



Rent Stabilization Board  
Legal Department

## MEMORANDUM

**DATE:** March 20, 2017

**TO:** Honorable Members of the Berkeley Rent Stabilization Board

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

By: Matt Brown, Staff Attorney

**SUBJECT:** Proposed Regulation 510 [Definition of New Construction for Units that Lack a Certificate of Occupancy] – First Reading

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### **Recommendation:**

That the Board adopt Rent Board Regulation 510 [Definition of New Construction for Units that Lack a Certificate of Occupancy] and repeal Rent Board Regulation 509 [Definition of New Construction for Legal Rental Units] as recommended by the IRA/AGA/Habitability Committee at its March 8, 2017 meeting.

### **Background and Need for Rent Stabilization Board Action:**

The Rent Board has always encouraged the legal construction of new rental units. Recent tragedies costing dozens of lives have directed national attention to the health and safety hazards posed by poorly constructed rental housing. These and other concerns regarding the policy ramifications of exempting illegally constructed units from rent control contributed to the decision to revise the wording of the Ordinance's new construction exemption.

Measure AA amended Section 5(i) of the Rent Ordinance to more closely conform to the language of Costa Hawkins.<sup>1</sup> Specifically, Costa Hawkins exempts all rental units with a

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<sup>1</sup> The Costa Hawkins Rental Housing Act imposed vacancy decontrol throughout the state. It provides a single, straightforward criterion for exemption of new construction: the date of issuance of the Certificate of Occupancy. The Board adopted Regulation 509 in 2014 to more closely mirror Costa Hawkins.

certificate of occupancy issued after February 1, 1995. This excludes newly constructed units that were not issued a certificate of occupancy, such as units constructed without permits, and certain units created by conversion of an existing building.

For the reasons discussed below, Regulation 510 is necessary to ensure that there are not unintended consequences for some units that were constructed after June 30 1980, especially detached units that were built from the ground up with all applicable permits that never received a certificate of occupancy.

### **A. Preserving the Conversion Rule**

The original wording of the new construction exemption read:

“I. Newly constructed rental units which are completed and offered for rent for the first time after the effective date of this chapter, provided that such new units were not created as a result of rehabilitation or conversion as opposed to new construction. However, the exemption [is limited to rent control and registration]”

Although newly constructed units were generally exempt from rent control, those units that were “created as a result of rehabilitation or conversion as opposed to new construction” were often subject to the Ordinance’s rent control and registration requirements, despite having been “completed and offered for rent for the first time after the effective date” of the Ordinance.

The new wording of the new construction exemption reads:

“I. Newly constructed rental units that have received a certificate of occupancy issued after June 30, 1980. However, the exemption [is limited to rent control and registration]”

There are two explanations for the omission of the prior law’s conversion rule. First, as discussed above, state law prevents the Rent Board from controlling the rents of any unit that has a certificate of occupancy issued after February 1, 1995, *including converted or rehabilitated units*. This means that if a unit created by conversion receives a certificate of occupancy after February 1, 1995, it is exempt under state law.

Second, the City of Berkeley Building Official issued a memorandum dated June 13, 2000 that clarified that a certificate of occupancy would henceforth only be issued “for construction of entirely new buildings and for changes in occupancy from one occupancy group to another or changes from one division to another division within the same occupancy group.” Since that date the Planning Department has generally issued certificates of occupancy only for projects or properties that were entirely new construction, or a change in occupancy type. Under this policy, units created by conversion will generally not receive certificates of occupancy.

The Board should preserve the conversion rule by excluding converted units from the exempt units listed in Regulation 510. See Regulation 510, subsection B.

### **B. February 1, 1995 Grandfather Clause.**

Costa Hawkins requires that rental units that have already been exempt pursuant to an exemption for newly constructed units must remain exempt. Therefore, the Rent Board must establish criteria for preserving exemptions for those units that do not have a certificate of occupancy but were already exempt as of February 1, 1995. See California Civil Code Section 1954.52(a)(2).

For units that received a formal determination of exemption on or before February 1, 1995, it is fairly straightforward to comply with the Costa Hawkins grandfather clause by merely allowing those units to remain exempt. See Regulation 510 subsection F.

