

Rent Stabilization Board
Legal Department

MEMORANDUM

DATE: June 19, 2017

TO: Honorable Commissioners of the Berkeley Rent Stabilization Board

FROM: Honorable Commissioners of IRA/AGA/Registration Committee
Jay Kelekian, Executive Director
47 By: Matt Brown, Staff Attorney

SUBJECT: Proposed Resolutions Regarding Exemptions

Recommendation:

That the Board adopt Resolutions 17-12 and 17-13 to clarify when exemptions attach to units after construction of new legal units or change in use of existing units.

Background and Need for Rent Stabilization Board Action:

At its June 8, 2017 meeting, the IRA/AGA/Habitability Committee recommended that the Board adopt two resolutions related to the applicability of exemptions from the Rent Ordinance.

Resolution 17-12 clarifies current practice regarding the effect of creating additional units on a property that contains existing units that are exempt from the Rent Ordinance. This regulation would supersede Regulations 91-5, 05-08, and the June 24, 1986 legal memorandum that currently form the basis for Rent Board determinations preserving existing exemptions where the creation of an additional unit might otherwise cause the exempt unit to become covered.

Resolution 17-13 addresses situations where the issuance of a certificate of occupancy takes place after the initial residential use of a rental unit. *Burien LLC v. Wiley* (2014) 230 Cal.App.4th 1039 interpreted the purpose of Costa-Hawkins' exemption for new construction and found that it was limited to situations in which the issuance of the certificate of occupancy added units to the housing supply. Therefore, a certificate of occupancy issued as a result of a change in use from one type of residential housing to another will not necessarily trigger exemption from local

rent control ordinances. The proposed resolution provides clarity to the public regarding in light of Measure AA's change in the local definition of new construction to mirror Costa-Hawkins.

The IRA/AGA/Habitability Committee reviewed these Resolutions at its June 8, 2017 meeting and voted unanimously to recommend that the full Board adopt them.

Drafts of proposed Board Resolutions 17-12 and 17-13 are attached hereto, along with the staff reports that were provided to the IRA/AGA/Habitability Committee.

Name and Telephone Number of Contact Person:

Matt Brown, Staff Attorney (510) 981-4930
Rent Stabilization Board

RESOLUTION 17-12

INTERPRETING THE RENT ORDINANCE TO HOLD THAT THE CONSTRUCTION OF AN ADDITIONAL LEGAL UNIT WILL NOT CAUSE EXISTING UNIT(S) TO LOSE EXEMPTION FROM THE RENT ORDINANCE

BE IT RESOLVED by the Rent Stabilization Board of the City of Berkeley as follows:

WHEREAS, the primary intent of the Rent Stabilization Board and the Rent Ordinance is to preserve affordable housing so as to continue the diversity our community has embraced for decades; and

WHEREAS, it is the position of the Rent Stabilization Board that the Rent Ordinance helps to maintain a healthy stock of affordable housing in the city, and that rent control laws as they exist do not act as a deterrent to the construction of new rental property; and

WHEREAS, the Costa-Hawkins Rental Housing Act (California Civil Code Section 1954.50 et seq.) provides that a unit that is separately alienable from any other rental unit is exempt from the Rent Registration and Rent Ceiling Provisions of the Rent Ordinance unless the tenancy began before Jan 1, 1996; and

WHEREAS, certain fully exempt, owner-occupied duplexes, commonly known as "golden duplexes," are comprised of two units on a single parcel where one of the units was occupied by the an owner of at least 50% interest as his/her principal residence on December 31, 1979, and one of the units is now occupied by the current landlord as his/her principal residence (B.M.C. 13.76.050F); and

WHEREAS, prior Board Resolutions (91-5 and 05-08) and legal memoranda have set forth circumstances in which the exemptions described above will be preserved or extended in the event of the construction of additional legal units; and

RESOLUTION 17-12

INTERPRETING THE RENT ORDINANCE TO HOLD THAT THE CONSTRUCTION OF AN ADDITIONAL LEGAL UNIT WILL NOT CAUSE EXISTING UNIT(S) TO LOSE EXEMPTION FROM THE RENT ORDINANCE (Page 2)

WHEREAS, the term “legal unit” is defined as a dwelling unit for which all applicable building permits have been issued and finally approved by the City; and

WHEREAS, on November 8, 2016, the voters passed Measure AA, which enacted various revisions to the Rent Ordinance; and

