



Rent Stabilization Board
Legal Department

MEMORANDUM

DATE: April 15, 2021

TO: Honorable Members of Rent Stabilization Board

FROM: Honorable Members of the IRA/AGA/Registration Committee

By: Matthew Siegel, Staff Attorney *MS*

SUBJECT: Proposed Amendments to Regulation 1013– Vacancy Rent Adjustment [Second Reading]

Recommendation:

That the Board adopt an amendment to Regulation 1013, requiring that, when a rental agreement includes periods for which the tenant pays reduced, discounted, or “free” rent, the written lease shall include language that states what the base rent ceiling will be at the expiration of the initial term of the tenancy or, in the case of a month-to-month tenancy, after the first twelve months of their tenancy. This language shall be in fourteen point font and in close proximity to the space reserved for the tenant’s signature. The IRA/AGA/Registration Committee unanimously recommended these changes at its March 2, 2021 meeting.¹ The Board adopted these proposed amendments on first reading at its March 15, 2021 meeting.

Background and Need for Rent Stabilization Board Action:

Initially passed in 1996, Board Regulation 1013 implements Costa-Hawkins which provides that the landlord may set the initial rent at the commencement of a new tenancy. For tenancies commencing on or after January 1, 1999, the initial rent or “base rent” for a rental unit is the monthly market rent established by the parties at the commencement of the tenancy (Rent Board Regulation 1013(A) (2)).

In 2003 the Board amended Regulation 1013 to clarify that when the rental agreement includes periods for which the tenant pays reduced, discounted or “free” rent, the monthly market rent is calculated as the average of the monthly payments made during the initial term of the agreement or, in the case of a month-to-month tenancy, during the first twelve months of the tenancy (Board

¹ The committee considered also requiring that leases that are subject to the rent-averaging provisions of Regulation 1013(A)(2) contain a notification requirement that these tenancies are subject to the good cause for eviction protections listed in BMC 13.76.130 but ultimately decided to limit this proposal to only amend the regulation to require that the rent ceiling be clearly identified in the lease when the agreement provides for reduced, discounted, or “free” rent.

Regulation 1013(A) (2)). The amendment was passed due to some property owners structuring their rental agreements to provide for an above-market rent for the first month followed by some form of free or discounted rent for the remainder of the term, thus creating the appearance of a higher “initial” rent. For instance, if the market value of a unit is \$2,000 per month, or \$24,000 per year, the lease may state that the rent is \$2,400 for the first month but provide for two months free. The owner would then file a Vacancy Registration Form with the Board listing the base rent as \$2,400 based on the first months’ rent. As a result the tenant would have paid a total of \$24,000 in rent for the year, or a monthly average of \$2,000, not the listed \$2,400. Property owners would then seek to take the Board’s annual increases on a base rent of \$2,400 and not the proper \$2,000. The purpose of the 2003 amendment was thus to ensure that the base rent is the market rent for the length of the lease term or, in the case of a month-to-month tenancy, the average monthly payments made during the first twelve months of the tenancy.

Currently, in response to Covid-19 and to respond to an increase in vacancies, some landlords have been structuring their initial rental agreements to provide for drastically higher initial monthly payments followed by either reduced payments or periods of “free” rent, then followed by monthly rents that are less than the initial elevated rents. These rental agreements also give tenants the option to break their lease after a set period of time without penalty. For many of these agreements, the total rent paid by the tenant during this initial timeframe up to or prior to lease-breaking, amounts to an average monthly rent that is less than what the base rent would be after the implementation of the rent averaging required by Regulation 1013(A) (2).²

Initially, absent a clear indication of preemptive intent from the legislature, there is a presumption that local regulation in an area over which the local government traditionally has exercised control is not preempted by state law.³ It has long been held that local rent control ordinances have wide latitude to regulate or monitor rent ceilings and grounds for evictions.⁴ The amendment notifying tenants of the lawful monthly or base rent falls squarely within the Board’s powers to regulate rent ceilings.⁵