However, where a unit was constructed after June 30, 1980 but before February 1, 1995, that unit “has already been exempt from the residential rent control ordinance of a public entity on or before February 1, 1995, pursuant to a local exemption for newly constructed units” provided that it was not created as a result of conversion or substantial rehabilitation. Cal Civ. Code Section 1954.52(a)(2). Therefore, the committee recommends that Regulation 510 also include a provision that exempts units constructed before February 1, 1995. In order to exclude units created as a result of conversion or substantial rehabilitation, we limited this exemption to detached rental units constructed from the ground up. See Regulation 510, subsection C.

### **C. Disparities in Issuance of Certificates of Occupancy**

Rather than exempting all newly-constructed rental units, the amended new-construction rule exempts only those rental units for which a certificate of occupancy has been issued after the effective date of the Rent Ordinance. See Berkeley Municipal Code (B.M.C.) Section 13.76.050I. Only units constructed with permits in conformity with applicable building codes are granted certificates of occupancy.

Although Costa Hawkins’ exemption of all rental units with certificates of occupancy issued after February 1, 1995, might appear to apply to all units constructed after February 1, 1995, the California Building Code did not require issuance of certificates of occupancy for all newly-constructed units at that time. Thus, some of the units that were constructed after the enactment of Costa Hawkins do not have a certificate of occupancy, and therefore are not necessarily exempt from rent control under state law.

However, the Rent Board has often expressed a policy goal of encouraging the construction of additional lawfully permitted rental units. See Resolutions 91-5 and 05-08. Such units increase the supply of housing where they are created from entirely new space, rather than as a result of conversion of existing space. Where the additional unit is constructed with permits, it will be required to be constructed to applicable building codes, and thus all applicable safety standards should have been met regardless of whether a certificate of occupancy was issued.

**Where it is clear that an additional unit was constructed with permits after February 1, 1995, the permitted unit should be exempt from the Ordinance, despite lacking a certificate of occupancy.** This avoids a potential loophole whereby two otherwise identical properties might be treated differently because of inconsistent issuance of certificates of occupancy. See Regulation 510, subsection D.

It bears emphasis that Regulation 510 seeks to treat all classes of rental units in the most evenhanded way possible under the circumstances. Certain provisions (such as the Costa-Hawkins grandfather clause date of February 1, 1995, and Costa-Hawkins' use of Certificates of Occupancy as the sole criterion for new construction) are outside the control of the Rent Board. Others, such as the decision to preserve rent control on units that are created as a result of conversion or rehabilitation, are policy decisions.

The proposed language of Regulation 510 seeks to ensure that the fewest number of tenants lose the protection of rent control while ensuring that as many landlords as possible are not surprised to learn that Costa-Hawkins does not exempt them from rent control.

#### **D. Avoiding Confusion or Gamesmanship**

Regulatory agencies have the authority to enact regulations for the purpose of implementing a piece of legislation. Such regulations must be consistent and not in conflict with the legislation and reasonably necessary to effectuate its purpose. (*People v. Tubbs* (2014) 230 Cal.App.4th 578.) Legal staff has drafted this Regulation with two goals in mind: first and foremost is the goal of ensuring that the Measure AA amendment to the new construction exemption is lawful; second is that the new exemption will not be confusing or vulnerable to abuse.

Although Regulation 510 serves an important role in avoiding any potential conflict with Costa Hawkins, the committee chose to keep this Regulation narrowly tailored and extend exemptions only to a limited set of units that lack certificates of occupancy. Staff is concerned that an open-ended regulation, especially one that exempts units that were created as a result of conversion or substantial rehabilitation, would invite abuse by landlords seeking exemptions for units that are not exempt under state law, and were not exempt under the original language of the Rent Ordinance.

Community members have raised concerns that properties which became duplexes as a result of permitted additions or conversions of uninhabitable space will be rent controlled under the proposed wording of Regulation 510. On the other hand, good cause for eviction protections apply to such units regardless of the wording of this regulation, as does vacancy decontrol, which allows all Berkeley landlords to set the initial rent as high as the market will bear.

Regulation 510 clarifies that rent control applies to some post- February 1, 1995 conversions that were previously believed to be exempt. However, a regulation which exempts additions and/or converted spaces from rent control will have the opposite effect, and inevitably result in removing rent control protection from tenants in those units.

