



Rent Stabilization Board
Office of the Executive Director

MEMORANDUM

DATE: May 7, 2018
TO: Honorable Members of the Rent Stabilization Board
FROM: *Jy* Jay Kelekian, Executive Director
SUBJECT: Suggested Amendments to the Rent Ordinance -- For Consideration

Reason Action is Needed

Berkeley voters passed Measure D in June of 1980 which established the current Rent Ordinance (the Ordinance) as codified in Berkeley Municipal Code (B.M.C.) Chapter 13.76.¹ Because it was passed by voter initiative, the Ordinance may only be amended by voters. Berkeley City Council has, periodically, placed measures on the general ballot for the voters to decide when the Board recommends modifications. Most recently, Measure AA amended the ordinance in 2016 to increase relocation benefits, conform exemption criteria to state law, and strengthen protections for elderly tenants, disabled tenants, and tenant families with children.

The possibility of a significant change in state law may necessitate certain changes to the Ordinance. In addition, community members have raised concerns regarding the exemption of Accessory Dwelling Units and owner-occupied duplexes that were owner-occupied in 1979 ("golden duplexes").

This memo will suggest the sections of the Ordinance to be amended but may not always identify the specific proposed language to be used. Traditionally, proposed changes to the Ordinance are reviewed and first discussed at the 4 x 4 Committee. The same proposals presented to the Rent Stabilization Board this evening were presented at the April 30, 2018 4x4 Committee meeting. If there is interest in these concepts, at the Board's request, draft language will developed by staff and reviewed/recommended by the Board and 4x4 Committee then submitted to Council for consideration of being placed on the November ballot. The goal of the April 30 and May 7th meetings is to begin that conversation and process.

¹The Ordinance was subsequently amended substantially by Measure G in 1982.

Proposed Amendments to Account for the Potential Repeal of Costa-Hawkins

Base Rent Ceilings: B.M.C. section 13.76.100 (Establishment of Base Rent Ceiling and Posting)

Background – As originally passed by the voters in 1980, the Berkeley Rent Ordinance established a system of vacancy control. The most fundamental component of vacancy control is the establishment of a Base Rent Ceiling, which can then be adjusted on an annual basis. The Base Rent Ceiling for all tenancies was originally calculated using the lawful rent in effect on May 31, 1980. See B.M.C. section 13.76.100 (Establishment of Base Rent Ceiling and Posting).

The Costa-Hawkins Rental Housing Act became effective on January 1, 1996,² and – among other things – prohibited vacancy control and mandated vacancy decontrol. Under Costa-Hawkins, all initial rents established after January 1, 1999, can be set at any amount; the rent for the previous tenancy has no bearing on the amount the landlord is entitled to charge a new tenancy. This change in state law superseded the Base Rent Ceiling provisions of the Ordinance, rendering them invalid and devoid of legal effect.

Even though Costa-Hawkins fundamentally shifted the way Berkeley was able to control rents, the Berkeley voters never amended the Ordinance to account for this change. Instead, the Board enacted Regulation 1013 which authorized the Board to implement the form of rent control mandated by Costa-Hawkins. As of 2018, approximately 11 – 12% of the rent-controlled units in Berkeley have tenancies that pre-date January 1, 1999. All other units have experienced at least one vacancy rent adjustment authorized by Costa-Hawkins, and many units have turned over multiple times and thus been subject to multiple vacancy rent adjustments.

A statewide ballot initiative to repeal Costa-Hawkins appears likely to qualify for the general election on November 6, 2018. If Costa-Hawkins is repealed, Berkeley's original vacancy control system will resume and landlords will be prohibited from raising rents on new tenants. However, the legal effect of the repeal of Costa-Hawkins (with respect to existing rents established after January 1, 1996) is not plainly set forth in the Ordinance, because the superseded language tying rent ceilings to 1980 rents was never removed.

If Costa-Hawkins is repealed, Regulation 1013 will need to be immediately suspended and repealed as it will refer to a statute that no longer exists. Absent a provision that clearly articulates the effect of Costa-Hawkins vacancy rent increases upon base rent ceilings, voters may be confused about the effect of Costa-Hawkins repeal, and the outdated wording of the Ordinance will generate confusion. To insulate the Ordinance from potential legal challenges, Board staff recommends amending B.M.C. 13.76.100 to make clear that all Costa-Hawkins rent increases shall remain in effect, and Base Rent Ceilings shall be adjusted accordingly. Rent ceilings that were established prior to 1999 would remain in effect.