WHEREAS, it is the intent of the Board to issue a single resolution integrating these previous resolutions and legal memoranda, to harmonize their reasoning with the revisions enacted by Measure AA; and

WHEREAS, it is the intent of the Board that this resolution *shall not* apply to illegal units or to legal units created primarily by the subdivision of existing residential space; and

NOW, THEREFORE, BE IT RESOLVED that the City of Berkeley Rent Stabilization Board interprets the Rent Stabilization and Eviction for Good Cause Ordinance to hold as follows:

The construction of additional legal units will not cause any existing exempt units on the same property to come under the coverage of the rent registration and rent ceiling provisions of the Rent Ordinance. The following are common examples of how this rule is applied:

RESOLUTION 17-12

INTERPRETING THE RENT ORDINANCE TO HOLD THAT THE CONSTRUCTION OF AN ADDITIONAL LEGAL UNIT WILL NOT CAUSE EXISTING UNIT(S) TO LOSE EXEMPTION FROM THE RENT ORDINANCE (Page 3)

1. The construction of additional legal units will not cause a single-family home to come under the coverage of the rent registration and rent ceiling provisions of the Rent Ordinance.
2. A duplex resulting from the addition of a second legal unit to a single family home may qualify as a "golden duplex" if the original single-family home was occupied by an owner of at least fifty percent interest as his/her principal place of residence on December 31, 1979.
3. When additional legal units are added to a parcel that contains a "golden duplex," the pre-existing units will remain exempt as long as an owner of record of at least 50% interest is residing in one of the two pre-existing units. B.M.C. 13.76.050F limits the "golden duplex" exemption to two units; the third unit or any further additional units will not be exempt under 13.76.050F.

BE IT FURTHER RESOLVED that such exemption must be claimed by the owner, reviewed and approved by the Executive Director or his or her designee in accordance with Board Regulations 521 and 522.

Dated:

Adopted by the Rent Stabilization Board of the City of Berkeley by the following vote:

Yes:

No:

Abstain:

Absent:

John Selawsky
Chair, Rent Stabilization Board

Attest: _____
Executive Director

RESOLUTION 17-13

INTERPRETING THE RENT ORDINANCE TO HOLD THAT A RENTAL UNIT WITH A CERTIFICATE OF OCCUPANCY ISSUED AFTER RESIDENTIAL USE OF THE UNIT BEGAN DOES NOT QUALIFY AS EXEMPT AS "NEW CONSTRUCTION" UNLESS RESIDENTIAL USE ORIGINALLY COMMENCED AFTER JUNE 30, 1980

BE IT RESOLVED by the Rent Stabilization Board of the City of Berkeley as follows:

WHEREAS, the primary intent of the Rent Stabilization Board and the Rent Stabilization and Eviction for Good Cause Ordinance is to preserve affordable housing so as to continue the diversity our community has embraced for decades; and

WHEREAS, it is the position of the Rent Stabilization Board that the Rent Stabilization and Eviction for Good Cause Ordinance helps to maintain a healthy stock of affordable housing in the city, and that rent control laws as they exist, do not act as a deterrent to the construction of new rental property; and

WHEREAS, rental units defined as "new construction" since June 30, 1980, have always been exempt from portions of the Rent Ordinance; and

WHEREAS, in 1995, the California Legislature passed California Civil Code Section 1954.50 et seq. ("Costa-Hawkins Rental Housing Act") commonly referred to as "Costa-Hawkins"; and

WHEREAS, Costa-Hawkins created a state law exemption for new construction and set forth the date of issuance of a certificate of occupancy as its sole criterion for exemption of newly constructed units built after February 1, 1995; and

WHEREAS, the Second District of the California Court of Appeal, in *Burien, LLC v. Wiley* (2014) 230 Cal.App.4th 1039, examined the purpose of the Costa-Hawkins new construction exemption; and

RESOLUTION 17-13

INTERPRETING THE RENT ORDINANCE TO HOLD THAT A RENTAL UNIT WITH A CERTIFICATE OF OCCUPANCY ISSUED AFTER RESIDENTIAL USE OF THE UNIT BEGAN DOES NOT QUALIFY AS EXEMPT AS “NEW CONSTRUCTION” UNLESS SUCH RESIDENTIAL USE COMMENCED AFTER JUNE 30, 1980 (Page 2)

