



Request for Policy Analysis (Council Referrals)

Department Housing Rules Date 9/4/2024 (C.2) & 10/2/2024 Item C.1
 Department Rep. Name/Ext. Erik Solivan Councilmember Sponsorship Councilmember Ortiz
 Policy/Ordinance Subject Prohibit Sale or Use of Algorithmic Councilmember Torres
Devices for Residential Dwelling Units Councilmember Cohen

| Staff Recommendation | | | | | | | | | | | | | | | |
|--|--|--|--|--|---|--|---|---|--|---------------------------------|-------------------------------------|--|--|--------------------------|--|
| <input type="checkbox"/> | GREEN | Adopt based on tradeoffs outlined on next page | | | <input checked="" type="checkbox"/> | YELLOW | Defer to a later designated date or the annual Budget Process | | | <input type="checkbox"/> | RED | Recommend Council not adopt nominated idea | | <input type="checkbox"/> | NEEDS CLARIFICATION OR MORE TIME TO EVALUATE |
| Staff Evaluation | | | | | | | | | | | | | | | |
| Is this already underway in a department work plan? | | | | Is this time critical or an emergency? | | | | Will this require substantial resources, staffing, budget, strategic support, or reprioritizing existing work plan? | | | | | | | |
| <input type="checkbox"/> | Yes | <input checked="" type="checkbox"/> | No | <input type="checkbox"/> | Yes | <input checked="" type="checkbox"/> | No | <input checked="" type="checkbox"/> | Yes | <input type="checkbox"/> | No | | | | |
| Criterion to Determine Scale of Project Complexity | | | | | | | | | | | | | | | |
| Project complexity is determined by scoring the project in each of the 3 criteria below and then summing the score. | | | | | | | | | | | | | | | |
| a. Low Complexity is a sum of 6 or less. b. Medium Complexity is a sum of 7 – 9. Total Score = 14 c. High Complexity is a sum of 10 or greater. | | | | | | | | | | | | | | | |
| Scoring Criterion | Low Complexity | | | Medium Complexity | | | High Complexity | | | | | | | | |
| | Estimated Duration | 6 – 9 months | <input type="checkbox"/> = 1 | 9 - 18 months | <input type="checkbox"/> = 2 | More than 18 months | <input checked="" type="checkbox"/> = 3 | | | | | | | | |
| | (Internal) | Organizational Complexity | Can easily be absorbed into existing work plan | <input type="checkbox"/> = 1 | Planned work (future) | <input type="checkbox"/> = 2 | Work not currently proposed | <input checked="" type="checkbox"/> = 3 | | | | | | | |
| | | Have staff with required skillset/knowledge | <input type="checkbox"/> = 1 | Have staff with required skillset/ requires moderate research | <input type="checkbox"/> = 2 | Do not have staff with required skillset/requires significant research | <input checked="" type="checkbox"/> = 3 | | | | | | | | |
| | (External) | Less than or equal 2 staff required | <input type="checkbox"/> = 1 | 3 - 4 staff required | <input checked="" type="checkbox"/> = 2 | More than 5 staff required | <input type="checkbox"/> = 3 | | | | | | | | |
| 1 Additional department; no community outreach required | <input type="checkbox"/> = 1 | 2 Other departments Involved; some community outreach required | <input type="checkbox"/> = 2 | 3 or more departments and/or external partners involved; significant community outreach required | <input checked="" type="checkbox"/> = 3 | | | | | | | | | | |
| DEPT. Required | <input type="checkbox"/> Airport | <input type="checkbox"/> Auditor | <input checked="" type="checkbox"/> CMO | <input type="checkbox"/> OEDCA | <input type="checkbox"/> ESD | <input type="checkbox"/> Fire | <input type="checkbox"/> HR | <input checked="" type="checkbox"/> IT | <input type="checkbox"/> PRNS | <input type="checkbox"/> Police | <input type="checkbox"/> Retirement | | | | |
| | <input checked="" type="checkbox"/> Attorney | <input type="checkbox"/> Clerk | <input type="checkbox"/> CMO – Budget | <input type="checkbox"/> Community Energy | <input checked="" type="checkbox"/> Finance | <input checked="" type="checkbox"/> Housing | <input type="checkbox"/> IPA | <input type="checkbox"/> Library | <input checked="" type="checkbox"/> PBCE | <input type="checkbox"/> PW | <input type="checkbox"/> DOT | | | | |

CMO Approval: /s/ Lee Wilcox Date 9/19/24

Analysis

Explain the rationale for staff recommendation, including any mitigating factors that need to be considered (recent legislative action, significant work plan changes, etc.). Please address the following as well.

