SANTA MONICA RENT CONTROL BOARD MEMORANDUM

TO: Santa Monica Rent Control Board

FROM: J. Stephen Lewis, General Counsel

FOR MEETING OF: October 10, 2019

RE: The Board will consider whether to adopt a new Regulation 5100, respecting the scope of authority granted by a removal permit; Regulation 5101, relating to the rent-controlled status of removed units; and Regulation 5102, respecting the expiration of removal permits.

Subject Matter

In this public hearing, the Board will consider whether to adopt the following three new regulations:

- Regulation 5100, respecting the scope of authority granted by a removal permit;
- Regulation 5101, relating to the rent-controlled status of removed units; and
- Regulation 5102, respecting the expiration of removal permits.

How this Item was Initiated

This item was initiated by the Board's General Counsel in response to the Court of Appeal's July 30 opinion in *1041 20th Street, LLC v. Santa Monica Rent Control Board*.[1]

Discussion

In *1041 20th Street, LLC*, the Court of Appeal held that the Board was correct when it determined in a 2016 administrative decision that a removal permit does nothing more that permit an owner to take a controlled unit off the market. The

[1] *1041 20th Street, LLC v. Santa Monica Rent Control Board* (2019) 38 Cal.App.5th 27

Court further clarified that a removal permit does not—as lawyers for the property owners had argued in the litigation—"remove rent control" from a unit that remains on the market. The Board, and then the Court of Appeal upholding the Board's decision, based that conclusion on the plain language of the provision of the Santa Monica City Charter authorizing removal permits. That provision, Charter Section 1803, subdivision (t), authorizes the Board to permit a landlord "to remove a controlled rental unit from the rental housing market…"

The first of the proposed regulations, Regulation 5100, makes even more explicit what the Charter's plain language already makes clear, stating that "A removal permit authorizes the owner of a controlled unit…to cease the residential rental of that unit." The regulation also clarifies that, once the Board grants a removal permit, the owner may proceed, under Charter Section 1806(a)(9), to terminate tenancies affected by the permit—a necessary predicate to removing any currently-occupied unit from the market. Finally, the regulation clarifies that an owner who terminates a tenancy pursuant to a removal permit must comply with all noticing and relocation-fee requirements.

The second of the proposed regulations, Regulation 5101, makes clear that any unit as to which the Board has granted a removal permit remains subject to rent control for as long as it remains rented for residential purposes. It also makes clear that, should a removed unit ever be returned to the market, that unit will again be fully subject to rent control.

The third and final of the proposed regulations, Regulation 5102, specifies the period during which a removal permit must be acted on, without which such action the permit will expire. The litigation revealed there are some units or properties,—most notably 1041 20th Street, which was the subject of the litigation—as to which a removal permit was granted based on facts that are demonstrably no longer true. [2] As to those properties, which do not qualify for a removal permit, it makes no sense to permit the owner to act on a long-ago-issued permit to remove units from the market merely because they could have been removed years ago. But, in the absence of a specified expiration date, city-issued permits do not expire. Thus, there are property owners who clearly, and in some cases admittedly, could not qualify for a removal permit today who could nonetheless remove a unit or units from the market based upon a permit whose appropriateness has long since passed.

[2] Staff does not yet know how many properties for which this is true, but is currently engaged in a detailed investigation to determine the exact number.

Proposed Regulation 5102 would remedy this problem by specifying that a permit may no longer be used once it has been acted upon, after the expiration of a specified expiration period, or (for permits issued in the past that have already been acted upon or should have been acted upon but have not) immediately upon adoption of the proposed regulations.

Immediate termination when a permit is deemed to have been acted upon simultaneously with the Board's issuance of a removal permit:

Proposed Regulation 5102 states that "…a removal permit can no longer be used with respect to a unit once that unit has been removed from the residential rental market pursuant to that permit." If a unit as to which an owner has applied to the Board for a removal permit is already vacant on the date when the Board grants the owner's application, there is nothing more for the owner to do. This is because, as made clear by both Charter Section 1803(t) and proposed Regulation 5100, a removal permit is nothing more than permission to take a controlled unit off the market.

