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June 20, 2022

Via Electronic Mail Only

Nicole Haines-Livesay
Chairperson
Mountain View Rental Housing Committee
500 Castro Street
Mountain View, CA 94041

RE: RHC June 20, 2022 Agenda Item 9.1 – Proposed CSFRA Regulations re Base Rent and Concessions

Dear Chair Haines-Livesay and Committee Members:

The California Apartment Association (CAA) appreciates the work by the Mountain View Rental Housing Committee (RHC) and its staff to work with stakeholders on the development of regulations related to the calculation of Base Rent.

CAA cannot support the proposed regulation in its current form. CAA maintains its long-standing opposition to the proposed regulations as stated in letters to the RHC from both CAA and its legal counsel on March 28, 2022 and from CAA on May 23, 2022. CAA reserves all of its rights and defenses in connection with this matter.

As the RHC reviews this matter at its June 20, 2022 meeting, it is important to consider two items:

- Up front concessions that often take the form of one or two months free rent are a critical tool to remove barriers to entry to housing and promote housing affordability, consistent with the stated goals of the Community Stabilization and Fair Rent Act (CSFRA).

- The retroactive nature of the proposed regulation is inconsistent with other cities that adopted similar regulations and penalizes housing providers who complied in good faith with the CSFRA.

Concessions Promote Access to Housing

Up front rent concessions are a critical tool housing providers use to lease vacant units and reduce barriers for people looking to access rental housing. As the CSFRA itself recognizes, moving can be costly. See CSFRA Section 1701(s), which states in relevant part, "nearly all rental housing requires that prospective tenants pay three months' rent up front in order to secure a lease - generally representing the first month's rent, last month's rent, and security deposit." Rent concessions offset these costs. They often take the form of one- or two-months free rent and reduce the up front costs a tenant must pay when moving out of one home and into a new one. These up front concessions do not reduce the periodic payment of monthly rent over the lease term and the tenant knows the amount they must consistently pay each month.

By adopting the amendment as written, many housing providers will discontinue offering up front rent concessions as they will be forced to treat a one-time incentive as a permanent reduction to the tenant's rent.

When a tenant receives a concession in the form of a free month of rent, the tenant is accustomed to paying the stated rent in their rental agreement each month. When a tenant receives an Annual General Adjustment (AGA), the only change they experience in their periodic payment of monthly rent is the increase allowed by the AGA.

Regulation is Inconsistent with Peer Cities; Punishes Housing Providers
Up front rent concessions were issued by housing providers and agreed to by tenants in good faith. Since the effective date of the CSFRA, housing providers have been following the law and were in compliance with the CSFRA when they offered, and the tenant accepted, an upfront rent concession in the form of a free month of rent. Adopting the regulation as drafted now reverses course and attempts to make a violation of one-time temporary rent concessions that do not alter the monthly rent paid.

The proposed regulation, as drafted, creates confusion, increases bureaucracy, and unfairly penalizes rental housing providers with potentially years of rent roll backs, creating a significant financial liability. The petition process can be complicated, time consuming, and expensive for housing providers, tenants, and the RHC. It's important that this regulation recognizes and balances the risks with the intended benefits.

In its earlier analysis, as a justification for developing this regulation, RHC staff referred to several rent control programs in California that regulated the use of rent concessions. However, it is important to note that several cities including Richmond, Berkeley, and West Hollywood did not include any express retroactive application in their adopted regulation on rent concessions. If the RHC seeks to remain consistent with other jurisdictions who have regulated concessions, Mountain View's regulation should follow the lead of these other cities and not amend its petition process to specifically allow for retroactive application.

Conclusion & Recommendations
Should the RHC feel compelled to adopt regulations on this matter, the RHC must recognize the importance of one-time concessions and how they are different from a concession that takes the form of an ongoing monthly reduction to the tenant's monthly rent. The RHC should specifically exclude one-time, up-front concessions from the calculation of "Base Rent." And, to align with some degree of consistency with other cities and to reduce confusion, bureaucracy and not penalize housing providers who were acting in good faith when offering one-time concessions, any adopted change to the petition process in Chapter 4 must not be retroactive in nature and should only be applied to future tenancies

CAA appreciates the RHC's commitment to working with stakeholders and is available to answer any questions or provide additional information you may find helpful as you consider this issue.

