



**CITY OF EAST PALO ALTO
OFFICE OF THE CITY ATTORNEY**

Administrative Report

Date: March 11, 2009

To: Members of the East Palo Alto Rent Stabilization Board

From: Valerie J. Armento, Interim City Attorney
Rafael E Alvarado Jr., Assistant City Attorney
Wilbert Lee, Housing Services Director

Re: Appeals of Denials of Petitions for Exemption Based Upon Substantial Rehabilitation

Recommendation

Hold a public hearing, consider the material presented and make a determination with regard to each property as to whether to grant the appeal of the denial of the petition for exemption based upon substantial rehabilitation as requested by the representative for the various property owners or to uphold the denial of the petition.

Background

The Rent Stabilization Ordinance (RSO), in Section 5, contains a provision which states:

Section 5. Applicability

5.1 This Ordinance shall apply to all real property, including mobile home parks, which are being rented or are available for rent for residential use, in whole or in part, except for the following:

...

F. Properties that have been substantially rehabilitated.

...

The more detailed procedures for obtaining an exemption are set forth in Section 500 of the Rules and Regulations, a copy of which is replicated in Attachment 1.

On December 31, 2008, a representative for 41 property owners filed a cover letter and materials requesting an exemption based upon substantial rehabilitation for each of the 41 properties. A copy of the cover letter listing all the properties is in Attachment 2. Director Lee sent 41 responses, each dated January 29, 2009, denying each of the requested exemptions. The main reasons stated in his denial letters were:

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Rule and Regulation Section 500 contains several requirements which must be met before an exemption based upon substantial rehabilitation can be granted. Although you submitted a packet of material related to this property, there does not appear to be evidence of compliance with critical threshold requirements enumerated below.

1. Section 502 clearly states “The Application for a Certificate of Exemption must be filed on Board-approved forms.” You have created a form which varies from the City’s form and which does not contain all specified components.
2. Section 500(F) clearly requires that in order to qualify for an exemption under the RSO “the rehabilitation expenditures must be approved by the Board prior to their being incurred.” There is no record that any approval for rehabilitation expenditures was ever sought for this property or approved by the Board for this property.

The same representative submitted three new sets of materials for three additional properties on East O’Keefe by way of a letter dated January 29, 2009 which was received on January 30, 2009. A copy of that cover letter with the properties listed is in Attachment 3. Mr. Lee sent three letters each dated February 4, 2009 denying each of those requested exemptions for the same reasons as set forth above stated in the January 29 denial letters.

After receiving the 41 denials, by way of a letter dated February 3, 2009, the representative of the property owners requested that the 41 denials be reconsidered but did not provide any material to address the two critical requirements noted in Mr. Lee’s January 29 letter. A copy of his reconsideration request is in Attachment 4 and Mr. Lee’s February 9, 2009 response elaborating on the reasons for his original denials and declining to reconsider is provided in Attachment 5. The Rules and Regulations do not contain any provisions pertaining to reconsideration.

On February 13, 2009, a second representative of the property owners submitted 41 letters appealing the January 29 exemption denials and requesting a hearing before the Rent Stabilization Board (RSB), but without the required appeal filing fee. On February 18, 2009 two letters were received appealing two of the three February 4 exemption denials and requesting a hearing before the RSB for properties located on East O’Keefe; these letters also were not accompanied by the required appeal filing fee. On February 19, 2009 a check was received for the appeal fees for all 43 properties for which appeal letters were previously received. All of the appeal letters are identical. An example of the February 13 letter is found in Attachment 6a an example of the February 18 letter is in Attachment 6b. The fee remittance letter is Attachment 7.

The materials submitted fill seven bankers’ boxes. These boxes will be available at the hearing but are not being reproduced and distributed to individual Board members. If Board members wish to review the materials at any other time, please contact the rent stabilization staff since the materials are in the program office.

Discussion

Procedural Issue

As a threshold matter, staff believes the Board should consider whether or not each appeal was timely filed. If an appeal was not timely filed, staff believes the Board could determine not to consider such an appeal and reject it as untimely. In the alternative, the Board could decide to waive any issues of timeliness and consider each appeal on its merits.