The proposed change would mandate that the owner state what the monthly market rent, or base rent, would be at either the expiration of the initial lease term or the expiration of the first twelve months of a month-to-month tenancy. This form of disclosure is important since some tenants may be misled by the structure of the rental agreement when it provides for varying amounts of rental payments and/or “free” rent over the course of the lease. While such leases are permissible under the regulation, the IRA/AGA/Habitability Committee reasoned that tenants should be

² While leases structured in this form are unique, as long as the base rent is properly calculated, these rental agreements are permissible.

³ Action Apartment Assn. Inc. v. City of Santa Monica (2007) 41 C.4th 1232

⁴ Fisher v. City of Berkeley (1984) 37 C.3d 644; McHugh v. City of Santa Monica (1989) 49 C.3d 348, 375

⁵ Board Regulations Chapter 10 [Establishment of Base Rent Ceiling], Chapter 12 [Individual Adjustment of Rent Ceilings] An additional proposed change to the regulation requiring lease language disclosing to tenants the existence of good cause protections was tabled by the Committee for further discussion.

informed as to the exact monthly rent or base rent that will be permitted under the ordinance should they wish to continue their tenancy either at the expiration of the initial lease or after the first twelve months of their month-to-month tenancy.

Conclusion

The COVID-19 pandemic appears to have created a proliferation of Berkeley leases structured in the format described herein. The proposed amendment requires disclosure as to what the lawful base rent is under the terms of their rental agreement to any tenants in rent-controlled units with leases that provide for discounted or “free” rent.

The proposed Regulation 1013 is attached. The proposed amendments are underlined.

Name and Telephone Number of Contact Person:

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1013. Vacancy Rent Adjustment - Page 1

(A) New Maximum Allowable Rent

(1) Pursuant to Section 1954.50, et seq. of the Civil Code, the landlord may establish the lawful maximum allowable rent for any controlled rental unit consistent with this regulation. The new rent level shall thereafter become the maximum lawful rent ceiling for the unit for all purposes including, but not limited to, the computation of all future rent adjustments. The unit shall otherwise remain controlled by all other regulations of the Rent Board.

(2) In this Regulation the terms “new rent level,” “new rent ceiling” and “initial rental rate” refer to the rent established by the landlord for a tenant whose tenancy becomes effective after January 1, 1996. For tenancies commencing on or after January 1, 1999, the “initial rent” for a rental unit shall be the monthly market rent established by the parties at the commencement of the most recent tenancy. Where the rental agreement includes periods for which the tenant pays reduced, discounted or “free” rent, the “monthly market rent is calculated as the average of the monthly payments made during the initial term of the agreement or, in the case of a month-to-month tenancy, during the first twelve months of the tenancy.

(3) Required provisions in rental agreements that contain periods for which the tenant pays reduced, discounted or “free” rent.

When the rental agreement includes periods for which the tenant pays reduced, discounted or “free” rent, the rental agreement must include a clause identifying what the rent ceiling will be following the expiration of the initial term of the tenancy; or, in the case of a month-to-month tenancy, after the first twelve months of the tenancy. The rent ceiling shall be calculated in accordance with the averaging requirements as set forth in Section 1013(A)(2) herein.

This statement must be in at least fourteen point font and in close proximity to the space reserved for the tenant’s signature.

The provisions of Section 1013(A)(3) set forth herein shall become effective for initial rental agreements entered into no sooner than fifteen days after the date this regulation becomes effective.

