

SANTA MONICA RENT CONTROL BOARD MEMORANDUM

TO: Santa Monica Rent Control Board

FROM: J. Stephen Lewis, General Counsel

FOR MEETING OF: April 11, 2019

RE: The Board will hold a public hearing on whether to adopt a new Regulation 4203, respecting the calculation of rent decreases, specifying that a rent decrease due to the reduction of housing services or maintenance shall be calculated from the date on which the petition as to which it is granted was filed. The Board will also consider whether to repeal or amend subdivision (a) of existing Regulation 4004, respecting affected parties' response to individual rent-adjustment petitions.

Subject Matter

The Board will hold a public hearing on whether to adopt a new Regulation 4203, respecting the calculation of rent decreases, specifying that a rent decrease due to the reduction of housing services or maintenance shall be calculated from the date on which the petition as to which it is granted was filed. The Board will also consider whether to repeal or amend subdivision (a) of existing Regulation 4004, respecting affected parties' response to individual rent-adjustment petitions.

How this Item was Initiated

At its February 14 meeting, in response to a Discussion Item proposed by Chair Torosis, the Board directed staff to draft for its consideration proposals to make rent decreases "retroactive." Staff understood the Board to mean that the Board wished to consider proposals under which rent decreases would be prospective, but would be calculated to account for the entire period during which any problem giving rise to that decrease had existed. At its March 14 meeting, the Board considered three proposals drafted by staff, under which rent decreases would be calculated to account for some or all of the period during

which the problem justifying such decrease occurred. After hearing from the public and deliberating, the Board directed staff to draft a proposed regulation requiring that rent decreases be calculated from the date on which the decrease petition was filed.

The Board also directed staff to provide an analysis of the effects of amending or deleting Regulation 4004, subdivision (a), under which the Board must dismiss a rent-decrease petition upon verification that the conditions complained of in that petition have been corrected at any time before the date of the hearing.

Discussion

Why is the Board considering this, and what is staff proposing?

The voters created the Rent Control Law in Santa Monica to ensure that rents are not increased unreasonably, and to ensure that landlords receive rents that are sufficient—but no more than sufficient—to achieve a fair return. The voters created the Board to administer the Rent Control Law, and to adjust rents as necessary to achieve the law’s overall purpose of ensuring that rents do not become unfair. The Board does this, in part, by adjusting rents downward, if there are reductions in services or maintenance, by an amount commensurate with the value of those reductions.

Under the Board’s existing practice, such rent decreases go into effect on the first rent-due date occurring at least 30 days after the decrease decision is issued, and account only for reductions in services or maintenance continuing from that date forward. As members of the public and Commissioners have observed, this practice has the result that tenants who have been paying a rent that has been proven unfair for what may have been several months have no remedy. Thus, the Board has concluded, the existing practice is inconsistent with the Charter’s purpose.

To address this problem, the Board has directed staff to draft a regulation under which rent decreases, while still going into effect only prospectively, are calculated to account for periods of unfair rent paid by the tenant, and collected by the landlord, before that date. To ensure that the calculation isn’t needlessly cumbersome, and that all parties are granted maximum due process, the Board has directed that the regulation provide for the calculation of the decrease only from the date when the decrease petition was filed with the Board. Staff recommends that the Board consider adopting the following regulation to achieve that result:

4203. Calculating the Decrease

A rent decrease resulting from a reduction in housing services or maintenance, including but not limited to a failure to comply with all housing, health, and safety codes, will account for the past, present, and continuing reduction on which the decrease is based.

- (a) *Valuing Past Reductions*. The total value of a reduction of services or maintenance which was in effect through the date when the hearing record is closed is calculated as follows:
- (1) Determine the monthly value of the reduced service or maintenance.
 - (2) Multiply the monthly value of the reduction by the number of months between the first rent-due date after the rent-decrease petition was filed with the Board and the date when the decrease is to go into effect.
 - (3) If any portion of the hearing process is delayed or continued for good cause, the calculation of the total decrease amount for past reductions shall not include that period of delay or continuance.
- (b) *Applying a Decrease for Past Reductions*. The entirety of a decrease for past reductions is applied on the first rent-due date during which the decision is in effect. If the amount of the decrease for past reduction is greater than the amount of rent that would otherwise be due, the balance is applied in the subsequent month or months.
- (c) *Valuing Ongoing Reductions*. The value of ongoing reductions is the sum of the monthly values of all items for which a rent decrease is awarded. The decrease in rent will remain in effect from month to month for the duration of the affected tenancy unless restored in accordance with Regulation 4038, subdivisions (b) and (c).

Would this be legal?

Yes. At the Board's last meeting, a member of the public asserted that calculating rent decreases to account for reductions in maintenance or service occurring before the decrease goes into effect would be illegal under two Court of Appeal opinions. That assertion was wrong.

First, the speaker asserted that including the value of a past loss of services or maintenance in a prospective rent decrease would be an award of damages, and would therefore be an illegal exercise of judicial powers, under *Sterling v. Santa Monica Rent Control Board*.¹ In support of that assertion, he quoted the following sentence from that opinion: "Contrary to the view of the superior court, there is not any question in the instant matter of an unconstitutional exercise of

¹¹ *Sterling v. Santa Monica Rent Control Bd.* (1985) 168 Cal.App.3d 176.

judicial power or of the awarding of damages.” From this sentence, the speaker extracted the idea that, if the rent decrease awarded in that case had accounted not only for reductions in services occurring after the date when the decision went into effect (as it did) but also accounted for reductions that had occurred before that date (which it did not), the decrease would have been an award of damages, and for that reason would have been an illegal exercise of powers reserved only to courts. But this is a serious misreading of the case. The court opined only that no damages had actually been awarded by the Board in that case; it did not opine, even in dicta (much less in a holding), that a rent decrease going into effect prospectively, but accounting for past reductions in services, would have been an award of damages. It certainly did not say that such an award, if it had occurred, would have been illegal.