The Rules and Regulations, in Section 507 provides: “Any appeal of the Administrator’s exemption determination shall be filed within 15 days from the date the decision is mailed to the affected landlord. At the time of filing the appeal, appellant shall pay an appeal fee in the amount of \$100.”

Here is the timeline:

December 31, 2008	41 Petitions for Exemption filed for [R&R § 503 gives 30 days from date of filing to respond]
January 29, 2009	41 exemption ‘denial without prejudice’ letters sent stating reasons [R&R § 503 gives 15 days to supplement info missing]
January 30, 2009	3 additional Petitions for Exemption filed for
February 4, 2009	3 additional exemption ‘denial without prejudice’ letters sent
February 4, 2009	February 3 letter received requesting reconsideration of 41 denials
February 9, 2009	letter sent saying reconsideration request denied
February 13, 2009	41 appeals received but absent required filing fee
February 18, 2009	2 appeals received but absent required filing fee
February 19, 2009	Check received for \$4,300 for 43 appeals

February 13, the date on the appeal letters and the date the letters were received, is 15 days after January 29. Because the Rules and Regulations require the appeal fee to be paid “at the time of filing” and the appeal fees were not received until February 19, the appeals are considered as filed on February 19 not on the date the appeal letters were received. In the 41 appeal letters, the property owner representative acknowledges in each letter the denial occurred on January 29, 2009. The elapsed time between January 29 “the date the decision is mailed” and February 19 is 21 days. Hence it does not appear the 41 appeals were timely filed and therefore they are subject to dismissal. This situation can be analogized to the California Rules of Court, which give judges discretion to allow relief from filing deadlines for good cause, except for the filing of a notice of appeal. “[N]o court may extend the time to file a notice of appeal. If a notice of appeal is filed late, the reviewing court must dismiss the appeal.” (CRC 8.104 (b)).

The two East O’Keefe appeals do not present this timing of filing problem, since the elapsed time from February 4 to February 19 is exactly 15 days.

Another minor procedural issue is that while an exemption petition was filed for 1851 Clarke Avenue and a denial letter concerning 1851 Clarke Avenue was sent and apparently received, the appeal letter submitted is for 1850 Clarke Avenue.

Substantive Issues Generally

The burden of proof for qualifying for an exemption based upon substantial rehabilitation is on the petitioner. That means, the one seeking the exemption must demonstrate a clear entitlement to the exemption.

There are numerous substantive matters to review with regard to any of the properties for which the Board considers an appeal on the merits.

1. Failure to use City form

Section 502 requires that an application for a certificate of exemption be filed on an official form, a copy of which is found in Attachment 8. None of the applications are filed on an official form. Instead, the legal representatives appear to have made up their own form, an example of which is attached as Attachment 9. A comparison of the two readily shows that several key pieces of information are absent from the petitions submitted.

2. Failure to obtain pre-approval of rehabilitation expenditures

Section 500(F) clearly requires that rehabilitation expenditures be approved prior to being incurred. The staff has no record for any of the properties for which petitions were submitted that any pre-approvals were sought or granted. The staff has afforded the property owners representatives an opportunity to provide proof of pre-approval, but has not received such proof.

3. Failure to provide required tenant information

Sub-section 500(F).C. specifies that the exemption may only be applied to units occupied by low and moderate income tenants, and references to low and moderate income tenants appear in sub-sections E, F and G as well. Sub-section 500(F).D. requires the landlord to supply the names of tenants. Tenant information is needed so that the staff can verify the income levels. None of the materials submitted contains any tenant information. The only reference to tenants is the statement "All existing tenants have been provided concurrent notice of this petition via U.S. Mail." An example of the brief notice sent to tenants appears in Attachment 10.

4. Absence of declaration under penalty of perjury

Section 505.C. states "The landlord must state, under penalty of perjury, that all tenants meet the income guidelines required for exemption." The City's application contains a statement under penalty of perjury that the information provided is true and correct. No statement under penalty of perjury has been submitted for any of the properties for which a petition for exemption has been filed.

