for temporary harm to a rental unit. For example, if a rental unit is damaged by a fire through no fault of the landlord or tenant, and it takes two months to fully remedy the damage, the tenant may be entitled to a reduction in rent during that period. That reduction is justifiable on a temporary basis as a means of compensation for the reduced consideration that the tenant received under the lease during those months. *See id.*; Section 1710(c). But the Committee's proposed Regulation would effectively make that reduction permanent—it would automatically[2] reduce the landlord's ability to lawfully increase rents in *every subsequent year* by 16.67% (two months divided by twelve months). This, too, would be an unfair and absurd result.

Perhaps in recognition of such problems, staff proposes another subtle amendment to Chapter 2, section (b)(2), of the Committee's regulations. Currently, that regulation tracks the language of the CSFRA itself exactly, providing that "[t]he term 'initial rental rate' means only the amount of Rent actually paid by the Tenant for the initial term of the tenancy." The proposed amendment, however, alters this to provide, "The term 'initial rental rate' means only the amount of Rent

[2] This automatic effect further highlights the inconsistency with the CSFRA. Rent reductions for a decrease in housing services are to be granted by petition. (Section 1710(c).) By enacting the amended Regulation, the Committee would bypass this petitioning requirement, at least in a subset of cases.

actually required to be paid by the Tenant for the initial term of the tenancy." (Emphasis added.)

The problems with this amendment, however, are two-fold. First, while this modification *might* address the failure to pay rent during the COVID period, discussed above, it doesn't necessarily solve the "withholding" example. And, more importantly, this regulatory change conflicts with the actual text of the CSFRA itself. "An agency invested with quasi-legislative power to adopt regulations has no discretion to promulgate regulations that are inconsistent with the governing statute, in that they '"alter or amend the statute or enlarge or impair its scope."' *Colmenares v. Braemar Country Club, Inc.*, 29 Cal. 4th 1019, 1029 (2003) (quoting *Carmel Valley Fire Protection Dist. v. State of Cal.,* 25 Cal. 4th 287, 300 (2001)).

That Staff felt the need to add the highlighted language seems to hint at a recognition of the problems that their proposal to average rent across an entire year creates, but that is a problem of the Regulation's own making. Focusing on whether a given rental rate was lawfully paid in any given "period" during the initial term of the tenancy, as Section 1702(p), directs, avoids these problems in the first place.

Simply put, the proposed amendments are inconsistent with the plain language of the CSFRA itself and should be rejected.

B. Retroactive Application of the Amendment Violates Housing Providers' Right to Due Process.

We are concerned that Staff's characterization of this amendment as merely a "clarification" is an attempt to justify its retroactive application. But any effort to apply it retroactively, when landlords were not reasonably on notice of this unprecedented interpretation, would work a fundamental unfairness in violation of due process. *See, e.g., Myers v. Philip Morris Cos., Inc.*, 28 Cal. 4th 828, 845-47 (2002) (declining to apply a statute retroactively where it would raise serious constitutional questions under the due process clause) (citing *Eastern Enters. v. Apfel*, 524 U.S. 498, 548-49 (1998) (Kennedy, J., concurring)); *Eastern Enters.*, 524 U.S. at 557 (Kennedy, J., concurring)

("administrative order [w]as 'arbitrary, capricious, an abuse of discretion,' [citation] because 'the inequity of . . . retroactive policy making . . . is the sort of thing our system of law abhors' (ellipses in original) (quoting *Nat'l Lab. Rel. Bd. v. Guy F. Atkinson Co.*, 195 F.2d 141, 149, 151 (9th Cir. 1952))). Retroactive application of the proposed regulatory amendment would call into question as many as *seven years* of rent increases, imposed in good faith, based on an interpretation that landlords cannot reasonably have been expected to anticipate.[3]

We recognize that in some narrow circumstances, regulations that seek to "clarify" the law may be given retroactive effect if they are (2) adopted shortly after the interpretive question arises and (2) close enough in time to reasonably suggest that the "clarification" comports with the intent of the original enacting body, *see W. Sec. Bank v. Superior Court*, 15 Cal. 4th 232, 243-44 (1997); *Hunt v. Superior Court*, 21 Cal. 4th 984, 1008 (1999). Those conditions are not present here, given that seven years have elapsed since the adoption of the CSFRA. *See, e.g., Peralta Cmty. Coll. Dist. v. Fair Empl. & Hous. Comm'n,* 52 Cal. 3d 40, 52 (1990) (rejecting legislative attempt, during 1987-1988 session, to "clarify" the meaning of former § 12970 of the Fair Employment & Housing Act, adopted in 1980, *see* Cal. Stats. 1980, ch. 992, § 4).

And even when such circumstances are present, "a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts." *W. Sec. Bank*, 15 Cal. 4th at 244.

Moreover, such purported "clarifications" will not be applied retroactively if they fill gaps that "had not previously been spelled out" by elaborating in detail on topics about which the law was previously silent. *See Lee v. Amazon.com, Inc.*, __ Cal. App. 5th __, No. A158275,

[3] The staff report indicates that some landlords and tenants have been advised in accordance with the proposed regulatory amendment when they "have reached out with questions." At best, this would amount to an improper "underground regulation" and cannot provide the notice to landlords more generally that the due process clause would require.

2022 Cal. App. LEXIS 202, at *46-48 (Ct. App. Mar. 11, 2022) (rejecting retroactive application of purportedly "clarifying" regulations of California Environmental Protection Agency's Office of Environmental Health Hazard Assessment).

That is undeniably the case here. Landlords in Mountain View have not previously been apprised of the fact that the monthly rent that they lawfully charged tenants during the initial term of the tenancy, in accordance with the Costa-Hawkins Rental Housing Act, Civ. Code § 1954.50 et seq., and which the tenant "actually paid" (Section 1702(b)) as one of the "*periodic* payments" of "rent" (Section 1702(p)), would be subject to reduction based on temporary concessions or—especially—rebates. This is a substantive, unanticipated change in the law that would work a fundamental unfairness if applied to rent increases imposed prior to the effective date of the Regulation.

C. Conclusion.

We urge you to reject the proposed Regulation, which is inconsistent with the plain language of the CSFRA. At the very least, however, we urge you to delay consideration of the amendment and conduct stakeholder outreach to work towards a regulation that is more equitable and does not deprive housing providers of their right to due process.

Sincerely,

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