But even if the Court of Appeal had said these things in its 1985 opinion, it would be of no significance now. In 1989, the California Supreme Court rejected that idea that administrative agencies—and this Board in particular—can never award damages.² The Supreme Court expanded on this point in 1991.³ In 2004, the Court of Appeal specifically upheld this Board’s authority to award rent decreases to account for reductions in services or maintenance that existed before the date when the decrease goes into effect, and concluded that, even if such an award can accurately be described as “damages,” it is permissible.⁴ Thus, far from holding that the proposed regulation is, or would be, illegal, case law (including case law upholding a Board regulation substantively identical to this one) holds that it would be entirely proper.

The speaker next cited *Larson v. City and County of San Francisco*,⁵ noting that, in that case, the Court of Appeal struck down a portion of San Francisco’s rent stabilization ordinance that authorized damages awards. The speaker neglected to mention, however, that the Court struck down only those provisions allowing San Francisco to award damages for unquantifiable things like tenant harassment and emotional distress, and held valid those portions of the law that—exactly like the proposed regulation at issue here—do nothing more than

² *McHugh v. Santa Monica Rent Control Board* (1989) 49 Cal.3d 348.

³ *Walnut Creek Manor v. Fair Employment & Housing Comm.* (1991) 54 Cal.3d 245.

⁴ *Ocean Park Associates v. Santa Monica Rent Control Bd.* (2004) 114 Cal.App.4th 1050.

⁵ *Larson v. City and County of San Francisco* (2011) 192 Cal.App.4th 1263.

include past and ongoing reductions in services or maintenance in the amount of rent decreases that will go into effect prospectively. Thus, far from suggesting that the proposed regulation would be problematic, *Larson* demonstrates that it would not be.⁶

Why is the Board thinking about amending or repealing Regulation 4004(a)?

Under Regulation 4004, the Board must notify affected parties that a rent-adjustment petition has been filed. The Board must also give the affected parties a form on which they may respond to the petition. Under subdivision (a) of Regulation 4004, an owner may respond to a tenant's rent-decrease petition at any time up until the hearing on that petition by asserting that all problems complained of in the petition have been fixed. If the Board determines that the landlord's claim is true, subdivision (a) requires the Board to dismiss the tenant's petition.

This arguably runs counter to the policy that the Board's proposed Regulation 4203 would advance, which is to more fully carry out the Rent Control Charter Amendment's stated intent to prevent the collection of unfair rent. As noted above, the proposed regulation would do this by expanding tenants' remedy to cover more of the period during which the unfair rent was paid. The remedy is expanded only to the date when the tenant filed a rent-decrease petition. If the petition were dismissed even when the tenant had paid rent that had become unfair due to the reduction of services or maintenance, merely because the landlord belatedly (but before the hearing) corrected problems on which the decrease was based, the tenant's remedy for payment of unfair rent would be eliminated.

While this would undo the remedy expansion that Regulation 4203 creates, there may be policy reasons to accept that undoing. As noted at its March meeting, the Board has pursued a policy of promoting and encouraging compliance with the law first, and focusing on remedial measures only when those efforts fail. This is why, for example, a tenant may not file a rent-decrease petition until he or she has first notified the landlord of an alleged problem in writing, and given the landlord the opportunity to fix it. There may be value in

⁶ See, especially, *Larson*, supra, 192 Cal.App.4th at p. 1281.

giving landlords one last incentive to correct problems before the tenant's rent-decrease petition is heard.

But, if the Board were to continue to provide this incentive, it may wish to limit the period during which it is available. If a landlord may obtain dismissal of a tenant's rent decrease petition at any time before that petition may be heard, he or she has a substantial incentive to delay the hearing for as long as possible. This would require the tenant to live with a reduction in maintenance or services, and with payment of rent that has become unfair as the result of that reduction, for an extended period. To prevent this, the Board could amend Regulation 4004, subdivision (a) to say that the Board must dismiss a tenant's rent-decrease petition upon proof that the landlord has corrected the problems on which it is based at any time before the first date on which the hearing is originally scheduled to be held. Such an amended subdivision (a) would state:

- (a) If at any time ~~prior to~~ before the first date on which the hearing is originally scheduled to occur a landlord ~~indicates~~ states on the response form to a decrease petition that ~~he/she has corrected the conditions or restored the services which are the subject of a petition for rent adjustment filed by a tenant~~ all problems complained of in the petition have been corrected, the Board shall dismiss the petition for rent adjustment after it has verified that the conditions have been corrected.

Alternatively, the Board could simply repeal subdivision (a).

Recommendation

Staff recommends that the Board vote on whether to adopt proposed Regulation 4203, as drafted or as the Board may amend it, after hearing from the public and deliberating. Staff recommends also that the Board vote on whether to repeal subdivision (a) of Regulation 4002, amend it as described above, or leave it unchanged .

The following pages are written communications that have been received from the public on this item of the Apr. 11 agenda and are part of the Board record.

From: William Kairala [<mailto:wkairala@gmail.com>]
Sent: Monday, April 8, 2019 5:47 PM
To: RentControl Mailbox <RentControl.Mailbox@SMGOV.NET>
Subject: Comments to Rent Control Board

Hi board members,

Unfortunately I won't be able to attend that day meeting. However, I do want you to know that in order to have the managers/landlords to respond to the maintenance requests, is crucial to have set the rent decrease petition awarded, from the day it was applied for. The city will save resources, time, and money. The petition will be a feasible tool in resolving maintenance matters. The good apples will welcome the much needed fine tune of the process.

Thank you.

William Kairala.