

# Item G-1: Proposed Rescission of Richmond Rent Board Regulation 842(B) and Adoption of Richmond Rent Board Regulation 842.5 Concerning the Effective and Final date of Rent Board Decisions

October 16, 2019 | Regular Meeting of the Richmond Rent Board

## Item G-1: Statement of the Issue

At its Regular Meeting on July 17, 2019, the Rent Board directed staff members to explore whether Regulation 842(B), which permits stays of the Hearing Examiner's decision pending appeal, conflicts with the Fair Rent, Just Cause, and Homeowner Protection Ordinance (hereinafter, "Rent Ordinance"), which states that a Hearing Examiner's decision shall not be stayed pending appeal. Richmond Municipal Code Section 11.100.070(d)(11)

## Item G-1: Background

Richmond Municipal Code Section 11.100.070(d)(11), in pertinent part, states, “the decision of the hearing examiner shall be the final decision of the Board in the event of no appeal to the Board. The decision of the hearing examiner shall not be stayed pending appeal...”

At first blush, it would appear that this provision potentially conflicts with the state law prohibition on Hearing Examiner’s decisions being enforceable immediately.

To avoid any potential conflict with state law, on January 24, 2018, the Rent Board adopted Regulation 842(B), which states, in pertinent part, that “the hearing examiner’s decision shall be stayed pending appeal.”

Although alleviating any conflict the Rent Ordinance may have with existing state law, Regulation 842(B) created a potential conflict with the Rent Ordinance.

## Item G-1: Discussion

- Richmond Municipal Code Section 11.100.070(d)(11), in pertinent part, states, “the decision of the hearing examiner shall be the final decision of the Board in the event of no appeal to the Board. The decision of the hearing examiner shall not be stayed pending appeal...”

## Item G-1: Discussion

- Only final decisions are enforceable.
- Richmond Municipal Code Section 11.100.070(d)(11) explains that when the Hearing Examiner's decision is not appealed, the decision becomes the final decision of the Rent Board.
- How long does a party have to file an appeal to the Rent Board?

## Item G-1: Discussion

- On January 24, 2018, the Rent Board sought to fill that gap by adopting Regulation 842(A), which mandates that an appeal must be received by the Rent Program within 35 days from the date that the notice of the Hearing Examiner's decision is mailed to the party.
- If the parties fail to file an appeal within the requisite time period, the decision of the Hearing Examiner becomes the final decision of the Rent Board and by operation of law, is enforceable.

## Item G-1: Discussion

- This begs the question, what is the impact of the Hearing Examiner's decision during those 35 days?
- The decision is not yet final, and thus not enforceable
- However, the Hearing Examiner's decision is effective from the date of the decision, meaning that the legal rights and obligations found under the Hearing Examiner's decision accrues during the pendency of finality.

## Item G-1: Discussion

- Example:  
On August 30, Tenant receives a favorable decision adjusting the Maximum Allowable Rent (hereinafter, “MAR”) downward from \$1,000 to \$500 and is awarded excess rent in the amount of \$500.
- On September 1st what does the Tenant pay? On September 1st, the Tenant will still pay the \$1,000/month rent, unless the Landlord chooses otherwise, as the Hearing Examiner’s decision is not final and thus not enforceable.
- On September 30th, the Rent Program has not received an appeal and thus the time to appeal has expired. What is the impact of this event?
- The Hearing Examiner’s decision becomes final and is now enforceable.
- What does the Tenant pay on October 1<sup>st</sup>? On October 1st, the Tenant will now pay \$500 dollars in Rent, and is owed \$1000 dollars in excess rent rather than \$500 dollars due to the principle of accrual.

## Item G-1: Discussion

- The principle of finality or enforceability and the phrase “take effect” are used synonymously and are not to be confused with the word “effective”. When something “takes effect” it is enforceable, but the enforceability is measured from the effective date of the decision.
- Example, Richmond Municipal Code Section 11.100.070(j) states, in pertinent part, “If the Board makes a downward individual adjustment of the rent ceiling, such rent decrease shall take effect no sooner than thirty (30) days after the effective date set by the Board for the downward adjustment.”