WHEREAS, the *Burien* court examined whether local rent controls would apply when a multi-unit residential rental property converted to a different residential rental use; and

WHEREAS, the *Burien* court found that the purpose of the exemption based on the issuance of a certificate of occupancy was to encourage construction and conversion of buildings which add to the residential housing supply; and

WHEREAS, the court found that a certificate of occupancy based solely on a change in use from one type of residential housing to another does not enlarge the housing supply; and

WHEREAS, the *Burien* court held that an exemption under Costa-Hawkins based on the issuance of a certificate of occupancy will only apply to units which received certificates of occupancy prior to the units’ residential use; and

WHEREAS, on November 8, 2016, the voters passed Measure AA, which amended Berkeley Municipal Code 13.76.050 to partially exempt from the Rent Stabilization and Eviction for Good Cause Ordinance “Newly constructed rental units that have received a certificate of occupancy issued after June 30, 1980”; and

WHEREAS, this updated new construction exemption more closely conforms to the new construction exemption adopted in California Civil Code Section 1954.52(a) (1) (Costa-Hawkins); and

RESOLUTION 17-13

INTERPRETING THE RENT ORDINANCE TO HOLD THAT A RENTAL UNIT WITH A CERTIFICATE OF OCCUPANCY ISSUED AFTER RESIDENTIAL USE OF THE UNIT BEGAN DOES NOT QUALIFY AS EXEMPT AS "NEW CONSTRUCTION" UNLESS RESIDENTIAL USE ORIGINALLY COMMENCED AFTER JUNE 30, 1980 (Page 3)

WHEREAS, to ensure that Berkeley's local new construction exemption does not conflict with the holding in *Burien*,

NOW, THEREFORE BE IT RESOLVED that the Berkeley Rent Stabilization Board interprets the Rent Ordinance as follows:

A rental unit with a certificate of occupancy issued after residential use of the unit began shall not qualify as exempt under B.M.C.13.76.050I ("new construction").

Adopted by the Berkeley Rent Stabilization Board by the following vote:

Yes:

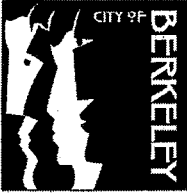
No:

Abstain:

Absent:

Chair, Rent Stabilization Board

Attest: _____
Executive Director



Rent Stabilization Board
Legal Department

MEMORANDUM

DATE: June 8, 2017

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

FROM: MB Matt Brown, Staff Attorney

SUBJECT: Proposed Resolution Integrating Policies on Addition of Legal Rental Units

Recommendation:

That the IRA/AGA/Habitability Committee approve and recommend that the Board adopt Resolution 17-XX.

Background and Need for Rent Stabilization Board Action:

Since the original enactment of the Rent Stabilization and Eviction for Good Cause Ordinance, questions have periodically arisen regarding the effect of adding legal rental units to residential properties. At this time there exist two Resolutions and a 31 year-old legal memorandum that apply to the various configurations of additional units. The Rent Board recently enacted Regulation 510, which also allows for exemption from the Ordinance to certain newly constructed units. At this time it may be wise to integrate these varied sources into a single resolution, drafted with Regulation 510 in mind.

What follows is a brief overview of the evolution of the Rent Board's interpretation of the effect of creation of additional units upon pre-existing or potential exemptions.

A. Adding a Second Unit to a Single Family Home May Create a "Golden Duplex"

On June 24, 1986, Deputy City Attorney Timothy J. Lee submitted a memorandum analyzing the exempt status of newly created second units. His analysis held that newly created second units would be exempt under 13.76.050(F), the "golden duplex" rule, if the original single family home was occupied by the owner as his or her principle place of residence as of December 31,

1979, and the unit would otherwise qualify for the exemption.

B. Adding Additional Units to a “Golden Duplex” Will Not Strip Exemption

On February 4, 1991, the Rent Board adopted Resolution 91-5, holding that the loss of exempt status of an owner-occupied duplex would discourage owners from constructing new rental units on the same property. Thus, Resolution 91-5 provided that “the construction of new legal rental units which are exempt [as new construction] does not affect the status of an owner occupied duplex”.

