



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Jacky Morales-Ferrand

SUBJECT: SEE BELOW

DATE: August 8, 2016

Approved

D. D. SyL

Date

8/10/16

SUBJECT: APPROVAL OF THE REGULATIONS IMPLEMENTING THE INTERIM AMENDMENT TO THE APARTMENT RENT ORDINANCE

RECOMMENDATION

Adopt a resolution approving the amendment to the existing regulations to add Chapter 9 which provides the procedural direction needed for the interim fair return hearing process implemented by the Interim Ordinance amending Chapter 17.23 of Title 17 of the San José Municipal Code (Apartment Rent Ordinance).

OUTCOME

Adoption of the amendment adding Chapter 9 to the existing regulations will provide needed procedural guidance for the implementation of the fair return hearing process established in the Interim Apartment Rent Ordinance adopted by the City Council on May 17, 2016.

BACKGROUND

On April 19, 2016, the City Council considered changes to the City's Apartment Rent Ordinance (ARO). After extensive discussion and public comment, City Council directed staff to return with amendments making several permanent modifications to the ARO, including lowering the 8% allowable annual rent increase to 5%, eliminating the debt-service pass-through provision, and implementing a rent registry. City Council also directed staff to develop and bring back an Anti-Retaliation & Protection Ordinance for approval in fall 2016. The City Council also directed staff to return on May 10, 2016 with an urgency ordinance that provides a temporary pause in rent increases to apartments subject to the ARO.

At the May 10, 2016, the City Council meeting the Interim Apartment Rent Ordinance (Interim Ordinance) was adopted. Based on the significant workload associated with implementing the permanent changes to the ARO, the City Council concluded that an Interim Ordinance was necessary to transition to the new ARO provisions and to reduce uncertainty for both tenants and landlords. The Interim Ordinance (Attachment A) became effective on June 17, 2016 and will be in effect until January 1, 2017 or 60 days after the permanent ordinance is in place, whichever is earlier.

The adopted Interim Ordinance reduced the annual allowable rent increase on tenants from 8% to 5%, eliminated rent increases available through the pass-through provisions (including debt-service, capital improvement, rehabilitation, and operations & maintenance) after September 1, 2016, and implemented a fair return petition process. A capital improvement pass-through will return as a mechanism for rent increases once the permanent ordinance is approved by the Council.

Many of the necessary updates and changes to the ARO to implement the Interim Ordinance can be completed by Housing Department staff. However, amending the regulations to add a chapter implementing the fair return petition process (petition process) requires review by the Housing and Community Development Commission and subsequent approval by the City Council. The Interim Ordinance Regulations, which includes the chapter implementing the fair return petition process, are provided as Attachment B to this memorandum.

ANALYSIS

The amendment to the regulations will provide direction to allow the Hearing Officers to conduct fair return petition hearings called for under the Interim Ordinance.

Fair Return Petition Process

Although the annual 5% increase should provide the vast majority of owners with a fair return, the fair return petition process is available for owners who can show that they are not receiving a fair return because their current net operating income is less than their net operating income adjusted for inflation (as measured by the Consumer Price Index, San Francisco Bay Area-All Urban Consumers) or that the 2014 base year net operating income did not provide a fair return.

The proposed regulations provide the timeframe associated with the fair return petition process. Under the proposed regulations, the time from when a petition is received until the hearing officer issues a determination, should take no longer than 70 days. An exception to this timeframe would be in cases in which the hearing is rescheduled for unforeseen circumstances by one of the parties. After receiving a petition, staff will respond with a determination of completeness within 10 days, and in the case of a complete application, will schedule a hearing within 30 days of that determination being made. A single hearing may occur over multiple days,

depending on the specifics of the petition and property in question. A hearing officer will have 30 days to issue their determination after the close of the hearing.

EVALUATION AND FOLLOW-UP

Upon adoption of the amendment to the regulations, the City Attorney's Office will provide mandatory training to the existing group of contracted administrative hearing officers who will preside over petition hearings. If requested, the Housing Department will set up training sessions to provide owners with technical assistance on the fair return petition process. When staff returns to the City Council with the proposed final ARO and its regulations, data on the number of petitions received under the interim ordinance will be provided to the City Council. Staff intends to return with the proposed ARO before the end of the calendar year. This will complete the majority of work on item no. 2 on the City Council's ordinance and policy priorities list.