## Item G-1: Discussion

- What happens when there is an appeal of the Hearing Examiner's decision?
- In the event of an appeal, a Hearing Examiner's decision is not final and thus not enforceable.
- In the event the Rent Board affirms or modifies the decision on appeal, the decision becomes the final decision of the Rent Board and is enforced from the effective date of the decision.
- If the decision is reversed, the decision is void and supplanted by the Rent Board's articulated decision.

## Item G-1: Decision of Rent Board on Appeal

- Richmond Municipal Code Section 11.100.090 states, in pertinent part that “no action or decision by the Board shall go into effect until thirty (30) days to allow...” for a Writ to Superior Court.
- In other words, the Rent Ordinance explains that Rent Board decisions on appeal cannot be enforceable for 30 days to allow for the parties to seek a writ at the Superior Court.
- So, although the Rent Board decision on appeal is final and enforceable, its enforceability is stayed for thirty days to allow for a party to sue at the Superior Court.

## Item G-1: Summarization of the Discussion

- The prohibition on staying a Hearing Examiner's decision contained in Richmond Municipal Code Section 11.100.070(d)(11), does not clearly conflict with existing state law, so long as the Rent Board adopts a series of Regulations clarifying that neither the Hearing Examiner's nor the Rent Board's decision are immediately enforceable; however, both decisions are effective for purposes of accrual.

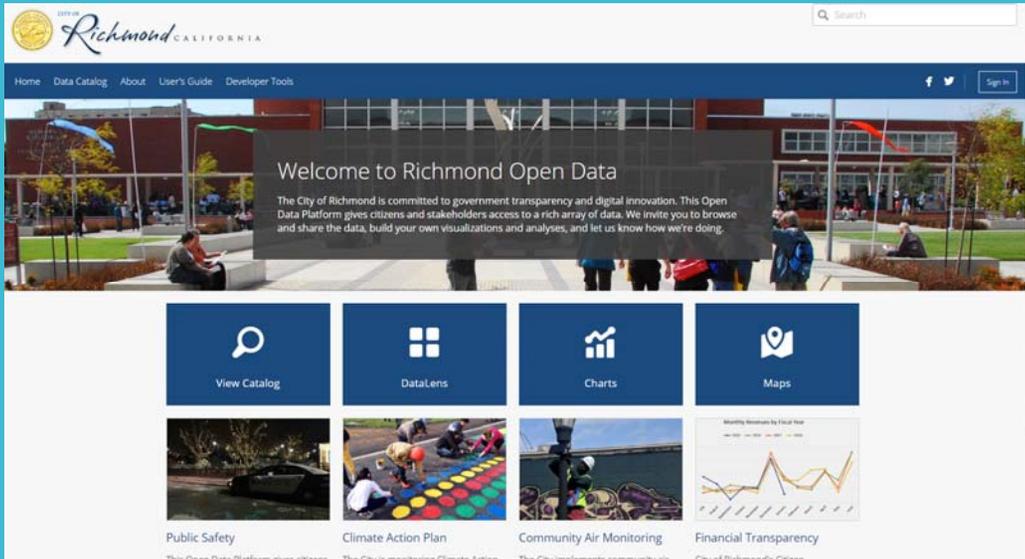
## Item G-1: Other Considerations of Regulation 842.5

Proposed Regulation 842.5 clarifies the following:

- Landlords are able to recoup the rents that accrue during the pendency of an appeal, only where the Landlord is legally entitled to those Rents through a properly-noticed Rent increase, which covered the dates of the accrued Rents being sought.
- Tenant(s) may recoup Excess Rent by offsetting the monthly Rent owed by the Excess Rent owed, only as described in a final Rent Board decision.
- Where a Landlord is found to be liable for Excess Rent, the Landlord is considered to be out of compliance with the Rent Ordinance and may not take a Rent increase.
- Tenants cannot waive rights granted through the Rent Ordinance, which includes rights affirmed through final decisions of the Rent Board.