Sincerely,

Joshua Howard
Executive Vice President
California Apartment Association

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March 28, 2022

Via Electronic Mail Only

Susyn Almond
Chairperson
Mountain View Rental Housing Committee
500 Castro Street
Mountain View, CA

RE: RHC March 28, 2022 Agenda – Draft Amendments to Chapter 2 of CSFRA Regulations

Dear Chair Almond and Committee Members:

The California Apartment Association (CAA) opposes the proposed amendment to Chapter 2 of the Community Stabilization and Fair Rent Act (CSFRA) Regulations to clarify the definition and calculation of "Base Rent."

This regulation, as drafted, is a monumental shift in policy that is not only ill considered, but also deceivingly framed as nothing more than a technical clarification. The proposed regulation is bad policy that disincentivizes landlords from reducing barriers to housing and is inconsistent with California's statewide rent control law which uses a commonsense approach for calculating Base Rent when a landlord provides a concession.

The amendment is also subject to significant legal scrutiny as it conflicts with the plain language of the CSFRA and infringes upon the procedural due process rights and contracts rights of rental housing providers throughout the City.

The Proposed Regulation Discourages Housing Affordability

The stated purpose of the CSFRA was to reduce displacement and promote community stability. Far from serving these goals, the proposed amendment does the opposite and disincentivizes the use of a key tool to reduce the cost of accessing housing. A tool that, it's worth noting, costs the City nothing. The proposed amendment would, at best, discourage housing providers from working with their residents to remain in their homes by reducing balances owed or reducing the upfront costs for families to move into vacant units through the use of move-in specials. At worst, the regulation penalizes landlords for these practices.

Rent concessions are a critical tool housing providers use to lease-up vacant units and increase access to housing. As the CSFRA itself recognizes, moving can be costly. See CSFRA Section 1701(s), which states in relevant part, "nearly all rental housing requires that prospective tenants pay three months' rent up front in order to secure a lease - generally representing the first month's rent, last month's rent, and security deposit." Rent concessions help to offset these costs,

as they often take the form of a one-time rent discount that minimize the upfront costs a tenant must pay when moving into a new unit.

The proposed amendment penalizes housing providers who offer these one-time bonuses to promote housing stability and security. By adopting the amendment as written, many rental owners will likely discontinue the use of rent concessions in rent negotiations as they will be forced to treat such discounts as permanent reductions rather than a one-time cost. The proposed regulation also discourages housing providers from working with tenants who are struggling, as any reduction in the amount a tenant owes is then considered a permanent rent reduction.

In short, far from serving the CSFRA's goals of making housing more affordable and secure, the proposed regulation punishes housing providers who provide discounts and flexibilities that help renters access and stay in rental housing.

The Proposed Regulation Conflicts with the Plain Language of the CSFRA

In addition to being bad policy that is diametrically opposed to the stated purposes behind the passage of CSFRA – and which is being adopted with zero input from stakeholders – the proposed regulation is also susceptible to serious legal challenges. First, the proposed regulation is not simply a "clarification" as characterized by the staff report but would instead serve to rewrite the definition of "base rent" in a way that is inconsistent with the language of the CSFRA itself.

To be clear, the CSFRA's current definition of base rent does not require that rent concessions, rebates, or discounts offered to a tenant be included in its calculation. Rent concessions, discounts or rebates are nowhere mentioned in the definition of base rent (or anywhere within the CSFRA), nor is there any reference to the monthly averaging calculation as is cited in the proposed regulation. CAA understands that RHC's position is that the definition of base rent has always required the inclusion of rent concessions and the proposed regulation would simply clarify and confirm this requirement. The RHC's own actions, however, belie that conclusion. Indeed, the very fact that the RHC is considering this regulation demonstrates that the current definition of base rent does not currently require the factoring in of rent concessions, or at the very least, is unclear as to whether rent concessions must be included.

Additionally, the CSFRA's definition of base rent suggests, if not requires, rent concessions to <u>not</u> be included in the calculation of base rent. Section 1702(b) provides the Base Rent for tenancies commenced on or after October 19, 2015, is the "initial rent rate charged upon initial occupancy," and that "initial rental rate" means "only the amount of Rent actually paid by the Tenant for the initial term of the tenancy." Additionally, the accompanying definition of "rent," is "[a]ll 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(p)).

The definition of "rent" informs what base rent is to include in two important ways. First, base rent includes "all nonmonetary consideration." A concession like free rent is a non-monetary consideration received by a landlord in exchange for the value of a tenant moving into the unit or remaining in the unit. Thus, rent concessions should be added to the "amount of rent actually paid" by the tenant, not discounted from that amount as the proposed regulation would. Second,

the definition of base rent is based on periodic payments, typically months, within the initial term of tenancy. Thus, if a tenant pays their monthly rental rate, even if they do not pay some months because they were given concessions, their base rent is still their monthly rental rate they "actually pay" when they do pay. The base rent in such a circumstance does not turn into an averaged amount, accounting for the concessions, as the proposed regulation and staff report outlines (e.g., a tenant with a monthly rental rate of $1,000 who received two months of rent concessions, still actually pays $1,000 when he or she makes monthly payments; the tenant never "actually paid" $833.33 per month).

