

**RESOLUTION NO. 77942**

**A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE  
AMENDING AND RESTATING CHAPTER 9 OF THE  
REGULATIONS FOR THE OPERATION AND ADMINISTRATION  
OF THE SAN JOSE RENTAL DISPUTE MEDIATION AND  
ARBITRATION ORDINANCE, CHAPTER 17.23 OF TITLE 17 OF  
THE SAN JOSE MUNICIPAL CODE AND SUPERSEDING  
RESOLUTION NO. 77922**

**WHEREAS**, on August 30, 2016, the Council of the City of San José (“City”) approved Resolution No. 77922 adding Chapter 9 to the Regulations of the Apartment Rent Ordinance (“Interim Regulations”) providing procedures for the fair return petition process; and

**WHEREAS**, although Interim Regulations were discussed at the Housing and Community Development Commission (“HCDC”) on August 11, 2016, and included changes suggested by HCDC, there were additional comments from the Law Foundation of Silicon Valley and the Tri-County Division of the California Apartment Association that were received after the final draft of the Interim Regulations were complete; and

**WHEREAS**, the City Council directed City staff to respond to stakeholder concerns and, if necessary, to return to Council with amendments to the Interim Regulations;

**WHEREAS**, City staff conducted additional outreach to the stakeholders, including a second discussion at the September 8, 2016 HCDC meeting and have amended and restated Chapter 9 of the Regulations; and

**WHEREAS**, the City desires to approve a new amendment to Resolution 61114 for the existing regulations for the operation and administration of the Apartment Rent Ordinance to amend and restate Chapter 9 attached as **Exhibit A**, in order to provide 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;

**NOW, THEREFORE**, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

The amendment to the existing regulations for the operation and administration of the San José Rental Dispute Mediation and Arbitration Ordinance adopted by Resolution 61114 to amend and restate Chapter 9 of those regulations attached as **Exhibit A** so as to provide the procedural direction needed for the interim fair return hearing process implemented the Interim Ordinance amending Chapter 17.23 of Title 17 of the San José Municipal Code, as described in the Director of Housing's memorandum dated September 13, 2016, and superseding Resolution No. 77922 is hereby approved.

ADOPTED this 27th day of September, 2016, by the following vote:

AYES: CARRASCO, HERRERA, JONES, KALRA, T. NGUYEN,  
PERALEZ, ROCHA; LICCARDO.

NOES: KHAMIS, M. NGUYEN, OLIVERIO.

ABSENT: NONE.

DISQUALIFIED: NONE.



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SAM LICCARDO  
Mayor

ATTEST:



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TONI J. TABER, CMC  
City Clerk

## **Exhibit A**

### 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 17.23.850 shall control over conflicting provisions in this Chapter.

##### 9.01.03 Notice

It is presumed that a landlord'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 and Notice**

##### 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 Notice of Petition and Proposed Increase

The landlord must serve on all tenants a City approved notice of the proposed petition filing, requested increase, proposed effective date of increase and tenant's rights to file, prior to filing the petition.

9.02.04 Opposition Statements.

A tenant may submit a statement in opposition to the claim(s) made by the petition on a City approved form ("Opposition Statement"). The Opposition Statement should be filed with the Program within 21 days of the date of the City Complete Notice. The Opposition Statement must be accompanied by a proxy form and should include any supporting documentation intended to be presented at the hearing.

9.02.05 Supporting Evidence.

A. The landlord must submit with the petition complete at least three (3) sets of copies of all evidence the landlord is relying on to support his or her claim, marked accordingly. Receipts, cancelled checks, and detailed invoices are the best documentation.

B. Tax returns and ledgers may be submitted as part of the supporting evidence, however, tax returns alone 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 alone 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 includes but is not limited to 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.

9.02.06 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 three copies of all required supporting documentation.

3. A petition seeking a rent increase was filed for the property within the previous twelve months and the subject of a decision, voluntary agreement or withdrawal determination under Section 9.03.03.

4. Where the petition is not accompanied by (a) list of all tenants and their addresses, (b) a copy of the completed proxy form and (c) a declaration that he/she has served the written notice pursuant to Section 9.02.03 on all the tenants prior to filing.

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 ("City Complete Notice") to the landlord with a copy to the tenants including information regarding tenant petition rights. 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 landlord listing the additional information or documentation required to complete the petition. Landlord may amend the petition to include the required information or documentation. With respect to 2014 Base Year information or documentation, landlord 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 landlord of the burden of proof.

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

E. If the landlord 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, or as soon thereafter as is possible and be available for review by the parties prior to the hearing. 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 landlord 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 landlord 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. A modified City Complete Notice will be sent in this event. The scheduling of the hearing will occur after the Program staff report is complete.

H. Once the hearing is scheduled, all tenants and the landlord shall be mailed notice of the hearing date and time, and information regarding the availability of the petition, any tenant submitted opposition statements or petitions, supporting documentation, and staff report at City Hall for review.

### **9.03 Scheduling and Appearance; Withdrawal**

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 forty (40) 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 40 days and the hearing thereafter. Notice of the hearing date shall be sent to the landlord and 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 landlord or a proxy designated in writing to act for landlord 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.

9.03.05 Petition withdrawals must be made in writing and the reason for withdrawal provided; withdrawal of a landlord petition will not prevent the hearing of tenant petitions for the property. City staff will notify tenants of the withdrawal of a petition. A petition for a property that was the subject of a withdrawn petition shall be heard by the previously assigned hearing officer, unless Program staff determines that is not feasible.

#### **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. 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 requested by Hearing Officer;
- 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, subject to adjustments for translation and reasonable accommodation.

#### 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 one or more tenants;
- 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;
- I. All recommended or final decisions, orders, or rulings; and
- J. Hearing recording.

**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 landlord 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. This provision is not intended to prohibit service reductions allowed under the Ordinance and regulations that cannot be readily itemized in this manner.
- 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 intentionally deferred maintenance or repairs will generally not be reasonable.

C. Expenses must be out of pocket and not reimbursed by any source in order to be reasonable.

D. If the Hearing Officer determines that the variation or timing of expenses is not reasonable, then such 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 or other similar documents that identify the provider, cost, address of work, dates, and the nature of the work performed and be provided along with cancelled checks or other proof of payment thereof. Original documents are the best evidence and all types of evidence may be submitted.

G. Expense claims based on cash payments or payments to affiliated entities must be documented to the satisfaction of the Hearing Officer.

## **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 landlord'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 landlord 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 mean 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.