## Item G-1: Recommended Action

RESCIND Regulation 842(B) and ADOPT Regulation 842.5 to clarify (1) when a Hearing Examiner's decision becomes effective and enforceable; (2) when a Landlord may recoup rents which accumulated during the pendency of an appeal; (3) when a Tenant may use excess rent to offset the monthly rent owed; (4) the impact that a finding of an excess rent liability has on a Landlord's compliance with the Rent Ordinance; and (5) that a Tenant may not waive their rights granted under the Rent Ordinance as such a waiver would violate public policy



# Item H-1: Participation in City of Richmond Open Data Dashboard

October 16, 2019 | Regular Meeting of the Richmond Rent Board

# Item H-1: Background

- On February 9, 2019, the Richmond City Council held a public retreat to, among other tasks, identify City Council priority policies for Fiscal Year 2019-20 and develop performance measures to track the progress of implementing priorities.
- Included in the City Council's 44 adopted priorities are the mitigation of displacement, as well as addressing homelessness and affordable housing in the City.
- Performance measures specific to Rent Program activities are described on the following slide.

Description	Performance Measure /Indicator	Target (with respect to performance measure)	Goal/Objective
<b>Landlord and Tenant Counseling on the requirements of the Rent Ordinance</b>	1) Number of counseling sessions conducted 2) Number of referrals to legal services agencies 3) Number of community members assisted in a language other than English 4) Launch Formal Mediation Program	1) Exceed previous year by 10% 2) Exceed previous year by 10% 3) Exceed previous year by 10% 4) December 2019	Provide culturally competent counseling services to Landlords, Tenants, property managers, and other members of the rental housing community
<b>Community engagement and outreach on the requirements of the Rent Ordinance</b>	1) Participation at monthly Community Workshops 2) Number of individuals subscribed to Rent Program listserv 3) Provide tailored presentations to Neighborhood Councils, Realtors, Associations, and other community groups 4) Publish the Guide to Rent Control in Richmond 5) Publish informational videos about the Rent Ordinance	1) Maintain participation achieved in FY 2018-19 2) Exceed previous year by 10% 3) Exceed previous year by 10% 4) September 2019 5) September 2019	Conduct outreach and education to Landlords, Tenants, and other community members

# Item H-1: Request for Participation

- Since 2015, the City of Richmond has utilized an open data platform to report on City initiatives in various departments. Residents can access the City's dashboard at [www.opendata.ci.richmond.ca.us](http://www.opendata.ci.richmond.ca.us). It currently includes three subject areas: Police Department data, Climate Action Plan progress tracking, and Financial Transparency.
- Upon request by the City Manager, staff in the IT Department and City Manager's Office have developed a strategy to expand open data capabilities across all City departments.



# Item H-1: Request for Participation (continued)

- Section 11.100.060(m) of the Rent Ordinance provide that the Rent Board, and, by extension, the Rent Program, operate as an integral part of the government of the City, but exercises its powers and duties independent from the City Council, City Manager, and City Attorney except by request of the Board.
  - Therefore, staff members find it appropriate that the Board consider formal approval of Rent Program staff resources to contribute to the City's Open Data dashboard.
- As an integral part of the City of Richmond government, the Rent Program can benefit from its participation in City initiatives, when such initiative falls within the purview of the Rent Ordinance, to maximize the services provided to Richmond residents, including governmental transparency and data reporting.

# Item H-1: Proposed Next Steps

- **If the Rent Program's participation in the City's Open Data dashboard is approved by the Rent Board, Deputy Director Paige Roosa will attend a series of workshops (each with a duration of approximately 60-90 minutes) in the coming months to obtain training in data entry and display on the City's Open Data portal.**

## Item H-1: Recommended Action

**APPROVE** the participation of Rent Program staff members in the City of Richmond's Open Data dashboard to assist with reporting on City Council approved performance measures and strategic priorities – Rent Program (Paige Roosa 620-6564).