PUBLIC OUTREACH

This action will be considered by the Housing & Community Development Commission on August 11, 2016. It will also be posted on the City's Council Agenda website for the August 23, 2016 Council Meeting.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office and the City Manager's Budget Office.

COMMISSION RECOMMENDATION

Pursuant to Section 7.01 of the existing regulations, the proposed amendment will be presented to the Housing and Community Development Commission at their regularly scheduled meeting on August 11, 2016, for approval of the amendment and a recommendation to the City Council. A supplemental memo will be released with their recommendation(s) to the Council.

HONORABLE MAYOR AND CITY COUNCIL

August 8, 2016

Subject: Interim Apartment Rent Ordinance Implementation

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CEQA

Exempt, Section 15061(b)(3) No potential for causing a significant effect on the environment.
File No. PP16-051.

/s/

JACKY MORALES-FERRAND
Director, Department of Housing

For questions, please contact Jacky Morales-Ferrand, Director, at (408) 535-3855.

Attachments:

A: Interim Ordinance (For information only; approved May 17, 2016)

B: Interim Ordinance Regulations

Part 8 - INTERIM REGULATION OF RENT INCREASES

Attachment A

17.23.800 - Interim limit on rent increases.

Notwithstanding Section 17.23.180 and Section 17.23.210 of Chapter 17.23, Title 17:

- A. No increase or combination of increases to the rent charged to a tenant of a rental unit may exceed five percent, subject to Section 17.23.810; and
- B. Rent may not be increased more than once in any twelve-month period; and
- C. A landlord must invoke the hearing process referred to in Section 17.23.230 in order to seek any increase in excess of the five percent increase allowed without review pursuant to Section 17.23.800.
- D. A landlord may set the initial rent for a new tenant immediately after a vacancy occurring pursuant to Section 17.23.190.B.

(Ord. 29730.)

17.23.810 - Deadline for petitions and awards; limit on awards.

- A. No landlord may petition for a rent increase due to debt service costs or for other pass-through costs listed in Section 17.23.440 after September 1, 2016.
- B. Notwithstanding Section 17.23.440.A.3, any award for a petition filed for an increase listed under Section 17.23.440.A after the effective date of the ordinance from which this part is derived shall not include any increase in excess of approved reasonable pass-through costs plus no more than two percent of the monthly rent.

(Ord. 29730.)

17.23.820 - Fair return after September 1.

- A. After September 1, 2016, a landlord may petition for a rent increase in excess of the five percent increase allowed pursuant to Section 17.23.800 by invoking the hearing process referred to in Section 17.23.230 in order to seek a fair return as described in this section. An "arbitration" hearing will be held for a fair return petition, and tenants may file service reduction petitions. A fair return petition will be filed on a city approved form and must include copies of all documents and information on which the landlord relies to establish that the base year net operating income was unusually low. Department staff will review the petition submittal for completeness, and respond to the landlord within ten business days with a list of additional documents or information required. If the landlord declares under penalty of perjury that the information or documents are not available to the landlord,

department staff shall proceed with scheduling the hearing. The hearing officer may require additional documentation. The burden of proof is on the landlord to show that the base year net operating income did not provide a fair return.

- B. For the purposes of determining the rent increase necessary to provide the landlord with a fair return, it shall be presumed that the net operating income (determined by subtracting the actual reasonable operating expenses from the gross income), received by the landlord in 2014 (the "base year"), provided the landlord with a fair return.
1. A fair return is that amount required for the landlord to maintain the base year net operating income adjusted for inflation.
 2. The adjustment for inflation shall be sum of a percentage of the annual increases to the Consumer Price Index, San Francisco Bay Area-All Urban Consumers for the petition period, prorated as needed. The applicable percentage of the Consumer Price Index is one hundred percent.
 3. The petition period shall be the period between January, 2014 and the filing date of the landlord petition.
- C. The presumption that the landlord received a fair return in the base year based on reasonable expenses may be overcome by sufficient evidence showing that income or expenses were unusually high or low for that building or complex in the base year as described in this section. The hearing officer may adjust the base year net operating income if the hearing officer finds:
1. The landlord's operating expenses in the base year were unusually high or low in comparison to other years due to unusual circumstances. In such instances, adjustments may be made in calculating operating expenses so the base year operating expenses reflect average expenses for the property over a reasonable period of time. The hearing officer shall consider the following factors in making this finding:
 - a. The landlord made substantial capital improvements that improved the housing services during the base year, which were not reflected in the base year rent levels;
 - b. Substantial repairs were made due to damage caused by uninsured disaster or vandalism;
 - c. Maintenance and repair were below accepted standards or resulted from the intentional deferral of other repairs or work, which deferral caused significant deterioration of housing services, the building or individual units. If the time since the deferred work was performed significantly exceeds the amortization periods established by the regulations, it shall be presumed that it was intentionally deferred; and
 - d. Other expenses were unreasonably high or low, notwithstanding prudent business practice.
 2. The landlord's gross income during the base year was disproportionate. In such instances, adjustments may be made in calculating gross income consistent with the purposes of this chapter. The hearing officer shall consider the following two factors in making this finding:
 - a.