(B) Vacancy Rent Levels

(1) Commencing January 1, 1996, a landlord may establish the initial rent rate for all new tenancies consistent with Civil Code Section 1954.50, et seq., and any Board regulations enacted consistent therewith, except where any of the following applies:

(a) (i) The previous tenancy has been lawfully terminated by the landlord pursuant to Civil Code Section 1946, unless the tenancy was terminated prior to December 31, 1994 pursuant to Berkeley Municipal Code section 13.76.130A.9. in order for the landlord to

recover possession of the unit for his or her own use and occupancy as his or her principal residence or for use and occupancy as a principal residence by the landlord's spouse, child or parent and the landlord or relative thereafter resided continuously at the unit for at least two years; or

(ii) The previous tenancy has been lawfully terminated upon a change in terms of tenancy noticed pursuant to Civil Code Section 827, except a change permitted by law in the amount of rent or fees or resulting from the owner's termination of or failure to renew a contract or recorded agreement with the Berkeley Housing Authority or any other governmental agency that provided for a rent limitation to a qualified tenant of the unit. A tenancy shall be presumed to have terminated upon a change in terms of tenancy if the tenant(s) vacate(s) the rental unit within twelve months of the landlord's unilateral change in the terms of the lease. Absent a showing by the landlord that the tenant(s) vacated for reasons other than the change in the terms of the lease, the initial rental rate for the new tenancy shall be no greater than the most recent rent ceiling (prior to the new tenancy).

(b) The new tenancy began within three years of the date that the owner terminated or failed to renew a contract or recorded agreement with the Berkeley Housing Authority or any other governmental agency that provided for a rent limitation to a qualified tenant of the unit, unless, for tenancies established after January 1, 2000, the new tenancy is exempted from this limitation pursuant to Civil Code Section 1954.53(a)(1)(B). During the three year period, the rental rate for any new tenancy established in that vacated unit shall be at the same rate as under the terminated or nonrenewed contract or recorded agreement, increased by any subsequently authorized Annual General Adjustments.

(c) The landlord has otherwise agreed by contract with the City of Berkeley or any other public entity to limit or otherwise restrict rent levels in consideration for a direct financial contribution or any other forms of assistance specified in Chapter 4.3 (commencing with Section 65915) of Division 1 of title 7 of the Government Code.

(d) The dwelling or unit has been cited in an inspection report by the appropriate government agency as containing serious health, safety, fire or building code violations, as defined by Health & Safety Code Section 17920.3 excluding those caused by disasters, for which a citation was issued at least 60 days prior to the date of the vacancy, and the cited violation had not been abated when the prior tenant vacated and had remained unabated for at least 60 days, unless the time for correction was extended by the agency that issued the citation.

(e) The prior tenant vacated the property as a proximate result of the conduct by the landlord which constitutes acts prohibited by law, or which constitutes constructive eviction or a breach of the covenant of quiet enjoyment of the property.

(f) The prior tenant was the spouse, child or parent of a landlord who recovered

possession of the unit pursuant to Berkeley Municipal Code section 13.76.130.A.9b.

(g) The initial rental rate as described in this section shall not, until January 1, 1999, exceed the amount calculated pursuant to subdivision (2) below. Nothing herein, however, shall prevent a landlord from charging a new rent level which is less than any preexisting rent ceiling.

(2) Before January 1, 1999, no landlord may set an initial rent level except upon the occurrence of a voluntary vacancy, abandonment, or an eviction for non-payment of rent, and an initial rent level may be set at an amount no greater than:

(a) Fifteen percent (15%) more than the rent in effect for the immediately preceding tenancy, or

(b) Seventy percent (70%) of the prevailing market rents in effect at the time of the beginning of the new tenancy for comparable units as established by HUD Fair Market Rents (FMRs) or,

(c) The lawful rent ceiling.

(d) Fifteen percent (15%) more than the rent in effect for the immediately preceding tenancy plus increases in the lawful rent ceiling for which the landlord became eligible but which were not implemented because the tenancy ended in December and the new tenancy began in January of the following year.

(3) As used in this subsection, the term "rent in effect" shall mean the last rent actually paid by the last tenant to occupy the unit and pay rent.