# **“FAIR RETURN” AND MAINTENANCE OF NET OPERATING INCOME (MNOI) REVIEW**

CHARLES OSHINUGA, STAFF ATTORNEY  
OCTOBER 16, 2019, RENT BOARD MEETING

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# BACKGROUND

## Landlords are Entitled to a Fair Return

- The Rent Board's ability to control rents is necessarily circumscribed by Constitutional principles.
- As it relates to rent control jurisdictions, these principles are satisfied so long "as the price controls are not confiscatory; i.e, they do not deprive investors of a fair return on their investment."
- This is consistent with the stated purpose of the Rent Ordinance.

## Selection of a “Fair Return” Methodology

- Recall that there are no constitutionally established methodologies required to be used when determining what amounts to a fair return on investment.
  - Courts have rejected particular methodologies as circular and have been clear that any fair return methodology used must be “concerned with the financial integrity of the business as a whole, not the ability to obtain a return on a discrete portion of the business.”
- On March 21, 2018, the Richmond Rent Board adopted a Maintenance of Net Operating Income (MNOI) framework as the required methodology used in determining what amounts to a fair return on investment.

# MNOI OVERVIEW

## MNOI Rationale

- MNOI is based on the presumption that the net operating income received by the Landlord in the Base Year provided the Landlord a Fair Return.
- Thus, so long as the net operating income (NOI) in the Base Year is maintained and adjusted for 100% of inflation, it is presumed the Landlord is receiving a Fair Return on their investment in the Base Year.

## Selection of the Base Year

- MNOI presumes that the rents Landlords chose to charge, in a year free from the idea of rent control, provided Landlords a fair return on their investment, as the rents that were charged were based on general market conditions, and not the upward pressure that policy discussions of rent control may have on the market.
- In the City of Richmond, the Base Year is 2015.

## The Annual General Adjustment (AGA)

- The Rent Ordinance permits a Landlord to take a rent increase equal to 100% of the inflation rate.
- This rent increase is known as the Annual General Adjustment (AGA).
- The AGA serves to maintain the Landlord's NOI and fair return on investment.
- Despite this device, there may be occasions where Landlords are still not receiving a fair return on their investment.

# Net Operating Income (NOI) Calculation

- Maintaining the net operating income (NOI) in the Base Year is essential to a Landlord obtaining a fair return on their investment.
- NOI is calculated by taking the total expenses in a given year and subtracting it from the gross income received in that same year.
  - Certain expenses and income are excluded from the MNOI analysis.

# Calculating the Fair Net Operating Income (NOI)

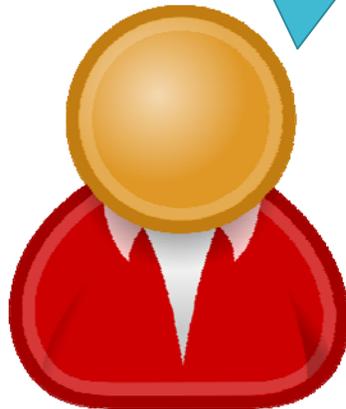
- Once one determines the net operating income (NOI) in the Base Year, that income must be compared to the net operating income in the Current Year.
  - The Current Year is the calendar year preceding the year the Landlord files the MNOI petition.
  - Prior to comparing the figures, the Base Year NOI must be adjusted by inflation (i.e the Consumer Price Index) that has occurred from the Base Year to the Current Year.
- This newly adjusted Base Year NOI is referred to as the “Fair NOI,” and is compared to the Current Year NOI.
- If the NOI in the Current Year is less than the Fair net operating income, the Landlord is not receiving a fair return and is entitled to an income adjustment through the form of a rent increase.

# BASIC EXAMPLE CALCULATION

# Maintenance of Net Operating Income (MNOI) Calculation Example

## MNOI Example Calculation

Greetings!  
I'm Maria



**4 Unit Complex**

## MNOI Example

MNOI calculations begin by examining the **Base Year net operating income and operating expenses...**