C. Adding a Second Unit to a Single Family Home Will Not Strip Costa-Hawkins’ Exemption for Single Family Homes

The Costa-Hawkins Rental Housing Act created a new exemption from rent control for all single family homes in California.¹ On May 2, 2005, the Rent Board adopted Resolution 05-08, interpreting the Ordinance to hold that the construction of a “new legal rental unit” on a parcel that is shared with a single family home will not cause the single family home to lose its exemption.

D. Proposed Resolution 17-XX Integrates the June 24, 1986 Memorandum, Resolutions 91-5 and 05-08, and Addresses New Gaps in Interpretation

In addition to the interpretations discussed above, new questions have arisen relating to the exempt status of units that are added to an existing “golden duplex.” Namely:

1. Where does the owner need to live in order claim the “golden duplex” exemption?
2. Can more than two units on a property be exempt as a “golden duplex?”

The “golden duplex” exemption reads, in its entirety:

“F. Rental units in a residential property which is divided into a maximum of four units where one of such units is occupied by the landlord as his/her principal residence. Any exemption of rental units established under this subsection (13.76.050 F.) shall be limited to rental units that would have been exempt under the provisions of this chapter had this chapter been in effect on December 31, 1979. After July 1, 1982, this exemption shall no longer apply to rental units in a residential property which is divided in to three or four units. It shall continue to apply to rental units in a residential property which is divided into two units, and which meet all the other requirements of this subsection (13.76.050F). Rental units which become non-exempt under this provision shall have the provisions of Subsections 13.76.080I² and 13.76.100C³. applied to them.”

¹ California Civil Code Section 1954.52 (a) (3) (A).

² Registration within sixty days for previously exempt units.

³ Maximum allowable rent (inoperative under Costa-Hawkins).

Note that although properties with four or fewer units were briefly eligible for the exemption, after July 1, 1982, the exemption applied only to duplexes. Thus, it would be fair to interpret the "golden duplex" exemption as applying only to no more than the first two units, even where the exemption is preserved for a property containing additional units created after the enactment of the Ordinance. Should the Board adopt this interpretation, it follows that the only units in which the owner may reside and claim the exemption would be the first two units.

The attached proposed resolution attempts to integrate prior resolutions and legal memoranda relating to the addition of legal units to exempt properties. It also presents an opportunity to harmonize the rule on addition of legal units to exempt properties with the amendments to the Rent Stabilization Ordinance enacted by Measure AA. Staff has attempted to balance clarity with completeness, to ensure that this Resolution can serve as the sole source for determining that a newly added legal unit will not cause an existing exemption to be lost, and to clarify the operation of the "golden duplex" exemption in cases where new units are added.

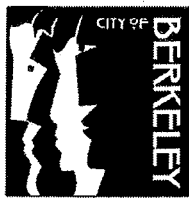
Conclusion

Combining Resolutions 91-5, 05-08 and the June 24, 1986 legal memorandum, and updating the language to harmonize it with Measure AA will clarify that adding legal units to properties with existing exemptions shall not jeopardize those exemptions.

A draft of proposed Board Resolution 17-XX is attached hereto.

Name and Telephone Number of Contact Person:

Matt Brown, Staff Attorney (510) 981-4930
Rent Stabilization Board



Rent Stabilization Board

RENT STABILIZATION BOARD

DATE: June 8, 2017

TO: Honorable members of the IRA/AGA/Registration Committee

FROM: MB Matt Brown, Staff Attorney

SUBJECT: Proposed resolution interpreting the Rent Ordinance to hold that a rental unit with a certificate of occupancy issued after residential use of the unit began shall not qualify as exempt as "new construction" unless the residential use originally commenced after June 30, 1980

Staff Recommendation:

That the committee recommend the full Board adopt proposed resolution 17-XX interpreting Section 13.76.050I of the Rent Ordinance to hold that a rental unit with a certificate of occupancy issued after residential use of the unit began does not create a "new construction" exemption unless the residential use originally commenced after June 30, 1980.

Background and Need For Rent Stabilization Board Action:

A. History

Units deemed "new construction" have always been partially exempt from the Ordinance. Initially, the exemption applied to:

"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."

Although newly constructed units were generally exempt from rent control, units created as a result of conversion or rehabilitation, as opposed to new construction, were covered by the law despite being offered for rent for the first time after the passage of the ordinance.

In 1995 the state legislature passed California Civil Code Section 1954.50 et. seq. ("Costa-Hawkins"). Costa-Hawkins created an exemption from local rent controls for units which have obtained a certificate of occupancy after February 1, 1995 and units which have already been exempt pursuant to a local exemption for newly constructed units (California Civil Code Section 1954.52(a)(1)(2)).