(4) The rent increases authorized by subsection (B)(2) shall not occur more than twice for any unit between January 1, 1996 and December 31, 1998. Where the initial rent imposed by a landlord on or after January 1, 1996 is no more than the rent in effect for the immediately preceding tenancy, the initial rent shall not count as one of the two increases authorized by this subsection. Nothing contained herein negates the obligation contained in Subsection (K) of this Regulation to register all new tenancies which commence after January 1, 1996.

(C) Single Family Residences

(1) For purposes of this Regulation, a single family residence is defined as a unit that is alienable separate from the title to any other dwelling unit or is a subdivided interest in a subdivision as specified in subdivision (b), (d) or (f) section 11004.5 of the Business and Professions Code.

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(2) Commencing January 1, 1996, with regard to a single-family residence that has not been rented since May 31, 1980, the landlord may establish the initial and all subsequent rental rates for all new tenancies.

(3) Commencing January 1, 1996, the landlord may establish the rent level for a new tenancy in a single-family residence consistent with subsection (B) of this regulation.

(4) Commencing January 1, 1999, the landlord may establish the initial and all subsequent rental rates of a single-family residence for all new tenancies except where:

(a) The preceding tenancy has been terminated by the landlord by notice pursuant to Section 1946 of the Civil Code or has been terminated upon the change in terms of tenancy noticed pursuant to Section 827 of the Civil Code.

(b) The landlord has otherwise agreed by contract with the City of Berkeley or any other public entity to limit or otherwise restrict rent levels in consideration for a direct financial contribution or any other forms of assistance specified in Chapter 4.3 (commencing with Section 65915) of Division 1 of title 7 of the Government Code.

(c) The dwelling or unit contains serious health, safety, fire or building code violations, excluding those caused by disasters, for which a citation has been issued by the appropriate governmental agency, and which citation has remained unabated for six months or longer preceding the vacancy.

(d) The dwelling or unit is a condominium that has not been sold separately by the subdivider to a bona fide purchaser for value.

(5) The landlord may establish the initial and all subsequent rental rates pursuant to this subsection for all existing and new tenancies in effect on or after January 1, 1999, if the tenancy was created between January 1, 1996 and December 31, 1998.

(D) Rent Defined

(1) For purposes of this regulation, "rent" is defined as the rent in effect for the immediately preceding tenancy which did not exceed the lawful rent ceiling.

(2) For the purpose of this Regulation, the term "rent" does not include any fees or charges paid by the tenant to the landlord pursuant to a lawful separate agreement between the tenant and the landlord as defined in Regulation 1012.

(3) The rent level established by the landlord pursuant to this Regulation shall become the new rent ceiling for the unit.

(E) Landlord Defined

“Landlord,” as used in this regulation, means an owner of record, lessor, or any other person or entity entitled to receive rent for the use or occupancy of any rental unit, or an agent, representative or successor of any of the foregoing.

(F) Prevailing Market Rents

(1) “Prevailing Market Rents” are defined as the rental rate that would be authorized for comparable units pursuant to 42 U.S.C.A. 1437(f), as calculated by the United States Department of Housing and Urban Development (HUD) pursuant to Part 888 of Title 24 of the code of Federal regulations. For purposes of this regulation, of the prevailing market rents shall be referred to as HUD FMRs (“fair market rents”), and include the cost of utilities except telephone.

(2) “Comparable units” for the purpose of this subsection is defined as those rental units that have the same number of bedrooms. A "bedroom" shall include a room intended for sleeping which conforms to the provisions of Chapter 5 of the Uniform Housing Code, being not smaller than seventy (70) square feet in floor area with a ceiling height not less than seven (7) feet six (6) inches

(3) The Board shall obtain copies of the FMRs, issued by HUD and make them available to the public.

(G) Voluntary Vacancies

(1) For the purposes of this Regulation, “voluntary” shall mean the independent choice of the tenant, without intimidation, pressure, or harassment.