# Example of Operating Expenses

## Definition of “Operating Expenses”

### Included in Operating Expenses

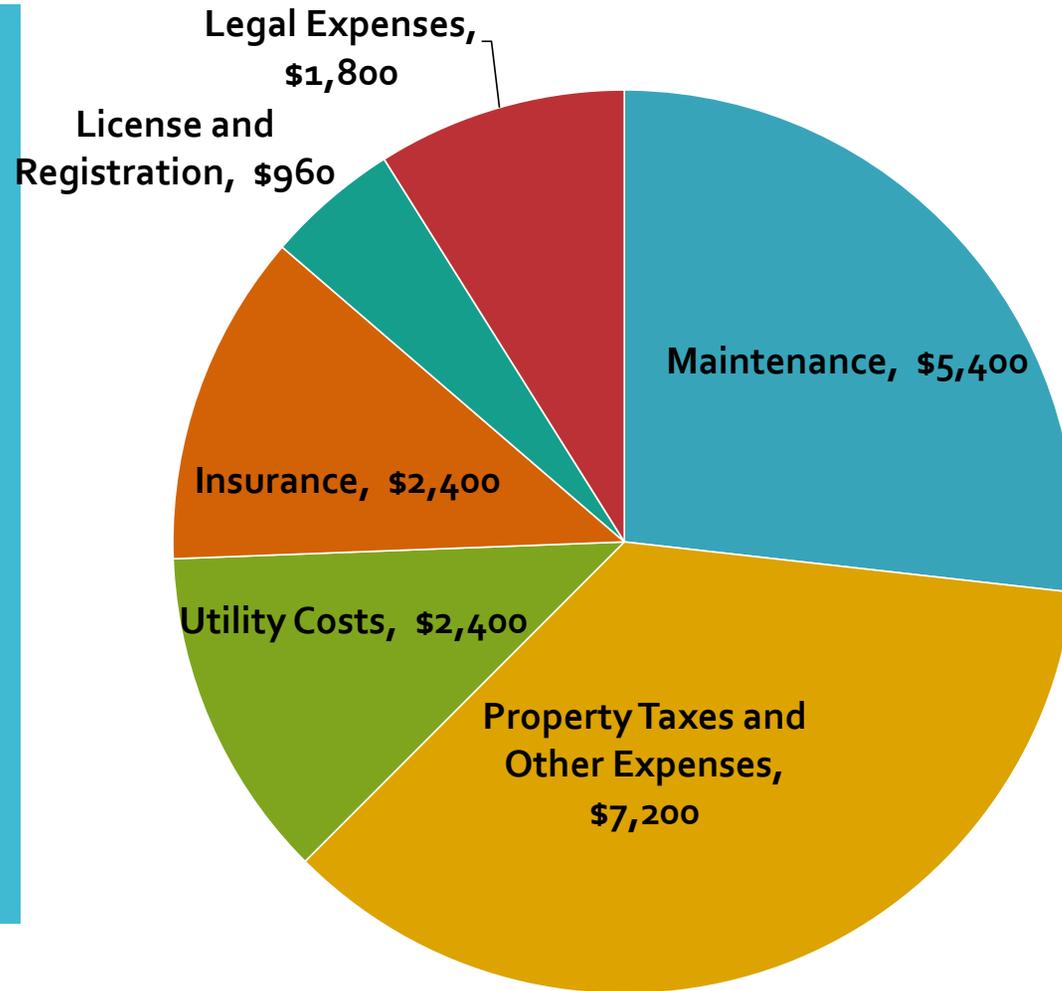
- Reasonable costs of operation and maintenance of the rental unit
- Real property taxes
- Insurance
- Utility costs
- Management expenses
- License, registration, and other public fees
- Landlord-performed labor
- Legal Expenses

### NOT Included in Operating Expenses

- Debt service costs and costs for obtaining financing
- Mortgage payments or principal
- Any penalties, fees, or interest assessed for violation of the ordinance or law
- Land lease expenses
- Political contributions
- Depreciation
- Any expenses for which the landlord has already been reimbursed
- Unreasonable increases in expenses since the base year

# Maria's Annual Operating Expenses (Hypothetical)

## MNOI Example Calculation



**Total Annual  
Operating  
Expenses  
=  
\$20,160**

# What is included in operating income?

## MNOI Example Calculation



Annual Net Operating  
Income

=

Total Annual Rent Collected  
– Operating Expenses

Operating income is usually the total amount of rent collected minus expenses. For the purpose of the Maintenance of Net Operating Income (MNOI) analysis, we will be using the **annual** rental income collected.