GREEN LIGHT: The Administration can implement this nominated idea under its current work plan. Item should be sent to Council to add to department work plan. (1) How will the idea be approached? (2) If adopted, what is its impact and/or tradeoff to the City Council Focus Area or to a department work plan, including strategic support? (3) What is the minimum viable scope to move the idea forward and reduce its complexity?

N/A

YELLOW LIGHT: Administration recommends Council defer this nominated idea to a later designated date or the annual Budget Process due to (describe cost implications, workload impacts, or other factors)

Algorithmic pricing is a common tool within the software for the property management industry of market-rate, affordable, and mixed-income housing developments. These tools use data-driven algorithms to optimize rental rates, streamline property management, and enhance operational efficiency. The tools used by RealPage, Yardi, and many others are ubiquitous, and the software providers are national firms with operations and customers in all 50 states. Given the limited resources and authority of the City of San José, due to state and federal preemptions as well as active litigation to regulate algorithmic pricing tools, the City’s efforts would have minimal impact on controlling or mitigating housing prices.

(Analysis continued on page 3.)

RED LIGHT: The Administration recommends Council not to adopt this nominated idea due to (describe reason implementation would be difficult if not impossible – conflict with other laws, etc.).

N/A

Analysis (Continued)

(Analysis continued from page 2.)

In addition, based on the highly technical nature of the theory of this work in regulating algorithms, this would likely be highly burdensome and costly to draft, impose, and enforce a municipal regulation. As the litigation proceedings and possible federal rule making proceeds forward, the City could explore ways to enhance the federal and state actions in 2025, given the broad impact on the City's housing affordability challenges.

Regulatory Considerations: Limited Scope for Municipal Regulation

While there are ongoing concerns about the impact of algorithmic pricing tools on affordability, particularly in market-rate housing, the capacity of the City to effectively regulate such tools is constrained. This limitation arises from both federal and state preemption of many issues related to rent setting and housing regulation:

1) State and Federal Review: Price-setting mechanisms utilized by national software companies are largely governed by state and federal law. The Federal Trade Commission and the United States Department of Justice have taken action. (source: <https://www.ftc.gov/business-guidance/blog/2024/03/price-fixing-algorithm-still-price-fixing>). The California Department of Civil Rights is also exploring options for regulating the algorithmic tools (source: <https://calcivilrights.ca.gov/2021/05/06/dfch-holds-civil-rights-hearing-on-algorithms-and-bias/>). In addition, over twenty lawsuits have been filed nationwide against the use of these tools, with the District of Columbia taking the lead (source: <https://oag.dc.gov/sites/default/files/2023-11/DC%20OAG%20RealPage%20Complaint%20-%20Filed.pdf>). The federal efforts underway examine whether pricing algorithms used by companies like RealPage may violate antitrust laws, an area of law the City is likely preempted in regulating.

2) Municipal Review: The City of San Francisco passed an ordinance that “prohibits the sale and use of algorithmic devices that help landlords set rent prices or manage occupancy levels for residential units.” The ordinance is not a regulatory action to be taken by the Housing Department of San Francisco. Instead, the ordinance allows any tenants or the City Attorney to file civil lawsuits against such practices and impose \$1,000 fines for violations plus recover damages. The Housing Department for the City of San José is not well-positioned, at this time, to take action on this issue, as such national challenges typically require a legislative or regulatory action like the Federal Trade Commission or the U.S. Department of Justice or U.S. Department of Housing and Urban Development. Therefore, any municipal attempts to regulate algorithmic pricing tools more directly than the City of San Francisco are likely to face legal challenges.

3) Industry Response: The National Apartment Association has issued a warning to its members in response to the Federal Trade Commission guidance (source: <https://www.naahq.org/ftc-issues-guidance-algorithms-rental-housing>).