

May 4, 2015

MEMORANDUM

**TO:** MAYOR AND MEMBERS OF THE CITY COUNCIL  
**FROM:** CITY ATTORNEY  
**RE:** RENT CONTROL MORATORIUM

The City Council is currently considering whether to adopt a rent control/stabilization ordinance. To provide you with adequate time to study and evaluate all available options, the City Council may first adopt a moratorium. We prepared this memorandum to discuss whether and how the City Council can do so.

ANALYSIS

**I. Overview**

The City can adopt a moratorium limiting rent increases. As the moratorium arguably affects property uses, the moratorium should be adopted under Government Code sections 36937(b) and 65858. In addition, when crafting the moratorium, the City must comply with state and constitutional law regarding local rent control ordinances. To assist the Council's discussion, this law is briefly explained below.

**II. City Can Adopt a Moratorium**

The City Council is authorized to adopt an urgency ordinance under Government Code sections 36937 and 65858. Section 36937(b) provides the City Council with the general authority to adopt ordinances "[f]or the immediate preservation of the public peace, health or safety, containing a declaration of the facts constituting the urgency..." These ordinances must be adopted by a four-fifths vote of the Council.<sup>1</sup> To provide the City with time to study an issue, an urgency ordinance can have a limited duration as determined by the Council.

Government Code section 65858 allows the City to "... adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time." To adopt the moratorium, the Council must find that there is a "current and immediate threat to the public health, safety, or welfare, and that the approval of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use which is required in order to comply with a zoning ordinance would

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<sup>1</sup> Gov. Code, § 36937(b).  
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result in that threat to public health, safety, or welfare.”<sup>2</sup> The interim moratorium ordinance requires a four-fifths vote for approval.

There are limits on the duration of a moratorium under section 65858. The initial urgency ordinance is valid for forty-five days. It may be extended twice by the Council: once for ten months and fifteen days and a second time for a year. At least ten days prior to the expiration of the initial ordinance or any extension, the City Council must “issue a written report describing the measures taken to alleviate the condition which led to the adoption of the ordinance.”<sup>3</sup>

In this case and subject to the substantive limitations discussed below, the City can adopt a local rent control moratorium ordinance.<sup>4</sup> The one question is whether section 36937 or 65858 applies. For example, section 65858 may not apply as rent control is traditionally viewed as a price regulation. However, the landlord-tenant relationship and associated housing concerns are land use issues. There is no clear case law on this point. In fact, cities have adopted rent control moratoria under both section 36937(b) and section 65858.

In light of this, the City should consider adopting a moratorium with reference to both sections. This would avoid any argument that the City should have adopted the moratorium under section 65858, for example, and did not. In addition, this has little practical effect as the required health and safety findings and four-fifths voting requirements are the same. The one difference is that section 65858 will limit the City’s ability to extend the moratorium past the two allowable extensions. Here, as we understand that the Council is looking for a short-term moratorium to study the issue and this does not seem to be a concern.

### **III. Substantive Limitations on Rent Control Ordinances**

To assist the City Council’s discussion of the potential moratorium, we wanted to provide a brief outline of the substantive limitations on rent control ordinances.<sup>5</sup> As an initial matter, the Costa-Hawkins Act prevents the City from imposing rent control on certain properties. For example, the City may not regulate rents on (1) a property that has been issued a certificate of occupancy after February 1, 1995; (2) single-family homes and condominiums; and (3) when tenancies change in most cases.<sup>6</sup>

In addition, rent control ordinances must allow landlords to receive a fair rate of return.<sup>7</sup> The property owner should be able to receive a fair return on capital improvements.<sup>8</sup> Property owners may amortize the costs of a capital improvement over the improvement’s useful life and pass the costs on to the tenants. Additionally, many rent control ordinances impose a “base rent,” which establishes rent as of a specific date and then allows for adjustments over time. The method for fixing and adjusting rent will be deemed unconstitutional only if the method is arbitrary or discriminatory.<sup>9</sup>

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<sup>2</sup> Gov. Code, § 65858(c).

<sup>3</sup> § 65858(d).

<sup>4</sup> See generally *Berman v. Downing* (1986) 184 Cal.App.3d 1545.

<sup>5</sup> This is a very complicated area of the law, and staff will provide a more detailed explanation if the Council decides to move forward with a permanent ordinance.

<sup>6</sup> Civ. Code, §§ 1954.52, 1954.53.

<sup>7</sup> *Kavanau v. Santa Monica Rent Control Board* (1997) 16 Cal.4th 761, 771.

<sup>8</sup> *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 958 (9th Cir. 1991), vacated in part, 987 F.2d 662 (9th Cir. 1993).

<sup>9</sup> *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 165.

Typically, rent control requires some type of administration, especially for disputes between landlords and tenants. For example, the City of San Jose enacted a rent control ordinance that allowed a landlord to automatically raise the rent by as much as eight percent.<sup>10</sup> If the landlord proposed to raise the rent over eight percent, a tenant may object to an increase. The matter would go to a mediation hearing officer who decided whether the proposed increase is reasonable.

Below is a bullet-point outline of common issues addressed in rent control ordinances:

- Applicability: What properties will be exempt from the ordinance? At a minimum, the ordinance must exempt the properties required by state law (i.e., post-1995 new construction, single family homes and condominiums).
- Rent Increases: Will rent increases be allowed during the moratorium? If so, how will permissible rent increases be calculated? In addition, the definition of rent increase may include utilities charges and fees not currently being imposed to avoid landlords circumventing the limit on rent increases.
- Evictions: Will the City also impose a "just cause" eviction requirement? Many cities with rent control limit landlords from evicting tenants except for just cause. There are state law requirements for these types of ordinances, and we would ensure that the draft ordinance met these requirements.

#### CONCLUSION

The City Council may adopt a moratorium to impose temporary rent control restrictions while it develops a long-term solution. This moratorium should be adopted as an urgency ordinance under Government Code sections 36937(b) and 65858. In drafting the ordinance, the City will need to ensure that it complies with constitutional and state law restrictions on rent control ordinances. Generally, these limit the type of properties that are subject to the ordinance and require that landlords receive a fair rate of return.

If you have further questions or any concerns, please do not hesitate to contact us.

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<sup>10</sup> *Pennell v. City of San Jose* (1988) 485 U.S. 1.