# Let's look at a 4-unit complex example with the Base Year of 2015...

## MNOI Example Calculation



**\$67,200**

Annual revenue is 4 units times \$1,400 times 12 months = \$67,200



**\$20,160**

Annual expenses are 30% of revenue = \$20,160

**Base Year Net  
Operating  
Income**



**\$47,040**

Annual net operating income (NOI) = \$47,040

## Illustration of Fair Return Using the MNOI Standard

Fast forward to 2020: Rent has increased by **\$210** through AGA increases over the span of five years. The new **Maximum Allowable Rent** for each unit is **\$1,610**.



**4 Unit Complex**

# Illustration of Fair Return Using the MNOI Standard

Maria has applied all of the Annual General Adjustment increases, but utility and management costs have also increased.



**\$77,280**

Annual revenue for 4 units is \$1,610  
\* 4 units \* 12 months = \$77,280



**\$26,275**

Annual expenses are now 34%  
of revenue = \$26,275

**Current Year  
Net Operating  
Income =**



**\$51,005**

Annual net operating income  
(NOI) = \$51,005

## Illustration of Fair Return Using the MNOI Standard

The Hearing Examiner looks at the Net Operating Income in the Base Year (2015) for Maria's case.



$$\begin{array}{r} \$47,040 \\ \text{2015 NOI} \end{array} + \begin{array}{r} 15\% \text{ of 2015 NOI} \\ \text{(CPI Increase)} \end{array} = \begin{array}{r} \$54,096 \\ \text{Fair NOI} \end{array}$$

- Fair net operating income is the base year net operating income (NOI) adjusted by the Consumer Price Index (CPI) increase since the base year.
- In this hypothetical example, the CPI increased by 15%. Therefore, the fair net operating income is \$47,040 increased by 15% for a total of \$54,096. To receive a Fair Return, the landlord should receive an annual net operating income of \$54,096.

# Illustration of Fair Return Using the MNOI Standard

## MNOI Example Calculation

- Because expenses have increased by 30 percent (from \$47,040 to \$51,005) since 2015, Maria's monthly net operating income has increased by less than the percentage increase of the Consumer Price Index (CPI).
  - The Hearing Examiner has determined the Fair Net Operating Income (NOI) is \$54,096 (a \$3,091 difference from the Current Year NOI).
  - To provide the landlord with a Net Operating Income (NOI) that generates a Fair Return, the Hearing Examiner determines each unit may receive up to a \$64 increase in the Maximum Allowable Rent (a total of \$256 for all 4 units).
  - The Hearing Examiner checks to see how much of a percentage the rent increase will result in for each tenant. In this example, the adjustment in the Maximum Allowable Rent would result in a 4 % rent increase for each tenant.
  - The Board has capped annual rent increases at 15%, which would phase in on a yearly basis the percentage change to the maximum allowable rent, in order to prevent rent shock for tenants.

# ADJUSTMENT OF BASE YEAR NOI

## What if Rents weren't based on General Market Conditions?

- The Base Year presumes that the rents Landlords chose to charge, in a year free from rent control, provided Landlords a fair return on their investment, as the rents that were charged were based on general market conditions.
- There are those instances where the rents that were charged or expenses incurred prior to the enactment of rent control were not based on general market conditions.
- In such case, the presumption that the rents received during the Base Year provided the Landlord a fair return may not be applicable.
  - One does not look to the amount of rent charged to determine whether rents were set based on general market conditions. Rather, one looks to the basis by which rents were charged; whether the rents charged were based on general market conditions or other conditions that would constitute exceptional circumstances.

