

DATE: November 17, 2009

TO: Mayor and City Council

FROM: Director of Development Services
City Attorney

SUBJECT: Introduction of an Ordinance Amending Sections of the Article 5 of Chapter 9 of the Hayward Municipal Code Relating to the Residential Rental Inspection Ordinance

RECOMMENDATION

That the City Council conducts a hearing and considers introduction of an Ordinance amending certain sections of Article 5 of Chapter 9 of the Hayward Municipal Code relating to the Residential Rental Inspection Ordinance.

SUMMARY

This report recommends introduction of an Ordinance amending certain provisions of the City's Residential Rental Inspection Ordinance to clarify the process by which inspectors obtain consent to enter occupied rental housing units. This amending Ordinance is necessary because the current Ordinance implies an owner can consent to inspection of an occupied rental housing unit without the tenant's knowledge or consent. The amending Ordinance, if introduced and adopted, will require an owner to facilitate consent. If consent cannot be legally obtained, the City would be required to apply to a court for an inspection warrant. The City Council first introduced the amending Ordinance at its meeting on October 6, 2009, and adoption of the amending Ordinance was noticed for City Council action on October 20, 2009. In response to comments from the Rental Housing Owners Association of Southern Alameda County submitted on October 20, 2009, staff has further revised the amending Ordinance. The City Charter requires re-introduction of an ordinance that is revised after its introduction.

BACKGROUND

The City of Hayward first initiated a comprehensive rental housing inspection program in 1982, with the 'Apartment House Inspection Ordinance.' This ordinance was superseded in 1989 by the 'Residential Rental Inspection Ordinance,' which has the stated goal of safeguarding the stock of decent, safe, and sanitary rental housing units within the City and to protect persons entering or residing in them by providing for inspection of rental housing units and the common areas when

certain indicators show that violations of housing and building codes may exist in a unit or pursuant to a systematic area-wide inspection program (Hayward Municipal Code sec. 9-5.102). There are approximately 21,000 rental housing units in Hayward. Such mandatory residential rental inspection ordinances are common throughout California.

Certain provisions of Hayward's ordinance were challenged in court in early 2009 by an organization representing owners of rental units. The focus of the challenge relates to the manner in which City inspectors are able to enter rental units that are occupied by tenants, as well as the penalties that can be imposed if inspectors are unable to gain access to a rental unit.

The Alameda County Superior Court determined in July, 2009, that certain provisions of the ordinance are legally defective because the language permits an owner of an occupied unit to open the unit for an inspection. The court also reasoned that the penalty the City can impose on an owner for not being able to allow for an inspection is also legally defective because the owner may not be responsible for the lack of access.

This report sets forth a recommended change to the Residential Rental Inspection Ordinance which addresses the legal defects by establishing a clear process by which owners and tenants are notified of the inspections and the manner in which entry can be made to conduct the inspections. The amending Ordinance is attached as Attachment I. After the amending Ordinance's introduction on October 6, 2009, staff revised Section 9-5.306 to delete the phrase "pursuant to the terms of any applicable lease" from the end of the first sentence of the second paragraph of the amending Ordinance. The deletion of this language is the only change to the amending Ordinance from the ordinance introduced on October 6, 2009. If the City Council is persuaded the proposed ordinance remedies the legal defects, it is recommended that Attachment I be introduced.

DISCUSSION

As indicated above, the court found Hayward Municipal Code sec. 9-5.306 and 9-5.401 legally defective. The two sections read as follows:

1. **Sec. 9-5.306 ENTRY.** Upon presentation of proper credentials the Enforcement Official, after having obtained the consent of the Owner or occupant, may enter any rental housing unit or motel or hotel at reasonable times during the daylight hours to perform any inspection required by this code.

Except in emergency situations the Enforcement Official shall not enter any rental housing unit or motel or hotel without the consent of the Owner or occupant thereof unless an inspection warrant therefore has been obtained and issued in the manner provided by the Code of Civil Procedure of the State of California.