The gross income during the base year was unusually low because some residents had unusually low rents for the quality, location, age, amenities and condition of the housing. Rent less than seventy-five percent of 2014 fair market rent as determined by the U.S. Department of Housing and Urban Development for the San José Sunnyvale Santa Clara metropolitan area can be considered unusually low for units in buildings without housing code violations; and

- b. The gross income during the base year was significantly lower than normal because of destruction of all or part of the premises and/or temporary eviction for construction or repairs.
- D. In determining the rent increase required to provide the landlord with a fair return, the administrative hearing officer shall determine:
1. The fair return in accordance with Section 17.23.820.B.
 2. The gross income required to produce the fair return.
 3. The rent increase needed to produce the required gross income.
- E. For the purposes of determining the net operating income, operating expenses shall include the following expenses in connection with the operation of the rental units:
1. Annual fees assessed under Chapter 17.23 to the extent that they cannot be passed through to tenants under Chapter 17.23;
 2. Business license fees, real property taxes, utility costs, insurance;
 3. Normal and reasonable repair and maintenance expenses for a rental unit and the buildings or complex of buildings of which it is a part together with common areas, which expenses shall include, but not be limited to, building maintenance including carpentry, painting, plumbing and electrical work, supplies, equipment, refuse removal, and security services or systems, cleaning, fumigation, landscaping, and repair or replacement of furnished appliances, drapes, and carpets.
 4. Reasonable management expenses (contracted or owner performed), including necessary and reasonable advertising, accounting, other managerial expense. Management expenses are presumed to be six percent of gross income, unless established otherwise. Management expenses in excess of eight percent of gross income are presumed to be unreasonable and shall not be allowed unless it is established that such expenses do not exceed those ordinarily charged by commercial management firms for similar residential properties;
 5. Attorney's fees and costs incurred in connection with successful good faith attempts to recover rents owing and successful good faith unlawful detainer actions not in violation of applicable law, to the extent the same are not recovered from tenants; and legal expenses of a nature are necessarily incurred in dealings with respect to the normal operation of the rental units, building or complex to the extent such expenses are not recovered from adverse or other parties. If, on the basis of substantial evidence, it is determined that these expenses will not reoccur annually, the hearing officer may amortize those expenses over a period of five years;

6.

Capital improvements and replacement of facilities, materials or equipment necessary to maintain the same level of services as previously provided, except to the extent such costs are compensated by Insurance proceeds or other sources, and subject to the condition that said expenses shall be amortized in accordance with the standards for capital improvements in the regulations.

- F. For the purposes of determining the net operating income, operating expenses shall not include:
1. Avoidable and unnecessary expense increases since the base year including maintenance and repair work which resulted from the intentional deferral of other repairs or work, which deferral caused significant deterioration of housing services, the building or individual units;
 2. Debt service, including mortgage interest and principal payments;
 3. Fees, other than fees expressly authorized by subsection E. of this section;
 4. Penalties, fees or interest awarded for violation of this chapter or any other law;
 5. Legal expenses, except as authorized by subsection E. of this section including attorneys' fees and costs, incurred in relation to administrative or judicial proceedings in connection with this chapter and legal expenses, where the pass-through of the expenses would constitute a violation of public policy;
 6. Depreciation of the rental unit or rental units.
 7. Any expenses for which the landlord has been reimbursed by any utility rebate or discount, security deposit, insurance settlement, judgment for damages, settlement or any other method or device.
- G. For the purposes of determining the net operating income, gross income shall be the sum of the following:
1. Gross rents, calculated on the basis of one hundred percent occupancy, adjusted for uncollected rents due to vacancy and bad debts to the extent such are reasonable and beyond the control of the landlord;
 2. Income from laundry facilities, garage or parking fees, or other services, if not included in rent; and
 3. Costs of (or related to) utilities paid directly to the landlord by the tenants, if not included in rent; and
 4. Interest from security and cleaning deposits (except to the extent paid to tenants); and
 5. All other income or consideration received or receivable in connection with the use or occupancy of the rental unit
- H. The hearing officer's decision shall include a determination in accordance with the provisions of this part of the amount of the rent increase, if any, which is required to provide the landlord with a fair return. The hearing officer's allowance or disallowance of any proposed rent increase or portion thereof may be reasonably conditioned in any manner necessary to effectuate the purposes of this chapter.