A removal permit goes into effect immediately upon the Board's having granted the application for it. In the case of a unit that is vacant on the date when a removal permit is granted, there is nothing more that the owner must to do act on that permit; the owner has, in effect already completed the action that the permit allows. Because the permit expires when acted upon, and because a permit granted as to a vacant unit has already been "acted upon," its single use occurs immediately upon the permit's being issued. Proposed Regulation 5102, subdivision (a) would codify this by specifying that a removal permit ceased to be valid for further use on "the date when the Board grants the removal permit for any unit to which the permit applies that is vacant on that date."

Expiration within 90 days:

When the Board grants permission to remove a unit from the rental housing market because the unit is uninhabitable, or because the owner is unable to achieve a fair return as long as a unit remains on the market (thus depriving the owner of a Constitutional right), the permit should be acted upon expeditiously. No tenant should be living in an irredeemably uninhabitable unit, and no property owner should be required to continue a condition that deprives him or her of a constitutional right. Thus, the proposed Regulation 5102, subdivision (c), paragraph (1), specifies that such permits should expire after 90 days, as they should be acted on well within a 90-day period.

It is possible that, for reasons beyond the owner's control and despite the owner's exercise of due diligence, the permit cannot be acted upon within 90 days. Proposed Regulation 5102, subdivision (c), paragraph (3) permits the Administrator to extend the expiration to a later date upon a showing of good cause. But, by specifying that a permit expires within 90 days in the absence of such a showing of good cause, the proposed regulations recognize the seriousness of the need for the affected unit to be removed from the market, and incentivizes the owner to effect the removal without delay.

Expiration within 2 years:

There is less need for immediate action when the Board grants a permit to remove units so that a property may be redeveloped with new controlled units including units that are designated affordable. Indeed, the development process being what it is, it seems likely that requiring an owner to act on a removal permit too quickly could result in the loss of good, habitable units while the building sits empty for months or a year or more awaiting resolution of all matters necessary for the redevelopment to begin. To avoid that problem, Regulation 5102, subdivision (c), paragraph (2) specifies that a removal permit granted to provide for redevelopment would expire only after 2 years, with the same possibility of extension upon a showing of good cause.

Expiration when acted upon:

Like a demolition permit authorizing the razing of a building, a removal permit necessarily contemplates something that is to be done only once; when that thing has been done, there is nothing left under the permit to do. Proposed Regulation 5102, subdivision (b) specifies that a permit authorizing an owner to remove a unit from the rental market "expires" (i.e., ceases to be valid) on the date when the removal has occurred, even if a longer expiration period has not yet run. Thus, for example, an owner who has already displaced a tenant to remove a unit from the market could not, if he or she returns the unit to the market, displace a new tenant under the previously-issued permit.

Immediate expiration of permits issued more than one year before regulation's effective date:

The above expiration periods would very clearly apply to any newly-issued removal permit, and would also apply to permits previously issued. But in order to avoid any lack of clarity as to the status of any long-ago issued permits that have never been acted upon, proposed Regulation 5102, subdivision (d) specifies that

any permit issued more than a year before the regulation's adoption would expire immediately.

Recommendation

Staff recommends that the Board hear from the public, deliberate, and decide whether to adopt proposed Regulations 5100, 5101, and 5102.

5100. Scope of Authority Granted by a Removal Permit

A removal permit authorizes the owner of a controlled unit to which the permit applies to cease the residential rental of that unit. Upon the Board's grant of a removal permit—and the owner's having obtained any other City-required permits—an owner may give such notice as is legally required to terminate any tenancy in the unit or units to which the permit applies. The Board's grant of a removal permit alters neither any requirement relating to the timing or method by which an owner must give a tenant notice that his or her tenancy will be terminated, nor the requirement to pay relocation fees required by state, local, or federal law.