5. Failure to supply purchase price for properties

Section 500(F).B. deals with rehabilitation expenditures and requires a comparison of the amount of the expenditures in relation to the purchase price of the property. The purchase price is defined as the gross price paid for the property without deducting buyer-assisted financing assessment bonds, taxes or penalties, or any costs of purchase or sale. None of the petitions submitted contain information with regard to the purchase price of the property for which the exemption is sought

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6. Failure to focus on structural expenditures

Section 500(F).B. provides “To be deemed ‘substantial rehabilitation’ the rehabilitation expenditures shall be predominately structural in nature as opposed to expenditures capable of being expensed for tax purposes or cosmetic improvements.” The billings, payment receipts and other documents submitted to support the petitions are a mish-mash of data covering a wide range of expenses and no clear statement is provided with regard to what structural work was performed with regard to any of the properties and the costs related specifically to that structural work.

If the Board does not decide to dismiss the 41 appeals denied by the January 29, 2009 letters as untimely, based upon the foregoing discussion of substantive items the Board could deny the 41 petitions based upon the substantive failures detailed above. Alternatively, the Board could decide to review each of the 41 petition requests in more detail. If the Board desires to do the latter, additional appeal hearings would need to be scheduled to provide more time for a thorough presentation on each property.

320 and 340 East O’Keefe Appeals

The two appeals that without question are before the Rent Stabilization Board in a timely manner are the ones filed concerning the denials of the petitions for exemption for substantial rehabilitation for 320 East O’Keefe and 340 East O’Keefe. These are discussed in more detail.

320 East O’Keefe

Attachment 9 is the petition filed on January 30, 2009 seeking an exemption for 320 East O’Keefe. Attachment 11 is the February 4, 2009 denial letter. Attachment 6b is the February 17, 2009 appeal letter which was received on February 18. Substantive issues 1, 3, 4, and 5 enumerated above are apparent from a review of the petition. Substantive issue 2 is reflected in the denial letter and no material to refute the absence of pre-approval has been provided.

Assuming for the sake of discussion the RSB did not consider any of the foregoing 6 general substantive areas either individually or collectively to support the denial of the exemption for 320 East O’Keefe, attention should then be focused on the expenditures claimed. Analysis is difficult because there is no narrative and only incomplete information was submitted, but based upon what is available, staff offers the following analysis for consideration.

The 320 East O’Keefe petition indicates the building has 20 units and the building was purchased on January 9, 2007. The petition does not provide a purchase price, let alone a per unit purchase price, but third party sources suggest that the property as a whole had a purchase price of approximately \$2,222,000.00. Using the \$2,222,000 figure and dividing it by the number of units yields a per unit purchase price of \$111,100.00. Petitioners would need to verify actual purchase prices with documentation.

Accompanying the petition is a two page summary list, alphabetical by vendor (Attachment 12), of the work claimed to have been done. In the upper right hand corner of the

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list is the petitioner's summary of the expenditures as petitioner categorizes them with a breakdown determined by petitioner. For 320 East O'Keefe, the summary is:

Rehabilitation and Life Safety	83,842.17
Seismic Retrofit	10,447.75
Gates/Security	3,762.96
Interior Unit Renovation	7,482.96
Scheduled Interior Rehab	121,000.00
Scheduled Exterior Rehab	199,446.00

These categories, however, do not conform to anything set forth in the Rules and Regulations, nor is there any explanation as to what types of expenditures the petitioner includes in any particular category, nor is there any information explaining the "scheduled" items. Based upon the foregoing listing, petitioner includes the statement that the total capital expenditures for 320 East O'Keefe are \$425,981.84 and the per unit capital expenditure is \$21,299.09.

Of note with regard to all the financial discussions regarding this property is the fact that while amounts are claimed on the summary list and invoices are presented, no materials related to actual payments being made have been submitted.