(Ord. 29730.)

17.23.830 - Landlords to retain 2014 records.

Landlords are required to keep all financial records for 2014 which may be necessary for making a net operating income determination. Failure to retain such records may result in the loss of the ability to demonstrate the need for a fair return rent increase after September 1, 2016.

(Ord. 29730.)

17.23.840 - No waiver.

The provisions of this part may not be waived, and any term of any lease, contract, or other agreement which purports to waive or limit a tenant's substantive or procedural rights under this part are contrary to public policy, unenforceable, and void.

(Ord. 29730.)

17.23.850 - Termination of Interim regulation.

The provisions of this part will terminate on the earlier of: sixty days after the effective date of an ordinance amending Chapter 17.23 to decrease the annual allowable rent increase to five percent, revise the cost pass-through process and require registration of rents or units or January 1, 2017.

(Ord. 29730.)

AMENDMENT TO THE RENTAL DISPUTE
MEDIATION AND ARBITRATION PROGRAM REGULATIONS

Chapter 9 Fair Return Petition Procedures

9.01 General Provisions

9.01.01 Intent

This Chapter is intended to provide procedures for the fair return hearing process provided for in Section 17.23.820 of the Municipal Code of the City of San José and to supplement the provisions in the existing regulations implementing Chapter 17.23 of the Municipal Code. Where procedures differ from the provisions in the existing regulations, these procedures are intended to apply to fair return petitions. These regulations are intended to be harmonized with existing provisions for tenant petitions and service reductions when those petitions are considered in connection with a fair return petition.

9.01.02 Conflicting Provisions

Ordinance No. 29730 adopting Section 17.23.800 through Section 17.23.820 shall control over conflicting provisions in this Chapter.

9.01.03 Notice

It is presumed that a petitioner's petition contains the correct address for notice, and that notices mailed to that address are received three (3) days after mailing.

9.02 Petitions

9.02.01 Petition Filing Requirement.

After September 1, 2016 a landlord seeking a rent adjustment must file a fair return petition with the Rental Rights and Referrals Program (Program) on a City petition form with all required supporting documentation and obtain a determination of completeness under this Chapter.

9.02.02 Petition and Forms.

Petition and forms shall be as prescribed by the Director with the approval of the City Attorney as to form. All forms shall specify, and all written statements shall be made, under penalty of perjury.

9.02.03 Supporting Evidence.

A. The owner must submit with the petition complete at least three (3) sets of copies of all evidence the owner is relying on to support his or her claim,

marked accordingly. Receipts, cancelled checks, and detailed invoices are the best documentation.

B. Tax returns are not accepted as sufficient evidence for Current Year claims, or for any year less than three years prior to the Current Year. Copies of contemporaneously prepared ledgers are not accepted as sufficient evidence for the Current Year.

C. Evidence that may tend to show that rents were unusually low for the quality, location, age, amenities and condition of the housing include evidence of rents collected in comparable buildings located in the same neighborhood.

D. Evidence that may tend to show destruction or vandalism of the building or units includes contemporaneous insurance claims

9.02.04. Acceptance for Filing; Completeness.

A. A petition will not be accepted for filing for under any of the following circumstances:

1. Where the petition is not made on the City petition form or not correctly completed.
2. Where the petition is not accompanied by all required supporting documentation.
3. A petition seeking a rent increase was filed for the property within the previous twelve months, including petitions that were subsequently withdrawn.
4. Where the petition is not accompanied by (a) list of all tenants and their addresses, (b) a copy of the City notice from the landlord consistent with Section 17-23-270 to each tenant that the landlord is filing a fair return petition (c) a copy of the completed proxy form and (d) a declaration that he/she has served the written notification on all the tenants.