² Costa-Hawkins had a phase-in period from January 1, 1996 – January 1, 1999. The particulars of this phase-in do not merit discussion in this memorandum, but it is important to note that all initial rents established after January 1, 1999, were permitted a market rate vacancy rent adjustment.

Proposed Action – Insert the following paragraph or similar language into B.M.C. 13.76.100 – “For such rental units where the landlord established a new initial rent under the Costa-Hawkins Rental Housing Act, the Base Rent Ceiling shall be the most recent lawfully established periodic rent. For such rental units that were exempt from rent stabilization pursuant to the Costa-Hawkins Rental Housing Act, the Base Rent Ceiling shall be the most recent lawfully established periodic rent.”

Exemption of New Construction: B.M.C. section 13.76.050 (Applicability)

Background – Costa-Hawkins currently prohibits rent control jurisdictions from controlling any units that have received a Certificate of Occupancy after February 1, 1995, and any units that were already exempt pursuant to a local exemption for new construction before that date. This had the effect of preventing local jurisdictions from updating their definition of new construction to account for the passage of time. If Costa-Hawkins is repealed, local rent boards will have the opportunity to update their new construction exemptions.

Currently, the Berkeley Rent Ordinance exempts units that have received a Certificate of Occupancy after June 30, 1980 (B.M.C. section 13.76.050I.) – the Berkeley voters adopted this standard in November of 2016 to more closely align the Ordinance with the Costa-Hawkins definition of new construction which requires a Certificate of Occupancy.

In the event of Costa-Hawkins repeal, the new construction exemption could be amended to create a rolling exemption that takes into account the actual age of the building. It is also important to remember that not all legally-constructed new units receive a Certificate of Occupancy, and a new Certificate of Occupancy can be issued to a building that is *not* newly constructed. If Costa-Hawkins is repealed, the voters will have the opportunity to redefine the “new” component of new construction in a way that avoids the pitfalls of Costa-Hawkins’ Certificate of Occupancy standard.

Berkeley has approved the construction of many newly constructed rental units in recent years. These newly constructed rental housing units have no rent controls or registration. Board staff proposes that B.M.C. section 13.76.050I. be amended to allow for a rolling exemption of 12 years for all newly constructed units. This standard would be consistent with Measure U1, adopted by Berkeley voters in November of 2016.

Proposed Action – Revise the New Construction exemption to provide that units shall be exempt for a 12-year period immediately following issuance of a final inspection approval by the City or equivalent document establishing the completion of construction. Thereafter, these units shall not be considered new construction and will be covered by rent control and registration.

Explore a Separate Ballot Measure Enacting a Reduced Program Fee for New Construction and Other Partially Exempt Units

The Board sometimes fields inquiries regarding rental units that are partially exempt from the Ordinance. Generally any assistance provided to tenants/owners of partially exempt units is limited, as such units are exempt from registration requirements but subject to eviction protections and security deposit interest. The program fee is only charged to owners of units that are subject to the registration requirements of the Ordinance.

Proposal: Some landlords have raised concerns that partially exempt units are not charged any fee. This could be remedied by a ballot initiative establishing a reduced fee for partially exempt units; if the landlord community is interested we can explore this idea.

Proposed Amendments to Deal with Accessory Dwelling Units and Golden Duplexes

Exemption of Accessory Dwelling Units: B.M.C. section 13.76.050 (Applicability)

In January 2017, state law was amended to encourage the construction of Accessory Dwelling Units. The amendments loosened parking requirements and authorized the construction of “junior” Accessory Dwelling Units within the envelope of a single-family home without need to apply for a use permit. The result has been a massive increase in interest among property owners in these types of units, as demonstrated by the spike in applications to build ADUs in all of California’s major cities.³ This, combined with renewed interest in the construction of various other types of ADUs (backyard cottages, garage conversions, house-lifting, additions, attic conversions) has resulted in confusion regarding the applicability of rent control to ADUs in general.