5101. Controlled Status of Removed Units

(a) A unit as to which the Board has granted a removal permit remains fully subject to the Rent Control Law and all Board Regulations enacted thereunder for as long as it is used, or is held out for use, as a residential rental unit.

(b) The unit will cease to be a controlled unit when the owner to whom the removal permit is granted (or that owner's successor in interest) has terminated any tenancy in that unit on the basis of the permit's having been granted. The unit will cease to be subject to control only because it will cease to be used, or held out for use, as a residential rental unit.

(c) If, at any time subsequent to its removal from the residential rental market, a removed unit is again used, or held out for use, as a residential unit, it shall be subject to the Rent Control Law and all Board Regulations enacted thereunder to the same extent as if the permit had never been granted. These regulations include, without limitation, those requiring landlords to:

(1). Inform the tenant that his or her tenancy is subject to rent control;

(2). Comply with all registration requirements; and

(3). Pay all current and future registration fees.

5102. Expiration of Removal Permit

A permit to remove a controlled unit from the residential rental market may be used only once for any unit to which it applies. For this reason, a removal permit can no longer be used with respect to a unit once that unit has been removed from the residential rental market pursuant to that permit. A permit to remove a controlled unit from the residential rental market can no longer be used after the earlier of:

(a) The date when the Board grants the removal permit, for any unit to which the permit applies that is vacant on that date. As to such a unit, the removal is deemed to have occurred simultaneously with the Board's grant of the permit.

(b) The day when the owner of the unit subject to the permit actually removes the unit from the residential rental market by ceasing to rent the unit or offer it for rent; or

(c) The expiration any of the following three periods:

(1) 90 days after the permit was granted, if the permit was granted because the owner cannot make a fair return by retaining the unit, as provided for by Charter Section 1803(t)(1), or because the unit is uninhabitable and cannot be made habitable in an economically-feasible manner, as provided for by Charter Section 1803(t)(2)(i).

(2) Two years after the permit was granted, if the permit was granted so that the property may be developed with multifamily dwelling units and the permit applicant agrees as a condition of approval, that the units will not be exempt from rent control pursuant to Charter Section 1801(c) and that at least 15% of the controlled rental units to be built on the site will be at rents affordable by persons of low income, as provided for by Charter Section 1803(t)(2)(ii).

(3) The expiration of any extension to either of the above two periods that the Administrator specifies in a letter written to the owner and copied to the Board and the occupant of any unit affected by the removal permit. The Administrator may extend a removal permit's expiration date beyond that specified in in paragraphs (1) and (2) of this subdivision (c) only for good cause as shown in a writing submitted by the owner or owner's representative. Good cause includes, as a minimum, proof that the removal has not occurred by the date originally specified due to factors beyond the owner's control and despite the owner's demonstrated due diligence.

(d) For any unit granted a removal permit more than one year before the effective date of this regulation, the date when this regulation becomes effective.

The following pages are written communications that have been received from the public on this item of the hŎŭφ мл agenda and are part of the Board record.

TO: Santa Monica Rent Control Board

FROM: James Corrigan, Manager
1041 20th Street LLC

DATE: October 10, 2019

Re: Proposed Regulations 5100-5102, Board Meeting 10/10/19, Item 11A

Dear SMRCB:

If the Board passed these new regs as staff recommends, to apply an expiration date to prior recipients of Cat C and CQ Removal Permits which had no expiration, the Board would be essentially reversing all of those prior decisions. The Court of Appeal found the Board has no authority to reverse a prior decision. This means you cannot adopt laws that would effectively change the original Board decision to grant the Category C or CQ Removal Permit (CQ provision was added in 1994 for rent control buildings severely damaged by the 1994 Northridge Earthquake) which had no expiration. Good try but blatantly illegal.

