Rent Stabilization Board

RENT STABILIZATION BOARD

DATE: April 21, 2003

TO: Honorable Members of the Rent Stabilization Board

FROM: Jay Kelekian, Executive Director

SUBJECT: Proposed Regulations 524 and 525

Recommendation:

That the Board adopt on first reading:

(1) Regulation 524 to clarify that the rent ceiling limitations of Rent Stabilization Ordinance are intended to apply to units rented for residential use by a "tenant in occupancy" and do not apply to rental units that are kept primarily for secondary occupancy, such as a pied-a-terre or a vacation home, or for non-residential use, such as commercial or storage; and

(2) Regulation 525 to provide a procedure by which a landlord may seek a determination from the Rent Board that a unit is not being occupied by a "tenant in occupancy."

Background and Need For Rent Stabilization Board Action:

The purposes of the Rent Stabilization and Eviction for Good Cause Ordinance (Berkeley Municipal Code Chapter 13.76) are to "regulate residential rent increases" and to protect tenants from unwarranted rent increases and arbitrary evictions in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. (B.M.C.§13.76.030.) In addition, the Ordinance is designed to address the City's housing crisis and advance the City's housing policies with regard to low and fixed income persons, minorities, students, handicapped, and the aged. (*Id.*) To advance these housing goals, the rent limitations of the Ordinance are intended to apply to real property that is being rented "for residential use." (B.M.C. §13.76.050.) Thus, the rent limitations of the Ordinance are not intended to apply to real property that is being rented or used for non-residential purposes.

Rent Boards in other rent control cities, including San Francisco and Santa Monica, have discovered that some tenants who originally rented a rent-controlled unit as a place to live no longer use the unit as their primary residence. Instead, it appears that some rental units have been converted to non-residential uses or have been retained for secondary occupancy. For example, in Santa Monica, it was discovered that some tenants who purchased homes elsewhere kept their rent-controlled units, in one

instance, to operate a computer business and, in another, to store legal files. Some tenants, who have moved to other parts of Los Angeles, have kept a rent-controlled unit by the Santa Monica beach as a vacation home for weekend getaways. In San Francisco, it was discovered that a Santa Barbara law firm kept a rent-controlled apartment as a pied-a-terre for its lawyers' use when the firm had business in the city. Because rent control laws are intended to address a city's housing shortage by protecting residents so that they are not priced out of their communities, a tenant's use of a rent-controlled unit for purposes other than as a primary residence is contrary to the intent and purposes of the rent control law. The non-residential use of a residential unit exacerbates a city's housing shortage by removing residential units from the city's stock of available housing. Abuses of the rent control law such as those mentioned above prompted the rent boards in Santa Monica and San Francisco to adopt regulations providing that rent regulations do not apply to rental units that are not occupied by a tenant as his or her primary residence.

It is not known whether or to what extent rent-controlled units in Berkeley are being used for non-residential purposes or for secondary occupancy. Nonetheless, there is concern in the community that there are some instances of non-residential use and that it is detrimental to the city and to the Rent Stabilization Program to permit such abuses. Proposed Regulations 524 and 525 are intended to address the issue. Under these regulations, units that are not occupied as a primary residence will lose their rent control protection for as long as they are used for secondary occupancy or non-residential use. The tenant does not, however, lose possession of the unit. If the unit is again occupied as a primary residence, either by new tenants or by the original tenant restoring the unit to residential use, rent control protection will be returned. At such time, the owner would file a Vacancy Registration form and report the new initial rent. These regulations do not change the landlord's obligation to keep the unit registered with the Rent Board.

A. Regulation 524. Tenant in Occupancy.

Subdivision (A) of proposed Regulation 524 states that the rent ceiling limitations of the Rent Ordinance only apply to a "tenant in occupancy," which is a tenant who occupies the rental unit as his or her "primary residence" and not as a secondary home or for non-residential use. Rental units kept primarily for "secondary residential occupancy" or "non-residential use" are not subject to rent controls. Examples of secondary residential occupancy ("pied-a-terre," "vacation home") and non-residential use ("storage," "commercial or office") are provided as illustrations of the type of occupancy or use not covered by the rent regulations.

Subdivision (B) is intended to provide guidelines for determining whether a rental unit is occupied by a "tenant in occupancy." It recognizes that many tenants may be temporarily absent from their homes for employment, family or personal reasons but still maintain their Berkeley apartment as their primary residence. These tenants are considered "tenants in occupancy" for whom the rent limitations will continue to apply. Subdivision (B) expressly provides that that occupancy as a primary residence does not mean that a tenant has to be continuously, physically present in the unit so long as the unit is the tenant's "usual place of return" after, for example, a vacation or a business trip or an academic sabbatical. The "usual place of return" standard is meant to distinguish a person's primary residence from a person's secondary residence. A pied-a-terre or a vacation home, for example, is not the place a person usually returns to after, say, hospitalization or attending to a sick relative.