2. **Sec. 9-5.401 FEES/PENALTY CHARGES.** The annual fee and fees or penalty charges for any inspection or re-inspection performed pursuant to the provisions of this code shall be established from time to time by resolution of the City Council. Payment of such fees shall be made by Owner of the rental housing unit or hotel or motel upon demand by the City.

The language in sec. 9-5.306 allows either an owner or tenant to unlock an occupied housing unit, which on its face can be interpreted to mean that an owner can unlock the door and allow an inspector to enter without the knowledge or consent of a tenant in possession. The language in sec. 9-5.401 allows the City to penalize an owner for a failure to inspect or re-inspect a housing unit even though the owner may not have been responsible for the inspector's inability to enter the housing unit. The way to remedy these legally defective sections is to provide clear notice to both owners and tenants of rental housing units of a scheduled inspection and to clarify the responsibility for establishing consent for the inspector to enter an occupied housing unit.

Staff surveyed a number of similar residential rental inspection programs around the state to determine the clearest method for obtaining legal access and establishing responsibility for gaining consent to enter an occupied housing unit for purpose of the inspection. All of the residential rental inspection programs surveyed require notice to both owners and tenants. Moreover, all of the programs surveyed involve the owner by placing the primary responsibility on an owner for contacting tenants of occupied housing units for the purpose of obtaining consent for the inspection.

It is crucial that owners be involved in the inspection process, due to the large inventory of rental units in Hayward. It would be inefficient and ineffective to eliminate owners from the notice and inspection process. Moreover, as owners are legally responsible for code compliance, it is mandatory that the City include them in these proposed amendments.

The recommended changes to the existing Ordinance contain the following important features:

1. The proposed amendments would require the City to provide advance notice to both owners and tenants of housing units. As a practical matter, the City will need to develop a database of affected housing units which includes addresses of buildings and the unit numbers within the buildings. Notices to tenants will have to be sent to 'occupants' because the City will not know the names of tenants.
2. The proposed amendments would require the owner to obtain the consent of tenants of occupied housing units for purposes of the inspection. Consent could be obtained through any legal means, including specific written or verbal consent by the tenant or through notice from the owner to a tenant. In any case, if legal consent is not forthcoming or entry is refused, the recommended changes require the City to obtain an inspection warrant from an appropriate court.
3. The proposed amendments would require the owner to be present at the time of the inspection. This requirement is important because owners are ultimately responsible for code compliance.
4. Finally, the recommended changes provide for notice of any re-inspections or follow-up inspections to be sent to both owners and tenants.

FISCAL IMPACT

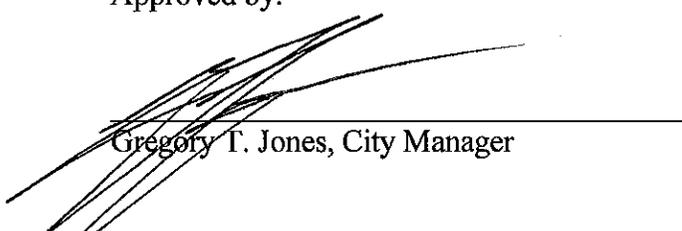
Development of a database of addresses and units will have a fiscal impact, as will the additional noticing requirements. These costs can be offset by the fees allowed by the Ordinance.

PUBLIC CONTACT

Notice of the public hearing was published in the Daily Review on November 7, 2009. Additionally, the organization representing Owners was provided with a draft of the original amending Ordinance on September 29, 2009. Further, attorneys for the Owners were advised of the hearing on November 17, 2009. Staff also contacted Echo Housing in early September 2009 regarding the public hearing. Echo Housing advises both owners and tenants of their respective rights and responsibilities.

Prepared by:
Michael S. Lawson, City Attorney
David Rizk, Director of Development Services

Approved by:



Gregory T. Jones, City Manager

Attachment – Attachment I-Draft Ordinance

ORDINANCE NO. _____

ORDINANCE AMENDING SECTIONS OF ARTICLE 5 OF
CHAPTER 9 OF THE HAYWARD MUNICIPAL CODE
RELATING TO THE RESIDENTIAL RENTAL INSPECTION
ORDINANCE

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Hayward does hereby ordain as follows:

Section 1. The last two sentences of the City of Hayward Municipal Code (hereinafter the "Municipal Code") Section 9-5.302, MANDATORY INSPECTION PROGRAM are hereby amended to read as follows:

"Owners, managers and tenants shall allow for the inspection of these units. If an Owner, manager or tenant refuses to permit an inspection, the Enforcement Official is authorized to procure an inspection warrant."