(2) Non-Voluntary Vacancy

(a) A vacancy resulting from harassment, threats to withdraw the property from the rental market pursuant to the Government Code Section 7060-7060.7 (Ellis Act), or notices of any kind that negligently or intentionally misrepresent to the tenant that he or she is required to vacate the controlled unit shall not be considered voluntary.

(b) “Harassment” shall be defined as a knowing and willful act or course of conduct directed at a specific tenant or tenants which:

(i) Would cause a reasonable person to fear the loss of use and occupancy of a residential unit or part thereof, or of any service, privilege or facility connected with such use and occupancy, including any housing service within the meaning of the Rent Ordinance Section 4(C), without legitimate reason or legal justification;

(ii) Materially interferes with a tenant's peaceful enjoyment of the use and occupancy of a residential rental unit.

(c) A single act may constitute harassment for purposes of determining whether a vacancy was voluntary. A course of conduct is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. Acts constituting harassment include, but are not limited to the following:

(i) Eviction on the grounds of owner or relative occupancy pursuant to Rent Ordinance section 13(A)(9) or (10), which is not in good faith.

(ii) The threat or repeated threat to evict a tenant in bad faith, under circumstances evidencing the landlord's purpose to cause the tenant to vacate a controlled rental unit;

(iii) Reduction in housing services under circumstances evidencing the landlord's purpose to cause the tenant to vacate a controlled rental unit;

(iv) Reduction in maintenance or failure to perform necessary repairs or maintenance under circumstances evidencing the landlord's purpose to cause the tenant to vacate a controlled rental unit;

(v) Abuse of the landlord's right of access into a residential unit within the meaning of California Civil Code §1954;

(vi) Verbal or physical abuse or intimidation;

(d) A vacancy occurring as result of the filing of a Notice of Intent to Withdraw under Government Code Section 7060-7060.7 (the Ellis Act) shall not be considered voluntary.

(e) A tenancy and subsequent vacancy created as a sham shall not be considered voluntary. A sham tenancy may be presumed where the occupant did not have a bona fide landlord-tenant relationship with the landlord, or occupied the property for less than four (4) months and principally for the purpose of vacating the property to establish eligibility for vacancy-related increase.

(H) Eviction for Nonpayment of Rent

Eviction for "non-payment of rent" is defined as the action to terminate a tenancy due to the tenant's failure to pay the rent to which the landlord is entitled under the rental housing agreement and existing law pursuant to Rent Ordinance section 13(A)(1) and/or paragraph (2) of Civil Code Section 1161.

(I) Abandonment

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For purposes of this section "abandonment" is defined as the tenant's independent choice, without intimidation, pressure, or harassment to relinquish all right and possession of the premises, with the intention of not reclaiming or resuming its possession or enjoyment, and the landlord terminates the tenancy pursuant to Civil Code Section 1951.3.

(J) No Rent Increase for Existing Tenants

The maximum lawful rent ceiling for any controlled rental unit that is occupied by an existing tenant shall not be increased under the provisions of this Regulation, while said tenant occupies his or her unit.

(1) For purposes of this Regulation, [existing tenant] refers to all persons who are defined as "tenants" pursuant to Rent Ordinance section 4(I), i.e. any renter, tenant, subtenant, lessee, or sublessee of a rental unit, or successor to a renter's interest, or any group of tenants, subtenants, lessees, or sublessees of any rental unit, or any other person entitled to the use or occupancy of such rental unit.

(2) No tenant occupying a controlled rental unit, who has the right to occupancy of a controlled rental unit, shall have his or her rent increased pursuant to this Regulation or Civil Code §1954.50, et seq. Pursuant to section 13(A)(2) of the Rent Ordinance, no tenant shall be required to vacate a controlled rental unit as a result of a covenant or condition in a rental agreement requiring the tenant to surrender possession.