B. Within ten (10) working days after the date of receipt of a petition, or an amended petition, Program staff shall determine whether said petition is complete or whether corrections or additional information is needed. If the petition is complete and there are no corrections or missing documents or information, Program staff shall mail a notice of determination of completeness to the petitioner. A delay in the response by Program staff shall not be deemed a determination of completeness.

C. If the petition is determined not to be complete, the Program staff shall mail a notice to the petitioner listing the additional information or documentation required to complete the petition. Petitioner may amend the petition to include the required information or documentation. With respect to 2014 Base Year information or documentation, petitioner may amend the Petition by submitting a written statement identifying the required information or documentation that is unavailable, and state how it became unavailable,

under penalty of perjury. Such a submittal does not relieve the petitioner of the burden of proof.

D. If the petition is determined not to be completed correctly, the Program staff shall notify petitioner in writing of the corrections required to complete the petition. Petitioner shall amend the petition to make the corrections. If Petitioner disagrees with the corrections, the Petitioner may also submit a letter objecting to the corrections.

E. If the Petitioner fails to amend or supplement the petition as required by Paragraph C or D within thirty (30) days of the date the notice sent under Paragraph C or D was mailed, the petition shall be deemed to be withdrawn.

F. A staff report shall accompany the NOI petition when it is submitted to the hearing officer and be available for review by the parties. The report shall include a list of all petitions filed in the last 12 months, the rate of inflation for the applicable petition period, a list of all unresolved City code violation complaints, and a summary of the petition and evidence submitted.

G. In the event that the petition is complete except for missing Base Year NOI evidence. The owner may submit a City prescribed form requesting the Program to accept the petition without the complete Base Year NOI evidence. The form will require an affidavit under penalty of perjury indicating that the owner does not have and cannot obtain this evidence, and a description of how this evidence and may require a filing fee to cover the cost for Program staff to investigate and prepare a report for the Hearing Officer. The scheduling of the hearing will occur after the Program staff report is complete.

9.03 Scheduling and Appearance

9.03.01. Program staff shall assign an (Arbitration) Hearing Officer to hear the completed fair return petition and the administrative hearing on the petition shall be scheduled within thirty (30) days of the mailing of the notice of determination of completeness. In the event the Hearing Officer elects to hold a pre-hearing conference, the pre-hearing conference shall be scheduled within 30 days and the hearing thereafter. Notice of the hearing date shall be sent to the Petitioner and affected tenants. The notice of the hearing date shall be deposited in the U.S. Mail at least two weeks prior to the hearing date.

9.03.02 Requests for rescheduling of the hearing will be considered if they are for reasons beyond the control of the requester and are received by program staff at least seven (7) days before the hearing date. Additionally, requests for rescheduling based on a party's medical emergency or similar significant conflicts may be allowed by Program staff if they were clearly unforeseen upon documentation of the unforeseen event and the immediate notification of Program staff.

9.03.03 Failure to appear by petitioner or a proxy designated in writing to act for petitioner shall result in a determination that the petition has been withdrawn.

9.03.04 If tenant petitions also have been filed for service reduction, housing code violations or other violations of the Ordinance, the hearing on NOI petition shall not occur until the mediation hearing for the tenant petitions is completed and period for appeal has ended. If there is an appeal, the appeal shall be heard by the hearing officer assigned for the NOI hearing. The tenant petition hearing on appeal and NOI petition hearings shall be combined unless it is determined to be infeasible by Program staff.

9.04 Conduct of Hearing.

9.04.01 Hearing Officer.

The Hearing Officer shall control the conduct of the hearing and rule on procedural requests. The hearing shall be conducted in the manner deemed by the Hearing Officer to be most suitable to secure that information and documentation which is necessary to render an informed decision, and to result in a fair decision without unnecessary delay.

9.04.02 Ex Parte Communications.

There shall be no oral communication outside the hearing between the Hearing Officer and any party or witness, except at a prehearing conference, if any, to clarify and resolve issues. All discussion during the hearing shall be recorded on audiotape. All written communication from the Hearing Officer to a party after the hearing has commenced shall be provided to all parties.