Section 2. Municipal Code Section 9-5.303(a), CAUSE FOR INSPECTIONS, is hereby amended to read as follows:

"Complaints from the tenant of a rental housing unit, motel unit or hotel unit that a code violation may exist."

Section 3. Municipal Code Section 9-5.306, ENTRY, is hereby amended to read in full as follows:

"SEC. 9-5.306 NOTICE AND ENTRY. The City shall serve written notice of the date and time of any inspection, including initial inspections and any follow-up inspections, to be conducted pursuant to this code, by mailing such notice at least fourteen (14) calendar days prior to the date of the inspection. Notice shall be mailed to the owner or the owner's designated representative at their last known address. In the case of multiple owners of the same property, notice to any one of the Owners is sufficient. The City shall also mail a copy of the inspection notice to the rental housing units on the property.

It shall be the responsibility of the Owner or the Owner's designated representative to obtain the consent of the tenants to inspect the subject rental housing units or otherwise obtain legal access to the units. If consent to enter on to any rental housing property or any rental housing unit is refused or otherwise cannot be obtained, the Enforcement Official is authorized to seek an inspection warrant from a court of competent jurisdiction.

The Owner or the Owner's designated representative shall be present at the rental housing property at the time of the inspection. The time of the inspection shall be at the time indicated in the notice issued pursuant to this code, or the time that the inspection was properly rescheduled in accordance with the provisions of this code. Violations of this paragraph may result in a re-scheduling fee.

An inspection may be rescheduled once by the Owner or the Owner's designated representative by giving notice to the Enforcement Officer at least five (5) calendar days prior to the scheduled inspection date. An inspection may only be rescheduled to a date within fourteen (14) calendar days of the previously scheduled inspection date. Violations of this paragraph may result in a re-scheduling fee."

Section 4. Municipal Code Section 9-5.310, NOTICES, is hereby amended to read in full as follows:

"The notice informing a property Owner of a mandatory inspection or any follow-up inspection shall be by first class mail. All other notices, including notices of Administrative and Lien/Special Assessment Hearing, shall be provided in accordance with state law. Delivery will be made to the Owner's address as it appears on the last equalized assessment roll or as known to the Enforcement Official. The failure of any person to receive notice properly given shall not affect the validity of any proceedings hereunder."

Section 5. All other provisions of Article 5 of Chapter 9 of the Municipal Code, relating to Residential Rental Inspections, except for those provisions amended pursuant to this ordinance, shall remain in full force and effect.

Section 6. Should any part of this ordinance be declared by a final decision by a court or tribunal of competent jurisdiction to be unconstitutional, invalid, or beyond the authority of the City, such decision shall not affect the validity of the remainder of this ordinance, which shall continue in full force and effect, provided that the remainder of the ordinance, absent the unexcised portion, can be reasonably interpreted to give effect to the intentions of the City Council.

Section 7. In accordance with the provisions of Section 620 of the City Charter, this ordinance shall become effective 30 days from and after the date of its adoption.

IN COUNCIL INTRODUCED at a regular meeting of the City Council of the City of Hayward, held the _____ day of _____, 2009, by Council Member _____

ADOPTED at a regular meeting of the City Council of the City of Hayward held the _____ day of _____, 2009, by the following votes of members of said City Council.

AYES: COUNCIL MEMBERS:
MAYOR:

NOES: COUNCIL MEMBERS:

ATTEST: COUNCIL MEMBERS:

ABSENT: COUNCIL MEMBERS:

APPROVED:
Mayor of the City of Hayward

DATE:

ATTEST: _____
City Clerk of the City of Hayward

APPROVED AS TO FORM:

City Attorney of the City of Hayward