Subdivision (B) also lists certain factors that are relevant to a determination that a rental unit is a tenant's primary residence. The list is not exhaustive. Each of the elements listed is evidence that the unit *is* the tenant's primary residence. Thus, an inference that the unit is *not* the tenant's primary residence may be drawn from an absence of evidence of each of the elements. No single element is determinative. Ultimately, the hearing examiner will weigh the factors in light of the totality of the circumstances and make a determination based on a preponderance of the evidence. Subdivision (B)(8) mentions a number of legitimate reasons why a tenant may be temporarily absent from their rental unit but still be a "tenant in occupancy." This list is also non-exhaustive. The subdivision expressly provides that any "reasonable temporary period of absence" would not affect an individual's "tenant in occupancy" status.

Subdivision (C) provides that a tenant who is enrolled as a student or is a member of the faculty or staff at a college or university in the Bay Area may be a "tenant in occupancy" entitled to rent control protections even if the person has another residence to which he or she will ultimately return. This provision is intended to protect persons who have relocated to the Bay Area for school or for a temporary teaching assignment and who use a Berkeley rental unit as a primary residence while located in the Bay Area but who will go back to their original homes at the completion of their studies or their teaching assignment. For such a person, their Berkeley apartment is their "primary residence" while they are in school or on their assignment. However, by way of illustration, a person who is merely enrolled for one course at a community college, or who is a student or member of the faculty, but does not reside in the Berkeley rental unit, may not qualify as a "tenant in occupancy" if another residence is their "usual place of return."

Under subdivision (D), if an individual rents two units in the same building and resides in one as a primary residence, the other unit will qualify for rent protection even if it is used primarily for residential storage of the individual's personal property. It does not require the units to be contiguous so long as they are in the same building and the items stored are the tenant's personal property. The unit will not be protected, however, if the tenant uses the unit for non-residential storage of, say, the tenant's business inventory or office files.

B. Regulation 525. Procedure for Challenging Tenant in Occupancy Status.

Subdivision (A) sets out the filing requirements for a landlord seeking a determination that a rental unit is not occupied by a "tenant in occupancy." The Rent Board will provide a petition form and the landlord must explain the basis for the petition and affirmatively state that the unit is not occupied by subtenants. If subtenants occupy the unit as their primary residence, they are "tenants in occupancy" and the landlord is not entitled to relief under these regulations. The landlord may, however, be entitled to impose rent increases on the subtenants under the Costa-Hawkins Act and Board Regulation 1013(O) if the "original occupants" no longer permanently reside at the rental unit. The "tenant in occupancy" petition must be served on all tenants who claim a right to possession of the unit and service must be at the rental unit and any other address that the tenant has provided to the landlord. It is anticipated that any tenant who is absent from their unit for a significant period has made arrangements to have their mail forwarded or has left someone in charge of monitoring their mail. If a tenant fails to appear at the hearing, the hearing examiner should require the landlord to provide evidence that he or she served the tenant at the rental unit's address. In addition, the examiner should inquire whether the tenant provided the landlord, in writing, any other address for service during the tenant's absence from the premises. If the tenant has provided another address in

writing, the hearing examiner should require the landlord to provide evidence that he or she served the tenant at the other address. The purpose of this inquiry is to ensure that there was a reasonable, good faith attempt to provide the tenant with actual notice. A landlord who files a petition under this section may also serve notice of a rent increase; however, the rent increase is stayed until there has been a determination on the petition.

Subdivision (B) provides that proceedings under this section are to be expedited. A hearing will be held within 30 days of the petition's filing, with at least 15 days notice, and a decision will be issued within 30 days of the hearing. In exceptional circumstances, the time periods may be extended for good cause.

Subdivision (C) provides that all other Board regulations pertaining to the hearings process will be applicable to "tenant in occupancy" petitions. This includes a right to appeal the determination to the Board. Appeals shall be handled as expeditiously as possible. A determination that a tenant is *not* a "tenant in occupancy" must be supported by a preponderance of the evidence. This means that the ultimate burden is on the landlord to prove that the unit is not the tenant's primary residence. However, the regulation also provides that if a landlord makes a prima facie showing that the unit is not continuously occupied by the tenant as a residence, the burden will shift to the tenant to show that the unit is his or her primary residence. A "prima facie showing" means that the landlord has presented sufficient evidence to prove his or her case if no other evidence were submitted. A landlord may know and be able to show that the tenant is away from the unit for extended periods but may not know why. Once this showing is made, the tenant must present evidence to explain the absence. The burden shift is justified because the tenant is the party who is in the best position to present evidence that the unit is his or her primary residence, notwithstanding the extended absences. If a landlord does *not* make a prima facie showing, the petition will be denied regardless of whether the tenant presents evidence.

If the hearing examiner rules that the tenant is not a "tenant in occupancy," the landlord is entitled to increase the rent in conformance with state law. If the landlord had given notice prior to the hearing examiner's decision, the rent increase will be effective on the date specified in the notice or on the date on which rent is next due following issuance of the hearing examiner's decision, which ever is later. This provision protects the tenant from a large retroactive increase. If the decision is appealed, the rent increase will be stayed; however, if the landlord prevails, the increase will be retroactive to the effective date under subdivision (C).

Financial Impact:

None

Name and Telephone Number of Contact Person:

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