B. Measure AA/Rent Board Regulation 510

This past November the voters approved Measure AA, amending the Ordinance.

With the passage of Measure AA, the definition of “new construction” was changed as follows so as to exempt “[n]ewly constructed units that have received a certificate of occupancy issued after June 30, 1980...” (B.M.C. §13.76.050I).¹ The purpose of this change was to harmonize the ordinance with the language in Costa-Hawkins which provides that units with a certificate of occupancy issued after February 1, 1995 are exempt from local rent control restrictions (CC§1954.52(a)).

On April 24, 2017, the Board passed Regulation 510 to address circumstances where some units that were constructed after June 30, 1980 did not obtain a certificate of occupancy but nevertheless were clearly “ground up” construction, thus falling within the spirit and intent of exemption for both Costa-Hawkins and Measure AA.

With the passage of Regulation 510, the Board has shown a desire to treat all classes of rental units in the most evenhanded way and to permit the new construction exemption to attach to a unit in certain circumstances even though it lacked a certificate of occupancy.

C. Case Law Affecting Interpretation of Costa-Hawkins

On October 22, 2014, the Court of Appeal, Second District, Division 5, ruled in the matter of *Burien, LLC v. Wiley* (2014) 230 Cal.App.4th 1039.

In that case a landlord had converted rent-controlled apartments to condominiums and sought exemption from the Los Angeles Rent Stabilization Ordinance under the theory that he had obtained a new certificate of occupancy for the property and was thus exempt under the new construction exemption in Costa-Hawkins (CC§1954.52(a)(1)).²

The court found that a commonsense interpretation of CC§1954.52(a)(1) is that Costa-Hawkins excludes buildings from rent control that are certified for occupancy after February 1, 1995 but not buildings that were certified for occupancy prior to that date. (*Burien* at 1047). The court’s rationale was that the purpose of the “new construction” exemption in Costa-Hawkins was to encourage actual construction of units thereby adding to the residential housing supply (Id. at 1047). The court further reasoned that a certificate of occupancy based solely on a change in use from one type of residential housing to another does not enlarge the supply of housing, and

¹ Costa-Hawkins imposed vacancy decontrol throughout the state. It provides a single, straightforward exemption of new construction which is the date of issuance of the Certificate of Occupancy.

² Costa-Hawkins was amended in 2001 to exclude condominiums sold separately to a bonafide purchaser for value from rent control exemption. This was originally adopted to spur construction of condominiums but instead created a loophole allowing property owners to obtain a permit to convert rental housing to condominiums but never complete the process and still claim exemption from rent control.

therefore did not further the intended purpose of the exemption. (Id. at 1047).

CONCLUSION

With the passage of Measure AA the voters aligned the Ordinance's "new construction" exemption more closely with state law. Board Regulation 510 is a furtherance of the Board's goal of encouraging the construction of new rental units in situations where they have complied with the intent and spirit of Costa-Hawkins and the Ordinance's new language but are unable to obtain a Certificate of Occupancy. Regulation 510 explicitly allows for a new construction exemption for detached units constructed from the ground up after February 1, 1995 where all applicable building permits have been issued and approved by the City but still lacks a Certificate of Occupancy (Board Regulation 510(D)).

The *Burien* court held, however, that a certificate of occupancy based solely on a change in use from one type of residential housing to another does not enlarge the supply of housing, and therefore did not further the intended purpose of the new construction exemption in Costa-Hawkins (*Burien* at 1047). *Burien* makes it clear that a change from one residential use to another, where a Certificate of Occupancy already existed, will not trigger the exemption under Costa-Hawkins . . . even if a new Certificate of Occupancy is issued for a rental unit.

In order to comply with the holding in *Burien*, the Board is compelled to find a property covered by the ordinance in cases where an owner is merely changing the type of use from one form of residential use to another.

Applying the holding in *Burien* furthers the goal of voter-approved Measure AA to have the ordinance more closely mirror Costa-Hawkins' standard for new construction exemption. The proposed resolution not only achieves this purpose and does not conflict with newly enacted Regulation 510.

A draft of proposed Board Resolution 17-XX is attached hereto.

Contact Person:

Matt Brown, Staff Attorney (510) 981-4930
Rent Stabilization Board