Existing law provides no special treatment for ADUs, and as a result the eligibility of a particular unit for exemption is highly case-specific. Rent Board staff believe that the majority of ADUs will be exempt because owners will be able to claim the “golden duplex” exemption for owner-occupied duplexes, and because any detached unit will generally receive a new Certificate of Occupancy. However, any given applicant may have questions that City staff are unable to answer, and it is in the interest of the entire city to encourage the construction of additional housing units whenever possible.

One of the conditions of approval of an application to create an ADU is owner-occupancy of the property. Therefore an exemption for all owner-occupied ADUs would have the effect of providing clarity to all applicants interested in adding ADUs to the housing stock, while avoiding abuses by any landlords seeking to evade rent controls (by subdividing a portion of a rented house into an ADU, for example). Existing tenants can retain existing protections through a grandfather clause.

³ Garcia, David; “ADU Update: Early Lessons and Impacts of California’s State and Local Policy Changes”, December 2017; UC Berkeley Turner Center, available at:
http://turnercenter.berkeley.edu/uploads/ADU_Update_Brief_December_2017_.pdf

Proposed Action – Enact an exemption for ADUs where the owner of record occupies the property as his, her or their principal place of residence. This exemption shall not apply to tenancies established prior to the effective date of the amendment.

“Golden Duplex” Exemption: B.M.C. section 13.76.050 (Applicability)

Some owner-occupied duplexes in Berkeley are exempt from rent control and eviction protection, so long as they were occupied by the owner on December 31, 1979 and are currently occupied by the owner. Concerns about golden duplexes have been raised relating to speculation driven displacement; a number of cases have arisen in which a long-term tenant is forced to abruptly move when facing a dramatic rent increase upon the sale of the property. These concerns can be addressed by imposing a residency requirement before the exemption takes effect, or by phasing out the exemption for all new purchasers.

In addition, concerns raised in public meetings regarding ADUs being exempt under this provision frequently centered on the “arbitrary” nature of the exemption’s 1979 occupancy requirement, and its all-or-nothing structure. Testimony was offered by potential landlords who were concerned not with the ability to raise the rent on their tenants but with the potential inability to evict a troublesome tenant without good cause.

Proposed Action – Staff recommends that a residency requirement of 36 months prior to exemption be enacted for all eligible duplexes sold after November 7, 2018. Tenants would be protected by rent control and eviction protections until the residency requirement has been met.

Additional Recommendation -Staff also recommends that the Board and Council begin considering updating the exemption itself. The Committee may choose to explore how best to balance several goals, including: providing golden duplex tenants with greater stability and security, allowing bona fide owner-occupants to retain flexibility in determining who they live with and greater, but not unlimited, flexibility in raising the rent above the standard rent control limits, and potentially achieving more consistent applicability across all owner-occupied duplexes. Collectively, we may determine that given the uncertainty of the scope of changes that November’s election may bring, it may be best to wait until another election to resolve these questions. However, given the recurring concerns raised by both sides, we may want to begin that discussion sooner rather than later. In addition to the proposed 36 month residency requirement noted above, some possible additional options for consideration include:

1. For all Golden Duplexes sold after 11/7/18
 - Upon the completion of the residency requirement, allow annual rent increases that are not unlimited but are larger than the AGA for fully controlled rental units.
 - Allow banking of increases but limit rent increases to no more than 10% in any 12 month period.
 - Allow owners to evict without a “good cause” but if a “no-fault” eviction is used the tenant is entitled to relocation expenses and the rent remains the same for the next tenant.

2. For all Golden Duplexes, regardless of date of acquisition
 - Apply rules similar to those described above but application would be extended to all golden duplexes.
3. For all owner-occupied duplexes (regardless of occupancy status in 1979)
 - Apply rules similar to those described above.
 - Existing tenants would be protected under current rent control and good cause rules.
 - Possibly have some residency requirement for cases of new-ownership.
4. Phase out Golden Duplex exemption at the time of post 11/7/18 sale
 - All existing golden duplex exemptions would remain but the exemption would completely expire upon transfer after 11/7/18.

Conclusion

We are seeking initial 4x4 discussion, comment and feedback on these potential changes to the Rent Stabilization Ordinance so that a formal proposal (including draft language) can be presented to the Rent Board for consideration. Ideally there will be a recommendation in May or early June. The Board will make the final recommendation to the City Council suggesting which items be placed on the ballot along with specific proposed language.