The expenditure summary list contains 153 line items, most of which are with reported amounts considered to be minor in nature. Of the 153 items, 29 are described as "consulting" which arguably do not meet the requirement that "expenditures shall be predominately structural in nature." To determine whether or not the consulting entries, such as by the Dahlin Group, are eligible for inclusion in any expenditure calculations, the individual bills submitted were reviewed and found to contain matters such as street lighting, mileage and photocopying expenses, affordable housing spreadsheet charges, density bonus strategies charges, property acquisition map preparation, impact fee analysis and so forth. Other consulting entries related to security and land surveys. Although it is possible something relevant may have been overlooked, staff did not find any consulting entries related to structural rehabilitation; most consultant entries had nothing to do with unit rehabilitation whatsoever.

Another 21 entries are described as "appliances" which do not qualify. Other obviously non-structural entries include "paint" (5), "flooring/carpets" (5), "doors/locks" (5), "gates and security systems" (4), "general conditions" (4), "pools" (4), "equipment" (3), "gutters" (3), "TI improvements (lumped)" (3), "powerwash" (2), "parking facilities" (1), "EPA building permits" (1), "lighting/street fixtures" (1), "TI faucets, sinks, showers" (1), "asphalt" (1), "exterior lights" (1), "landscape" (1), "tree trimming" (1) and "sidewalks" (1) One invoice with a possible qualifying description of "building improvements" pertains to an engineering company and is for ALTA surveys. There are 14 "electrical" entries which are questionable, especially given the minor sums involved and appear to be more in the nature of routine repairs. Thus, it seems the vast majority of entries should be eliminated from consideration.

Two entries are "roofs" (1) which are to be determined/scheduled but listed at \$40,000 and "windows" (1) which are also to be determined/scheduled but listed at \$30,000. No further information on these items is provided.

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The remaining entries for possible consideration are: “contractor” (10) and “contractor and construction” (28). It is virtually impossible, however, to make much sense out of the information provided in conjunction with these entries. For example, on Attachment 12, lines 32 and 33 relate to a JMI (Johnstone Moyer, Inc.) invoice for \$110.98 and \$12.33 respectively. It was not possible to find these precise entries on the accompanying invoice found in Attachment 13 (page EPA103-0059) but it also is difficult to believe that substantial rehabilitation work would be broken down into such low level detail or cost such a minor amount. Another example, on Attachment 12 lines 60 through 73 relate to bills from PMPS (Page Mill Property Services) for “contractor and construction” for a series of months. The individual invoice descriptions (pages EPA103-0074 through EPA103-0087) do not provide any additional detail, as illustrated in the two highest cost invoices (\$3,125.76 and \$1,067.04) attached as Attachments 14 and 15. This same pattern reappears in lines 82 through 95 (pages EPA103-0102 through EPA103-0115), where the amounts range from \$88.83 to \$3,125.77.

The last entry on the list is for Allsite Construction Company and relates to 13 units (unclear which 13 out of the 20 total units). The single page related to these purported “scheduled” expenditures is Attachment 16 (EPA103-0170) and are simply summarized on the claims list as \$15,342 per unit. However, a close review of the document reveals that it includes numerous items which would not qualify under the requirements of Section 500(F). For example, amounts are included for many items which fall under that category of “capable of being expensed for tax purposes or cosmetic improvements” such as kitchen and bathroom enhancements, paint, linoleum and carpeting, blinds, appliances, and so forth. The RSB should review this document in detail and determine what, if any, of the items qualify as structural or adequately reflect substantial rehabilitation.

It also should be noted that the vast majority, if not all the bills, are not addressed to the petitioner/property owner seeking the exemption. Rather, the bills are addressed to Page Mill Properties.

340 East O’Keefe

The situation presented by the petition for exemption for 340 East O’Keefe is similar to the preceding discussion pertaining to 320 East O’Keefe.

Attachment 17 is the petition filed on January 30, 2009 seeking an exemption for 340 East O’Keefe. Attachment 18 is the February 4, 2009 denial letter. Attachment 18 is the February 17, 2009 appeal letter which was received on February 18. Substantive issues 1, 3, 4, and 5 enumerated above are apparent from a review of the petition. Substantive issue 2 is reflected in the denial letter and no material to refute the absence of pre-approval has been provided.