Indeed, even Section 1702(b)'s reference to only the rent "actually paid" – which appears to be the authority on which the RHC is relying for the proposed amendment – lends at least as much support to the opposite conclusion as it does to the position taken by the RHC, as it requires the base rent to be adjusted based on what was *not* paid rather than what was *actually* paid. Reducing the base rent by the amount of any concession provided would adjust the base rent based on amounts the tenant did not pay rather than looking to the monthly rental rate actually paid by the tenant. Moreover, taking the RHC's interpretation of this language (i.e. an average of the exact amount tendered by a tenant to the landlord over the entire initial rent term) to its logical end would lead to untenable and unintended results. Specifically, tenants who were delinquent on their rent or otherwise did not pay the full amount of their rent – either without their landlord's approval or because the landlord agreed to write off some portion of delinquent payments – would be rewarded with a lower base rent calculation because they would have "actually paid" less rent. This would be unfair to paying tenants and landlords alike and clearly was not intended by the CSFRA.

All this is to say, the current definition of base rent does not require rent concessions be included in its calculation, and therefore the proposed regulation is in conflict with the CSFRA. "[R]egulations that alter or amend the statute or enlarge or impair its scope are void." (*Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 982). The proposed regulation should be rejected on this basis.

The Proposed Regulation Could Reopen Seven Years of Rent Increases in Violation of Constitutional Rights

Additionally, the proposed regulation could serve to reopen *seven years* of rent increases issued in good faith, if the rent increases were based on base rents that did not factor in rent concessions. Landlords could also be required to pay rent credits for those seven years if the rent increases are rolled back – which could be a very large sum given the number of years and units owned. Adding insult to injury, landlords could also face administrative penalties, and civil liability, including attorney's fees, for issuing rent increases that are now deemed to not comply with the CSFRA. (Section 1714). Landlords would be put in this fundamentally unfair position through no wrongdoing of their own but because the proposed regulation altered the definition of base rent in a way they could not have reasonably foreseen, and in violation of their constitutionally protected contract and due process rights.

The United States Constitution prohibits the government from passing any law "impairing the [o]bligation of [c]ontracts." (United States Constitution, Article 1, Section 10). The proposed regulation, however, would do just that. The proposed regulation would reopen for negotiation and possible modification seven years of rent increases, despite the fact that the rental rates were agreed to and contracted for in the lease agreements. It is industry standard for leases that include rent concessions, for the "initial rental rate" to be stated as the monthly gross rent. The landlord and tenant understand that there is a contractual monthly amount and concessions are

not included in that amount because the concessions are treated as a credit or rebate on the initial rental rate.

The "threshold inquiry" when evaluating whether a law violates the Contract Clause asks whether the law substantially impairs an existing contractual relationship. (*Energy Reserves Grp., Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 411). The proposed regulation certainly does that. Indeed, the proposed regulation would render meaningless the agreed to rental rate term in the contractual agreement between the landlord and tenant, allowing that term to now be challenged and modified. Accordingly, the proposed regulation would severely impair landlords' contractual rights to both rely on and enforce the terms of their lease agreements in violation of the Contracts Clause, and should be rejected on this basis.

In addition to infringing on constitutionally protected contract rights, the proposed regulation would work a profound unfairness on landlords in violation of due process. A fundamental pillar of the due process protections afforded by the California and United States Constitution is that before the government can infringe on a person's life, liberty or property interests, a fair procedure must be used - at a minimum reasonable notice and an opportunity to respond must be provided. (Cal. Const., Art, I § 1; U.S. Const. Amend. XIV § 1, *Nasir v. Sacramento County Off. of the Dist. Atty.* (1992) 11 Cal.App.4th 976, 985).

The proposed regulation is poised to significantly impair landlords' property interests without providing adequate procedural protections. Specifically, landlords could be placed in the untenable position of having seven years of rent increases issued in good faith reopened for negotiation, paying rent credits for those seven years in the case of rollbacks, and fighting administrative and civil actions and paying any resulting liability - all through no fault of their own and without any reasonable notice that the RHC would materially alter the definition of base rent. Landlords should not now be punished for this unanticipated change in the law. To do so would be manifestly unfair and violate constitutionally guaranteed due process protections.

