



**Rent Stabilization Board**

**RENT STABILIZATION BOARD**

DATE: November 20, 2014

TO: Honorable Members of the Berkeley Rent Stabilization Board

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

SUBJECT: Proposed amendments to Regulation 1018 [Initial Rent Determination] clarifying the date the Board will consider whether the tenant permanently resided in the unit and when evidence will not be considered – Second Reading

**Recommendation:**

On October 17, 2014, the IRA/AGA/Habitability Committee voted to recommend that the Board adopt the following amendments to Regulation 1018 which clarify:

1. That Initial Rent Determination (IRD) petitions are not petitions to determine a primary residence as defined in Regulation 524 which governs Determination of Occupancy (D) petitions;<sup>1</sup> and
2. That the Board shall only consider whether an original occupant permanently resides in the rental unit as of the date the petition was filed; and
3. That the Board shall not consider evidence of an original occupant's absence from the rental unit during a period of time prior to filing that is unrelated to whether the original occupant permanently resides in the unit at the time of filing.

**Background and Need For Rent Stabilization Board Action:**

The Costa-Hawkins Rental Housing Act (California Civil Code §1954.50 et seq.), passed by the State Legislature in 1995, provides that, in most cases, when a new tenancy commences at a rental unit, the landlord is entitled to establish the initial rent for the tenancy at the current market rate. (California Civil Code §1954.52(a).) The Legislature recognized that the prospect of being able to charge a market rent for vacant units could motivate owners to unilaterally terminate the tenancies of tenants in good standing. To discourage this conduct, the Act specifies that under certain

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<sup>1</sup> In order to file a D petition challenging whether someone resides in a rental unit as a primary residence (Regulation 525), a landlord must initially allege that no tenant currently resides in the unit as his/her primary residence. On the other hand, a landlord who files an IRD petition alleging that the last original occupant no longer permanently resides in the unit must allege that there are other sublessees or assignees in order to seek relief under this regulation.

circumstances where a landlord's actions cause the termination of a tenancy, the landlord will not be entitled to establish an initial rent for the next tenancy, meaning that the rent for the new tenancy will be no more than the last legal rent for the immediately preceding tenancy.<sup>2</sup>

The Act also allows the landlord to set an initial rent for an occupied unit when the original occupants who took possession of the unit no longer permanently reside there and the remaining occupant or occupants are sublessees or assignees who did not reside at the unit prior to January 1, 1996. Costa Hawkins states:

Where the original occupant or occupants who took possession of the dwelling or unit pursuant to the rental agreement with the owner *no longer permanently reside* there, an owner may increase the rent by any amount allowed by this section to a lawful sublessee or assignee who did not reside at the dwelling or unit prior to January 1, 1996. (California Civil Code §1954.53(d)(2) – emphasis added.)

Thus, the Board has always used the standard of whether an original occupant continues to permanently reside in the rental unit when determining whether a landlord may impose a vacancy rent adjustment on the remaining tenants.<sup>3</sup>

In many of the situations, depending on the circumstances of the particular incident, there is great potential for disagreement as to whether the landlord is entitled to set a market rate initial rent for a new tenancy. Indeed, Rent Board staff reports that questions regarding a landlord's eligibility to establish an initial rent are common. There are frequently questions as to whether an occupant remaining at a rental unit after the original occupants have moved has the status of "sublessee" or "co-tenant." Thus, there may often be legitimate questions as to whether a unit is eligible to have the rent set at a market rate. For this reason, the Board passed Regulation 1018 in 2006 – a regulation meant to settle disputes regarding a landlord's eligibility to impose a Costa Hawkins Vacancy Rent Adjustment.

Market rents have risen dramatically over the past several years thereby increasing the incentive for landlords to seek market rate rent adjustments. The Board has received many more IRD petitions alleging entitlement to rent increases during this time. Moreover, Rent Board Public Information Unit staff have relayed numerous stories of longer-term tenants feeling harassed by landlords who seek market rate increases for their rental units.

Also, claims have been brought that allege that original occupants did not reside in a unit for a period of time prior to the filing of the petition alleging that the original occupant no longer permanently resides in the rental unit where it's undisputed that the original occupant currently permanently resides in the unit. As drafted Regulation 1018 was silent regarding the time the Board would consider when the original occupant permanently resides in the rental unit.

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<sup>2</sup>The Board has codified these restrictions in Regulations 1013 and 1016.

<sup>3</sup>The right to set an initial rent when the last original occupant permanently vacates may be waived, however, if the owner has received written notice that the last original occupant has vacated and the owner thereafter accepts rent from the remaining occupants.

Nevertheless, the Board has always interpreted the relevant time period to be the time of the filing of the petition. This interpretation is consistent with strict statutory interpretation of Costa Hawkins which instructs that the landlord is entitled to increase the rent when an original occupant *no longer permanently resides* in the rental unit. In a case where a tenant vacates the unit for a period of time, but returns, the tenant clearly did not permanently vacate the premises and cease to permanently reside there. Moreover, that the owner is permitted to increase the rent when a tenant no longer permanently resides in the rental unit clearly indicates that Costa Hawkins was meant to apply only to situations when the original occupant is actually permanently residing outside of the premises when the landlord intends to impose the rent increase. The proposed amendments in Regulation 1018(D)(1) codify the Board's long-standing practice of using the date of filing as the date when the Board will consider whether the original occupant permanently resides in the rental unit.