Assuming for the sake of discussion the RSB did not consider any of the foregoing 6 general substantive areas either individually or collectively to support the denial of the exemption for 340 East O’Keefe, attention should then be focused on the expenditures claimed.

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Analysis is difficult because there is no narrative and only incomplete information was submitted, but based upon what is available, staff offers the following analysis for consideration.

The 340 East O’Keefe petition indicates the building has 21 units and the building was purchased on December 5, 2006. The petition does not provide a purchase price, let alone a per unit purchase price, but third party sources suggest that the property as a whole had a purchase price of approximately \$2,324,500.00. Using the \$2,324,500 figure and dividing it by the number of units yields a per unit purchase price of \$110,690.00. Petitioners would need to verify actual purchase prices with documentation.

Accompanying the petition is a three page summary list, alphabetical by vendor (Attachment 20), of the work claimed to have been done. In the upper right hand corner of the list is the petitioner’s summary of the expenditures as petitioner categorizes them with a breakdown determined by petitioner. For 340 East O’Keefe, the summary is:

Rehabilitation and Life Safety	107,154.98
Seismic Retrofit	64,277.26
Gates/Security	2,759.42
Interior Unit Renovation	34,882.40
Scheduled Interior Rehab	125,000.00
Scheduled Exterior Rehab	134,109.00

These categories, however, do not conform to anything set forth in the Rules and Regulations, nor is there any explanation as to what types of expenditures the petitioner includes in any particular category, nor is there any information explaining the “scheduled” items. Based upon the foregoing listing, petitioner includes the statement that the total capital expenditures for 340 East O’Keefe are \$448,183.06 and the per unit capital expenditure is \$21,341.05

Of note with regard to all the financial discussions regarding this property is the fact that while amounts are claimed on the summary list and invoices are presented, no materials related to actual payments being made have been submitted

This expenditure summary list contains 208 line items, many of which are in amounts less than \$5,000. Of the 208 items, 51 are described as “consulting” which arguably do not meet the requirement that “expenditures shall be predominately structural in nature.” Again, in an effort to determine whether or not the consulting entries, such as by the Dahlin Group or Schaff & Wheeler, are eligible for inclusion in any expenditure calculations, the individual bills submitted were reviewed and found either to contain no information on what services actually were performed, or to contain a wide spectrum of generic land use planning matters (Dahlin) or engineering services with captions such as “San Francisquito Creek Investigation” and “Woodland Park Hydrology and Water Quality” (S&W). Although it is possible something relevant may have been overlooked, staff did not find any consulting entries related to structural rehabilitation; most consultant entries had nothing to do with unit rehabilitation whatsoever.

Another 11 entries are described as “appliances” which do not qualify. Other obviously non-structural entries include “general conditions” (12), “flooring/carpets” (9), “paint” (5),

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“doors/locks” (4), “TI faucets, sinks, showers” (4), “gates and security systems” (4), “equipment” (3), “tile” (2) “TI improvements” (2), “interior” (2), “powerwash” (2), “parking facilities” (1), “EPA building permits” (1), “lighting/street fixtures” (1), “asphalt” (1), “landscape” (1), and “sidewalks” (1). Two invoices with a possible qualifying description of “building improvements” pertain to work by engineering companies. One pertains to ALTA surveys. The other was for internal surveys of buildings and the preparation of floor plans. There is one entry under “plumbing” with a negative \$8.39. There are 13 “electrical” entries which are questionable and especially given the minor sums involved appear to be more in the nature of routine repairs. Thus, the vast majority of entries should be eliminated from consideration.

Three entries are “balconies” (1) which are to be determined/scheduled but listed at \$10,000, “roofs” (1) which are to be determined/scheduled but listed at \$40,000 and “windows” (1) which are also to be determined/scheduled but listed at \$40,000. No further information on these items is provided.

Other entries for possible consideration are “contractor” (16) and “contractor and construction” (30). Similar to the 320 East O’Keefe discussions above, it is virtually impossible to make much sense out of the information provided in conjunction with these entries. There are a number of JMI invoices for fairly insignificant amounts and it is difficult to find the precise entries on the accompanying invoices but it also is difficult to believe that they reflect any significant rehabilitation work. Again, there are bills from PMPS (Page Mill Property Services) for “contractor and construction” for a series of months but the individual invoice descriptions do not provide any additional detail.