State Law Provides a Reasonable Standard to Address Concessions

In 2019, the California State Legislature adopted AB 1482 (Chiu), which established a statewide framework for tenant protections including, but not limited to: (1) statewide rent control that limits rent increases to 5% plus inflation, and (2) eviction protections that apply to most rental properties in the state. Recognizing move-in and lease renewal concessions as a critical and vital tool to promote access to housing and housing stability, AB 1482 included a provision that concessions may be excluded from the calculation of base rent when the landlord calculates a rent increase under AB 1482 so long as these discounts are separately listed and identified in the lease or rental agreement. AB 1482 therefore strikes a reasonable balance by allowing housing providers to preserve their base rent exclusive of one-time discounts or concession, while ensuring transparency by requiring these amounts to be separately identified in the rental agreement.

Although rental units subject to the CSFRA are, in many respects, exempt from the requirements of AB 1482, the RHC should give consideration to the language in AB 1482 which provides a framework for calculating rent increases when a landlord and tenant agree to a concession.

AB 1482 states, in pertinent part, "an owner of residential real property shall not, over the course of any 12-month period, increase the gross rental rate for a dwelling or a unit more than 5 percent plus the percentage change in the cost of living, or 10 percent, whichever is lower, of the lowest gross rental rate charged for that dwelling or unit at any time during the 12 months prior

to the effective date of the increase. *In determining the lowest gross rental amount pursuant to this section, any rent discounts, incentives, concessions, or credits offered by the owner of such unit of residential real property and accepted by the tenant shall be excluded. The gross per-month rental rate and any owner-offered discounts, incentives, concessions, or credits shall be separately listed and identified in the lease or rental agreement or any amendments to an existing lease or rental agreement.*" (emphasis added)

To provide the clarity the RHC is seeking to offer under the proposed amendment to Chapter 2, **CAA recommends that the RHC follow the approach taken by AB 1482 which provides an allowance for rental concessions, transparency for the concession, and clearly recognizes that it is a one-time incentive, not an ongoing component of the base rent.**

Using this approach, the RHC will create a consistent standard across Mountain View for *all* rental units even those not subject to the CSFRA's rent stabilization component as units built between 1995-2007 would be included under AB 1482. This approach further eliminates the risk that tenants will lose access to rent discounts and concessions that are both popular and help reduce barriers to housing, while at the same time ensuring that such discounts and concessions are clearly disclosed so there is not future confusion.

Lack of Stakeholder Engagement is a Chronic Problem

While the concerns with the proposed amendment are serious in and of themselves, perhaps most concerning is that they are symptomatic of a larger issue: the RHC's lack of engagement with stakeholders, both on the proposed amendment and nearly every other matter that comes before it. When the CSFRA was being implemented in 2017, the City went to great lengths to work closely with landlords, tenants, and the rental housing industry to seek feedback on the pending regulations that were being developed. However, once seated, the RHC and its staff have never once reached out to the California Apartment Association or its members for input or feedback on any matter coming before the RHC. The first time many stakeholders learn of important items coming before the RHC is when the agenda is posted and then, the only opportunity for input is in two-minute segments as part of public comment on an agenda item before the RHC.

Going forward, the RHC needs to adopt a better mechanism to engage stakeholders on major regulations before they're posted to the agenda. Failure to do so will only further perpetuate additional animosity, acrimony, and distrust between the rental housing owners and the RHC. The continued failure to seek out the feedback of those whom the RHC seeks to regulate denies the RHC from receiving critical input that could be helpful in drafting regulations that both protect renters and balance the operational needs of the rental housing providers.

Conclusion

Like many businesses, housing providers have struggled over the past two years to provide an essential service while grappling with increased costs, supply shortages, and constantly changing public health orders. Housing providers have been asked to serve as the first line of defense against housing insecurity as two crises – a global pandemic and long-running housing shortage – have collided. They have been asked to have compassion, be flexible, work with tenants, and reduce barriers to housing. The RHC proposes to repay those efforts with a policy that directly penalizes the precise actions housing providers were asked to take.

The RHC's actions are not only deeply unfair to housing providers, they seemingly serve nobody's interests. Tenants will not benefit from their landlords being disincentivized from offering concessions and discounts. The proposed regulation is nothing more than regulation for regulation's sake. It is a deeply flawed, legally questionable solution in search of a problem that does not exist. CAA urges the RHC to reject the proposed regulation.

Sincerely,

Joshua Howard
Executive Vice President, Local Government Affairs
California Apartment Association

CC:
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