## What if Rents weren't based on General Market Conditions?

- Where a Landlord believes that the Base Year did not provide a fair return, Landlords are permitted to present evidence to rebut the presumption that the Base Year net operating income provided a Fair Return.
- There are two avenues by which a Landlord may rebut the Base Year presumption:
  - 1) The Landlord's operating expenses in the Base Year were unusually high or low in comparison to other years
  - 2) The gross income during the Base Year was disproportionately low due to exceptional circumstances

# EXCEPTIONAL CIRCUMSTANCES IN THE BASE YEAR

## What if Rents weren't based on General Market Conditions?

- Landlords may rebut the Base Year presumption by demonstrating that the gross income in the Base Year was disproportionately low due to exceptional circumstances.
- This provision establishes a two-part analysis:
  - 1) First, to rebut the Base Year presumption, a Landlord must demonstrate that an exceptional circumstance served as the basis of setting rents.
  - 2) Second, to rebut the Base Year presumption, a Landlord must establish that because the rents were charged based on an exceptional circumstance, the gross income or rents charged in the Base Year were disproportionately low.

## Factors Considered in Determination of Proportionally Low Base Rents

- In determining whether the gross income in the Base Year was disproportionately low, the Hearing Examiner must consider the following factors:
  - i. If the gross income during the Base Year was lower than it might have been because some residents were charged reduced rent.
  - ii. If the gross income during the Base Year was significantly lower than normal because of the destruction of the premises and/or temporary eviction for construction or repairs.
  - iii. The pattern of rent increases in the years prior to the Base Year and whether those increases reflected increases in the CPI.
  - iv. Base period rents were disproportionately low in comparison to the base period rents of comparable apartments in the City.
  - v. Other exceptional circumstances.
- The Hearing Examiner has discretion to afford particular weight to any given factor but must analyze each factor to determine its applicability, regardless of whether the factors were raised by the Landlord.

## Base Year Rent Adjustments

- If the Landlord successfully demonstrates that: (1) the Landlord set Base Year rents based on an exceptional circumstance, and (2) the resulting rents were disproportionately low, the Landlord is entitled to an adjustment in their Base Year gross income.
  - That adjustment is reflected by artificially increasing the rents reported in the Base Year, which results in a higher Base Year NOI.
- The Hearing Examiner has the discretion to decide how such adjustment in the Base Year rents occurs, but all evidence relied upon to adjust the Base Year rents must be reasonable and substantiated by the evidence contained in the Record.

## Example Calculation

- Consider a situation where Landlord's MNOI petition demonstrates a Base Year gross income of \$12,000 and expenses of \$6,000.
  - The resulting Base Year net operating income would be \$6,000.
- Within that the same petition, it is determined that the Current Year gross income is \$17,400 and expenses are \$6,000.
  - The resulting Current Year net operating income would be \$11,400.
- Comparing the Current Year net operating income to the Base Year, one subtracts \$6,000 from \$11,400, which results in positive \$5,400.
  - It would appear that the Landlord is receiving a fair return because not only has the Landlord maintained the Base Year net operating income of \$6,000 in the Current Year, they have exceeded it by \$5,400.

## Example Calculation (continued)

- Suppose the Landlord presents evidence that they only rented to close friends and family members, and charged low rents because they wanted to give their family members a deal.
- Using the best evidence available, the Hearing Examiner would determine Base Year rent amounts that were set based on general market conditions and make an adjustment in the Landlords' Base Year rents to reflect those rents set based on general market conditions.

## Example Calculation (continued)

- Once the Hearing Examiner has made a determination as to the rents that were set based on general market conditions, the Hearing Examiner adjusts the Landlord's Base Year rents to reflect those based on general market conditions.
- Returning to our example, assume that average Base Year rents charged based on general market conditions were \$1,500.
  - The Hearing Examiner would then substitute \$1,500 times twelve months to determine the Base Year income. The result would be that the Base Year net operating income changes from \$6,000 (\$12,000 Base Year gross income minus \$6,000 expenses) to \$12,000 (\$18,000 Base Year gross income minus \$6,000 expenses).
  - Comparing the new Base Year net operating income of \$12,000 to the Current Year net operating income of \$11,400, the Landlord is no longer receiving a fair return on their investment, but is \$600 below maintaining their Base Year Net Operating Income.
  - As a result, the Landlord is entitled to a rent increase.

THANK YOU

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