9.04.03 Order of Proceedings.

A hearing on a fair return petition shall ordinarily proceed in the following manner, unless the Hearing Officer determines that some other order of proceedings would better facilitate the hearing:

- A. A brief presentation by or on behalf of landlord, if landlord desires to expand upon the information contained in or appended to the petition for rent adjustment, including presentations of any other affected parties and witnesses in support of the petition;
- B. A brief presentation by or on behalf of opponents to the petition, including presentations of any other affected parties and witnesses in opposition to the petition;
- C. A brief presentation of the results of any Program investigations or staff reports in relation to the petition, if any;
- D. Rebuttal by landlord.

9.04.04 Speakers' Presentations.

The presentation of each person speaking during a hearing shall be concise and to the point; visual and other presentation aids may be used as deemed appropriate by the Hearing Officer, provided that the presenter furnishes such

materials in advance for inclusion in the hearing record. Notwithstanding Regulation section 3.04.02, the Hearing Officer shall establish equitable time limits for presentations at a hearing.

9.04.05 Right of Assistance.

All parties to a hearing shall have the right to seek assistance in developing their positions, preparing their statements, and presenting evidence from an attorney, tenant organization representative, landlord association representative, translator, or any other person designated by said parties to a hearing.

9.04.06 Hearing Record.

The Hearing Officer shall maintain an official hearing record, which shall constitute the exclusive record for decision. The hearing record shall include:

- A. A copy of the petition and documents submitted to support the petition;
- B. Any written responses to the petition received from affected parties;
- C. All exhibits, papers, and documents offered either before or during the hearing;
- D. A list of participants present at the hearing;
- E. A summary of all testimony upon which the decision is based;
- F. A statement of all materials officially noticed;
- G. All findings of fact and conclusions of law;
- H. Any tentative decisions provided to the parties for comment and any comments received; and
- I. All recommended or final decisions, orders, or rulings.

9.04.07 Proof.

The landlord has the burden of proof to establish that a rent adjustment is required in order to provide the landlord with a fair return. The determinations regarding the quantum of proof required to meet the burden shall be made with respect to the following guidelines:

- A. The burden of proof shall be satisfied by persuading the Hearing Officer that the fact sought to be proven is more probable than some other fact.
- B. The burden of proof shall be met by using evidence only which has a tendency in reason to prove or disprove a disputed fact of consequence.
- C. Evidence shall be received with the petition for expenses alleged in the petition and made available for review by the parties prior to the first hearing unless the evidence is ordered to be submitted by the Hearing Officer.
- D. Moreover, no rent adjustment shall be granted unless supported by the preponderance of the relevant and credible evidence noted in the

hearing record and no rent adjustment shall be supported solely by hearsay evidence.

9.04.08 Re-Opening of Hearing Record.

The Hearing Officer may re-open the hearing record when she or he believes that further evidence should be considered to resolve a material issue, where the hearing record has been closed and where a final decision has not yet been issued by the Hearing Officer. In those circumstances, the parties may waive further hearing by agreeing in writing to allow additional exhibits into evidence.

9.05 Decision.

9.05.01 Within thirty (30) days after the close of the hearing, the Hearing Officer shall issue a final decision, approving, partially approving, or disapproving the rent adjustment requested by the fair return petition. Prior to the issuance of the final decision, the Hearing Officer may, at his or her discretion, prepare a tentative decision and request the Program staff to comment regarding clerical or mathematical errors and to circulate a tentative decision to the owner and affected parties for comment regarding clerical or mathematical errors. Any such comments shall be provided to the Hearing Officer and parties in writing by the commenter.

9.05.02 The decision shall include findings of fact and conclusions of law which support the decision, and shall specify the following:

- A. The amount of the rent increase, if any, for each unit.
- B. In the case of a downward adjustment in the rent, an itemization of each reduction in service on which the reduction is based, and the amount of reduction attributable to that housing service. An itemization of housing code violation shall be listed separately and the amount of reduction attributable to that violation.
- C. Any conditions which are placed on the award;
- D. The date on which any adjustment to the rent is effective for each unit.
- E. At the option of the Hearing Officer, any determinations for service reductions or other tenant petitions appealed to the Hearing Officer.