### **E. Repeal of Regulation 509**

Regulation 509 was enacted in 2014 to more closely mirror Costa-Hawkins' standard for new construction where units were created by conversion or rehabilitation. The proposed language for Regulation 510 encompasses the entire scope of Regulation 509, and therefore Regulation 509 can and should be repealed to avoid confusion if Regulation 510 is enacted as drafted.

### **Conclusion**

Regulation 510 strikes a careful balance between achieving the purpose of Measure AA while complying with state law and avoiding unintended consequences for landlords and tenants. Regulation 509 will become redundant and incomplete upon passage of Regulation 510, and should therefore be repealed.

Regulation 509 and Proposed Regulation 510 are attached hereto.

### **Name and Telephone Number of Contact Person:**

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Rent Stabilization Board

**510. Definition of New Construction for Units that Lack a Certificate of Occupancy.**

**(A) Scope and Authority.**

Since 1980, the Rent Ordinance has distinguished between newly-constructed rental units and those created through conversion or substantial rehabilitation. Effective December 18, 2016, the new construction exemption was amended. See Berkeley Municipal Code Section 13.76.050. Consistent with California Civil Code Section 1954.50 et seq., certain newly-constructed rental units for which a Certificate of Occupancy has not been issued are exempt from Chapter 8 (Rent Registration), Chapter 10 (Establishment of Base Rent Ceiling and Posting), Chapter 11 (Annual Adjustment of Rent Ceilings), and Chapter 12 (Individual Adjustment of Rent Ceilings) of the Ordinance. This Regulation sets forth the criteria for exemption of such rental units.

**(B) Conversion.**

A rental unit that is created as the result of conversion or substantial rehabilitation of an existing structure shall not be exempt unless a Certificate of Occupancy has been issued for that unit after June 30, 1980.

**(C) Units constructed before February 1, 1995.**

A detached rental unit constructed from the ground up after June 30, 1980 but before February 1, 1995 shall be exempt from the Chapters detailed in Subsection A.

**(D) Units constructed after February 1, 1995.**

A detached rental unit constructed from the ground up after February 1, 1995 shall be exempt from the Chapters detailed in Subsection A only where all applicable building permits have been issued and finally approved by the City.

**(E) Definition of “ground up” construction.**

For the purposes of this regulation, construction from the ground up is defined as the construction of an entirely new structure, not attached to any other structure and not created by the partial demolition of an existing structure.

**(F) Units with a formal determination of exemption.**

Notwithstanding the foregoing, where a formal determination of exemption was made before February 1, 1995, the subject rental unit shall remain exempt consistent with California Civil Code Section 1954.50 et seq.

[Effective Date: \_\_\_\_\_, 2017]

**509. — Definition of New Construction for Legal Rental Units**

~~(A) — Authority and Scope. Section 5(i) of the Ordinance exempts newly constructed rental units from Chapter 8 (Rent Registration), Chapter 10 (Establishment of Base Rent Ceiling and Posting), Chapter 11 (Annual Adjustment of Rent Ceilings), and Chapter 12 (Individual Adjustments of Rent Ceilings) of the Ordinance. This Regulation addresses only newly constructed rental units for which the owner has secured the necessary and proper City permits for legal construction.~~

~~(B) — Definition. As defined in Section 5(i) of the Ordinance and consistent with California Civil Code Section 1954.50, et. seq., new construction of legal units shall include:~~

- ~~(1) units that receive a Certificate of Occupancy issued after February 1, 1995; or~~
- ~~(2) units that have already been exempt from the Ordinance prior to February 1, 1995, pursuant to Section 5(i) of the Ordinance.~~

~~All units constructed as the result of rehabilitation, conversion, or partial demolition of existing units and which do not meet either of the definitions as stated in Paragraphs (B)(1) or (B)(2) above shall not qualify as new construction and shall be subject to the terms of all Chapters of the Ordinance including Chapter 8 (Rent Registration), Chapter 10 (Establishment of Base Rent Ceiling and Posting), Chapter 11 (Annual Adjustment of Rent Ceilings), and Chapter 12 (Individual Adjustments of Rent Ceilings).~~

[Adopted 11/17/14.]