Costa Hawkins provides little guidance regarding the standard to be used when considering whether an occupant permanently resides in a rental unit. The Board relies partially on California case law regarding "domicile" to set standards for the definition of "permanently residing." Case law indicates that the intent to make a unit one's residence is of paramount importance when considering whether a person has made a place his/her domicile. It is also clear that one is able to reside in more than one unit – the question is which unit is his/her permanent residence. The proposed amendments also make clear that an original occupant may have more than one residence and that s/he need not be physically present at all times in order for a determination to be made that s/he permanently resides in the rental unit for which the landlord seeks a rent adjustment.

The proposed amendments also clarify that the Board will not consider evidence submitted to prove that an original occupant was not residing in the rental unit during a period of time in the past if that evidence does not tend to prove the tenant's status as a permanent resident on the date of the filing of the petition. For example, the Board will not consider evidence that a landlord submits that shows that a tenant did not live in the rental unit during the time period from 2006 – 2008 if that evidence is not related to whether the original occupant was permanently residing in the unit on the date the landlord filed the IRD petition.

Finally, the proposed amendments distinguish the IRD petition from a Determination of Occupancy petition (D petition) that a landlord would file under Regulation 525 to show that a tenant does not occupy a residence as his/her primary residence as defined in Regulation 524. In order to file a D petition, a landlord **MUST** allege that the unit is not the tenant's primary residence and that no subtenants occupy the unit. By contrast, in order to file an IRD petition, a landlord **MUST** allege that the original occupant no longer permanently resides in the rental unit and that there are remaining subtenants or assignees in the unit.

### **Conclusion**

The proposed amendments make clear that Regulation 1018 may only be used to determine whether an original occupant permanently resides in the rental unit on the date the petition is filed. It further excludes evidence submitted to prove that the original occupant was absent from the unit

during some period of time in the past if that evidence is not submitted to prove that the original occupant was not permanently residing in the unit on the date the petition was filed. Lastly, the proposed amendments distinguish the IRD petition from the D petition.

Given the increasing incentive created by ever-rising rents in the current market, the Board has expressed a desire to address this situation by creating a fair solution that, at once, protects long-term tenants and allows landlords a market rate increase when they are entitled to it. The proposed amendments provide more clarity regarding the Board's standard of review and make clear the relevant date for determining when a landlord is permitted a Costa Hawkins Vacancy Rent Adjustment.

Attached is a draft of proposed Regulation 1018. Proposed additions to the Regulation are underlined.

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1018. Initial Rent Determinations

(A) The landlord or tenant of a rental unit who seeks a determination of the landlord's eligibility to establish the initial rental rate for the rental unit as allowed by the Costa-Hawkins Rental Housing Act (Civil Code §1954.50 et seq.) may file a petition on a form provided by the Board. The petition shall include an explanation of the basis for the petition, a statement of the issues for which a determination is sought and supporting documentation. If filed by the landlord, the petition shall include the names and last known address of the most recent former tenants of the unit. Proof that the petition has been served on all other parties to the rental agreement shall be submitted with the petition.

(B) Petitions filed under this section shall be expedited so that a hearing on the petition is held within 30 days of filing and a decision rendered within 30 days of the hearing. The parties shall be given at least 15 days notice of the hearing. A copy of the petition shall be referred to the Board's administrative staff who shall thereafter investigate the basis for the petition and prepare a report stating the findings of the investigation. Such investigation may include inspection of the property, investigation of public records and any other reasonable means of ascertaining the status of the property. The report and any relevant evidence submitted for consideration by Rent Board staff shall be included in the hearing record.

(C) Except as provided in Subdivision (B), proceedings on petitions filed under this section shall be conducted according to all provisions of Chapter 12, Subchapter B. The party filing the petition has the burden of proving the basis for the petition by a preponderance of the evidence presented to the hearing examiner. The decision shall be binding only with respect to the issues actually raised by the petition and any rights established pursuant to this regulation may be redetermined upon a showing of fraud, misrepresentation or concealment of material facts.

(D) A petition filed pursuant to this regulation shall not be a petition to determine whether the unit is the tenant's primary residence as defined in Regulation 524. Among other reasons listed in paragraph (A) above, petitioner may file pursuant to this regulation to determine that the last original occupant, as defined under Regulation 1013(O), no longer permanently resides in the unit. If the last original occupant no longer permanently resides in the unit, an owner will be eligible for a Costa Hawkins vacancy rent adjustment on any remaining sublessees or assignees pursuant to Regulation 1013(A).

1. When determining whether an original occupant permanently resides in a rental unit, the Board shall only consider whether the tenant permanently resided in the rental unit as of the date the petition was filed pursuant to this regulation. It shall not be dispositive that an original occupant no longer permanently resides in the rental unit if, at the time the petition is filed, the original occupant is not physically residing in the unit. Permanently residing in a rental unit does not require the original occupant's continuous physical presence in the unit. Evidence that an original occupant resides in more than one rental unit is not dispositive that the original occupant no longer permanently resides in the rental unit in question.

2. Evidence of an original occupant's absence from the rental unit during a period of time prior to the time of filing and unrelated to whether the tenant permanently resides at the rental unit as of the date of filing shall not be considered for the purpose of making a determination under this subsection.