F. The cover page of the decision will provide that the date the decision is issued is the date of mailing.

9.05.03 Voluntary Agreements. The Hearing Officer may recess the hearing to allow for the negotiation of a Voluntary Agreement. Voluntary Agreement negotiations are not recorded. Voluntary Agreements shall be executed on an approved City form and be consistent with Chapter 1-8 of the regulations, however, the Voluntary Agreement shall not set the base year net operating income and/or its component elements, or the fair return.

9.06 Guidance for Substantive Determinations

9.06.01 In calculating net operating income expenses for capital expenditures and replacement of facilities, materials or major equipment necessary to maintain the same level of services as previously provided may be allowed except insofar as such expenses are compensated by insurance proceeds or other sources. Such expenses shall be limited to those actually incurred in the base year or in the current year. The amount expended shall be amortized according to the schedule, below provided that the Hearing Officer may use 7 years for unlisted items, or such other period as is determined to be reasonable and consistent with the purposes of the Ordinance.

IMPROVEMENT AMORTIZATION PERIOD IN YEARS

Air Conditioner 10
Major Appliances (other than those listed) 7
Cabinets 10
Dishwasher 7
Doors 10
Dryer 7
Electric Wiring 15
Elevator 20
Fencing 10
Fire Alarm System 10
Fire Escape 10
Flooring 7
Garbage Disposal 7
Gates 10
Gutters 10
Heating 10
Insulation 10
Locks 7
Paving 10
Drywall 10
Plumbing 10

Pumps 10
Refrigerator 10
Roofing 10
Security System 10
Stove 10
Stucco 10
Washing Machine 7
Water Heater 7

9.06.02 Expenses for maintenance and repair are reasonable and normal where they are consistent within 10% from year to year. The Hearing Officer may also evaluate reasonableness by considering whether such expenses are in keeping with expenses for buildings of similar configuration and age.

9.06.03 Reasonableness Generally

- A. Expenses must be reasonable.
- B. Expenses arising from deferred maintenance will generally not be reasonable.
- C. Expenses must be out of pocket and not reimbursed by any source in order to be reasonable.
- D. Expenses that vary more than 10% different from prior years must be accompanied by a written justification and other documentation acceptable to the Hearing Officer for the variation in order to be reasonable. If the Hearing Officer determines that the variation is not consistent with the purposes or the Ordinance, these expenses may be reallocated or amortized as the Hearing Officer determines to be consistent with the Ordinance.
- E. Financing expenses for capital expenditures and replacement of facilities, materials or major equipment will be reasonable if they are for a period not exceeding the amortization period and the annual interest rate does not exceed 3.5%. Any financing with an interest rate in excess of 3.5% must be reasonable under the circumstances and must be documented to the satisfaction of the hearing officer.
- F. Expenses should be documented by contemporaneous and complete invoices from licensed businesses and provided along with cancelled checks as proof of payment thereof. It is anticipated that such documents will identify the provider, cost, address of work, dates and the nature of the work performed.
- G. Expense claims based on cash payments and payments to affiliated entities will generally not be reasonable.

9.07 Definitions

9.07.01 All undefined capitalized terms shall be defined as provided in the Interim Ordinance and if not defined therein, in the fair return petition form.

9.07.02 "Beyond the Control of the Owner" shall mean not precipitated by voluntary actions, such as owner's issuance of notices to vacate without cause,

but not including voluntary vacancies or vacancies after an unlawful detainer proceeding.

9.07.03 "Capital Expenses" shall mean expenses for capital expenditures and replacement of facilities, materials or major equipment necessary to maintain the same level of services as previously provided.

9.07.04 "Capital Improvements" are building, unit or property additions or modifications that improve the housing services to tenants from the level of services as previously provided.

9.07.05 "Current Year" shall mean the 12 month period ending the month prior to the submittal of a fair return petition. Alternatively, the petitioner may request to use an alternative current year that ended no more than 3 months prior to the submittal of the petition, but in that event the CPI for the Current Year shall be adjusted backwards accordingly.

9.07.06 "Director" shall be the City of San Jose's Director of Housing.

9.07.07 "Mail" shall mean to deposit in the U.S. Mail, including but not limited to, deposit in a U.S. mail postal box. Program staff may also "mail" documents and notices by utilizing certified or registered mail or with commercial package or courier services, in which case an item is mailed when it is deposited with or in the drop box of the service.

9.07.08 "Rental Rights and Referrals Program staff" or "Program Staff" shall mean the employees of the City of San José who implement Municipal Code Chapter 17.23 and its regulations.