One category of expenditures found in this compilation not included in 320 East O’Keefe is “seismic retrofit” and there are 24 such entries. For the most part, these bills do not contain any explicit explanation of the work performed. An example is line 91, relating to Biggs, Cardosa Associates. A copy of that invoice is Attachment 21. (EPA017-0108). It simply lists an overall contract amount, a percent complete, a fee earned, previous amount billed, and a fee due. Interestingly, the invoice total is for \$62,100 but the amount on line 91 attributed to 340 East O’Keefe is \$1,419.43. Without any detail, it is impossible to know not only what work was performed by BSA, but how the amount to be attributed to 340 East O’Keefe was determined. Another example is Cornerstone Earth Group, found on line 110. That invoice is Attachment 22 (EPA017-0137). The invoice lists a date, a title and a generic task plus a fee. It also includes a reimbursable expense category. The invoice total is for \$4,877.01 but the amount sought is \$170.70. A third example is Signet Testing Labs, line 156. A copy of that invoice is Attachment 23. Again a very generic invoice was submitted with no explanation of how this relates to 340 East O’Keefe or of how \$ 566.55 was attributed to 340 East O’Keefe of the \$16,167.25 total charged.

In checking with Planning, Building and Public Works, there do not appear to be any retrofit orders pertaining to these properties, nor to any residential properties in East Palo Alto. The Building Official acknowledged that Page Mill/Woodland Park has engaged in some voluntary retrofit activities.

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The last entry on the list is for Allsite Construction Company and relates to 9 units (unclear which 9 out of the 21 total units). The two pages related to these purported “scheduled” expenditures is Attachment 24 (EPA103-0315 and EPA103-0317) and are simply summarized on the claims list as \$14,901 per unit. However, a close review of the document reveals that it includes numerous items which would not qualify under the requirements of Section 500(F). For example, amounts are included for many items which fall under that category of “capable of being expensed for tax purposes or cosmetic improvements” such as kitchen and bathroom enhancements, paint, linoleum and carpeting, blinds, appliances, and so forth. The RSB should review this document in detail and determine what, if any, of the items qualify as structural or adequately reflect substantial rehabilitation.

It also should be noted that the vast majority, if not all the bills, are not addressed to the petitioner/property owner seeking the exemption. Rather, the bills are addressed to Page Mill Properties.

Attachments:

1. Rules and Regulations Section 500, Exemption Regulations
2. December 31, 2008 Petitions for Exemptions cover letter
3. January 29, 2009 Petitions for Exemptions cover letter
4. February 3, 2009 Request for Reconsideration letter
5. February 9, 2009 letter denying Reconsideration Request
- 6a. Example of February 13 appeal letter requesting RSB hearing
- 6b. Example of February 18 appeal letter requesting RSB hearing (320 East O’Keefe)
7. February 18, 2009 letter with appeal payment
8. City Application for Certificate of Exemption 2008-2009
9. Example of Petition for Exemption filed (320 East O’Keefe)
10. Example of letter sent by petitioning property owner to tenants
11. February 4, 2009 denial letter (320 East O’Keefe)
12. List of claimed expenses for 320 East O’Keefe
13. JMI summary invoice for May 2007
14. PMPS Invoice for December 2007 for 320 East O’Keefe
15. PMPS Invoice for June 2008 for 320 East O’Keefe
16. Undated Allstate Construction Company Invoice for 320 East O’Keefe
17. Petition for Exemption filed for 340 East O’Keefe
18. February 4, 2009 denial letter for 340 East O’Keefe
19. February 18 appeal letter requesting RSB hearing for 340 East O’Keefe
20. List of claimed expenses for 340 East O’Keefe
21. BCA Invoice for June 2007
22. Cornerstone Earth Invoice for Nov. 1, 2007 through Feb. 22, 2008
23. Signet Testing Labs Invoice for period ending 2/22/08
24. Undated Allstate Construction Company Invoice for 340 East O’Keefe