(K) Registration after January 1, 1996

Pursuant to sections 6(F)(17), 6(P) and 8 of the Rent Ordinance, any landlord who rents a unit to a new tenant after January 1, 1996, shall re-register the unit with the Board within fifteen (15) days of the re-rental of the unit. This provision does not apply to a sublet where there is no rent increase or to a short-term seasonal rental, as defined in Regulation 1014, if the rent for the short-term seasonal rental is less than the rent for the immediately preceding tenancy.

(1) The re-registration shall be filed upon a form, entitled "Vacancy Registration Form" provided by the Board. The Board shall approve such form by Resolution and the contents of the form may be changed from time to time.

(2) The landlord shall provide all information required by the form.

(3) Failure of the landlord to properly re-register a unit pursuant to this regulation shall result in the property being deemed not to be in compliance with section 8 of the Rent Ordinance

(L) Amenities

Until January 1, 1999, the base amenities shall remain the same for any unit as those provided

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on May 31, 1980, or the first rental date thereafter, or as otherwise determined by final Board decision.

(M) Increase and Decrease Petitions

Nothing in this Regulation prohibits tenants or landlords from filing rent decrease or increase petitions pursuant the Board's regulations.

(N) Fraud or Intentional Misrepresentation

Any increase in the maximum allowable rent authorized pursuant to this regulation that is obtained by fraud or misrepresentation by the landlord or his or her agent, servant, or employee shall be void.

(O) Subletting

(1) An owner may increase the rent by any amount allowed by Civil Code section 1954.50 et seq., and subsection (B) of this Regulation, to a sublessee or assignee where the original occupant or occupants who took possession pursuant to the rental agreement with the owner, no longer permanently reside there. The term "original occupant" as used herein is defined in Regulation 409. Within fifteen (15) days of any rent increase pursuant to this Subsection (O)(1), a Vacancy Registration form described in Subsection (K) shall be filed with the Board.

(2) Where one or more of the occupants of the premises pursuant to the agreement with the owner provided for above, remains an occupant in lawful possession of the dwelling or unit, this subdivision shall not apply to partial changes in occupancy of a dwelling or unit made with the consent of the owner. Nothing contained in this subsection shall establish or create any obligation of an owner to permit or consent to a sublease or assignment.

(3) Acceptance of rent by the landlord shall not operate as a waiver or otherwise prevent enforcement of a covenant prohibiting sublease or assignment, or as a waiver of an owner's rights to establish the initial rental rate, unless the landlord has received written notice from the tenant that is a party to the agreement and thereafter accepted rent. The landlord's right to establish the initial rent shall not be waived if, after receiving written notice that the last original occupant has vacated the premises, the landlord agrees in writing with any tenants still occupying the unit that the landlord's right to establish the initial rental rate, consistent with Civil Code section 827, shall be extended for up to six months following receipt of the notice.

(4) A landlord may not unilaterally impose or require an existing tenant to agree to

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new material terms of tenancy or a new rental agreement, unless the provisions are substantially identical to the prior rental agreement.

(5) Where the landlord initially rents a rental unit to a tenant and authorizes more than one tenant to occupy the unit, but fails to place the name of more than one tenant on the lease, all tenants who occupy the unit within one month, with permission of the landlord, express or implied, shall be considered to be original occupants.

[Effective January 1, 1996; amended May 27, 1997, August 22, 1997 and March 20, 1998; addition of (O)(5) effective October 23, 1998; addition of (G)2(f) effective December 27, 1998; addition of (1)(a)(ii) and deletion of (G)2(f) effective March 5, 1999; (B) and (O) amended August 20, 1999; (B)(1)(a)(ii), (B)(1)(b) through (f) amended February 11, 2000; addition of (C)(d) amended January 7, 2002; amended March 18, 2002 changed (B)(1)(g) and inserted a new (B)(1)(f); amended February 20, 2003 added last two sentences to (A)(2); removed definition of “original occupant” from Section (O)(1) and placed it in Regulation 409 – 9/19/19.]