There are so few whole buildings left, if any, besides 1041 20th Street that have Category C or CQ removal permits which have not been used to demolish the building, it appears that this proposed legislation is specifically meant to damage 1041 20th LLC in retaliation for the current lawsuit still pending at the State Supreme Court. As such, it can be challenged as spot zoning and retaliatory, arbitrary and capricious, among other defects that will appear when more time is available to research all aspects of the matter. Additionally, it is clear that the new regs are being rushed through now without any notification to 1041 20th LLC, the known interested party according to the staff report, and apparently the only interested party. Therefore, they are defective procedurally as well as substantively.

The only reason these Category C and CQ Permit buildings are still standing is the Board and its staff at the time told property owners they would be permanently exempt from rent control if they put in a heck of a lot of money into the buildings despite a lack of a fair return as calculated by the Board's staff and experts. After the Board reneged on these promises in 2016 leaving the property owners with devalued assets and rent controlled income streams or a lawsuit to litigate, and/or attorneys' fees to pay, the proposed regs now aim to retroactively insert an expiration date on Category C or CQ removal permits that had no expiration when the prior Boards approved them.

The effect of the regs as it applies to property owners where the property already has a Category C or CQ removal permit would be so the already duped property owners, who without the new expiration date, could at least still have the benefit of the removal permit they could have and probably would have already used the removal permit in the demolishing their buildings if they had known the SMRCB would attempt to reverse the original interpretations of the rent control law more than 22 years later by their predecessors but of course after the property owners took the risk of investing a heck of a lot of money into a property that they could have otherwise tore down the existing building and built fewer new condominiums than

the rental units they had preserved for the rental housing stock of Santa Monica.

If the Category C and CQ property owners had been told that they would have had to stay under rent control, these property owners would have had no economic recourse at all other than enforced the demolition of the building or accept that they were not going to be able to get a constitutional fair return as calculated by the Board's staff and experts. These owners including 1041 20th Street LLC probably would have already demolished the buildings had the Board not promised the buildings could be renovated and remain out of rent control.

In fact, exactly the opposite was promised these property owners, and perhaps whoever else this might affect, if anyone. With the 1041 20th LLC's Category C Removal Permit, the 1993 Board discussed what would be done with these building, and because the property owner promised to rehab the building, not to demolish the building, promised to keep the units rented, he would be able to rent the units free from rent control. Anything the Board does now will just make the situation worse. Worse for property owners and tenants, who will be displaced for demolition, and achieving no stated purpose of the Rent Control Charter Amendment, since demolition is not the aims of the Rent Control Charter Amendment.

The Board should remove from its proposed regs any retroactive termination or expiration date on all prior Category C and CQ removal permits. That is because these permits were obtained with the Board promising owners first that property would be permanently exempt from rent control if they spent a heck of a lot of money to rehab the property above what was "reasonable and necessary" for the then-current tenants, which was all the rent control law would allow. Second, the Board promised because that rehab would be so expensive, the removal permit would be permanent, with no expiration date.

The Board has the authority to make decisions concerning future changes in its policy and laws. However, the Board does not have the authority to make retroactive changes that in fairness, it should not make. The retroactive proposed regs are not fair and the Board has no authority to make them if they reverse or change prior Board decisions.

The Board's staff has already reneged on the first promise made to the affected property owners by staff's claiming in 2016 that suddenly all the Category C and CQ Removal buildings (and individual units) were under rent control. This action was taken by the staff without any action of the Board. Now staff is finally asking the Board's permission, but in the new regs as written and recommended, what staff is seeking is to renege on the second promise made to these property owners and rob these same property owners of future options they might have with an unexpired Category C or CQ removal permit.

Additionally, it is clear that the new regs are being rushed through now without any direct notification to 1041 20th LLC because of fear the Board may lose the case against 1041 20th LLC in the State Supreme Court. (By the way, the Staff Report does not even inform the Board the case is still pending at the Supreme Court.) Staff apparently hopes that if the Board loses the aforementioned lawsuit, it can still claim the 1041 20th LLC"s Category C Removal permit expired under new regs.

Do not think for a moment that 1041 20th LLC's lawsuits against the Rent Control Board will by done if the Board tries this end run against this property owner.

Very truly yours,

James Corrigan, Manager
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