

**HOUSING, RESIDENTIAL RENT AND RELOCATION BOARD
FULL BOARD SPECIAL MEETING**

August 24, 2023

6:00 P.M.

CITY HALL

1 FRANK H. OGAWA PLAZA, HEARING ROOM #1

OAKLAND, CA 94612

MINUTES

1. CALL TO ORDER

The Board meeting was administered in-person by B. Lawrence-McGowan from the Rent Adjustment Program (RAP), Housing and Community Development Department. B. Lawrence-McGowan explained the procedure for conducting the meeting. The HRRRB meeting was called to order by Chair Ingram at 6:03 p.m.

2. ROLL CALL

MEMBER	STATUS	PRESENT	ABSENT	EXCUSED
Vacant	Tenant			
D. WILLIAMS	Tenant			X
J. DEBOER	Tenant Alt.	X		
M. GOOLSBY	Tenant Alt.	X		
D. INGRAM	Undesignated	X		
C. OSHINUGA	Undesignated	X		
M. ESCOBAR	Undesignated			X
Vacant	Undesignated Alt.			
Vacant	Undesignated Alt.			
D. TAYLOR	Landlord		X	
K. BRODFUEHRER	Landlord	X		
C. JACKSON	Landlord Alt.			X
Vacant	Landlord Alt.			

Staff Present

Kent Qian

Marguerita Fa-Kaji

Briana Lawrence-McGowan

Deputy City Attorney

Senior Hearing Officer (RAP)

Administrative Analyst II (RAP)

3. PUBLIC COMMENT

- a. No members of the public spoke during public comment.

4. CONSENT ITEMS

- a. Chair Ingram announced that agenda item 4b is being postponed until after the appeal case is heard.
- b. Approval of Board Minutes, 8/10/2023: Vice Chair Oshinuga moved to approve the Board Minutes from 8/10/2023. Member J. deBoer seconded the motion.

The Board voted as follows:

Aye: D. Ingram, C. Oshinuga, M. Goolsby, J. deBoer, K. Brodfuehrer
Nay: None
Abstain: None

The minutes were approved.

5. APPEALS*

- a. L19-0013 et al., Vulcan Lofts, LLC v. Tenants

Appearances:	Servando Sandoval	Owner Representative
	Leah Hess	Tenant Representative
	Hasmik Geghamyan	Tenant Representative

This case involved an appeal to tenant petitions and a property owner petition for a certificate of exemption. In August and October 2018, tenants from Vulcan Lofts filed petitions challenging rent increases and alleging decreased housing services. The tenants also contested the exemption on the basis of fraud or mistake—as a prior ruling from the Board determined that four units of the property were exempt from the Rent Adjustment Ordinance on the basis of new construction. This was appealed by one tenant and affirmed by the Superior Court and Court of Appeals.

In November 2018, the property owner filed a petition seeking an exemption on the basis of new construction for units located at 4401 San Leandro Street. Tenants filed responses to the petition, arguing that the ordinance does not grant exemptions to properties where there has been residential use prior to the issuance of a certificate of occupancy—and that there was evidence of residential use prior to issuance of the certificate in

1987. On April 30, 2023, the Hearing Officer issued a hearing decision, granting the property owner's petition and dismissing the tenant petitions. The Hearing Officer found that the evidence established that the property was newly constructed after the purchase of the property in December 1985—and that the property was not residential before the purchase. The Hearing Officer also found that the residential occupancy started after the purchase in 1985, and that the certificate of occupancy was finalized on October 20, 1987. Based on these findings, the hearing decision concluded that the owners had met their burden of proof to establish that the property received a certificate of occupancy after January 1, 1983—and therefore, the subject property is exempt from the Rent Adjustment Ordinance.

The tenants appealed the hearing decision, arguing that:

- 1.) The Hearing Officer failed to address the primary legal question of whether any residential use prior to the issuance of the certificate of occupancy counts as prior residential use for the purpose of exemption—or if only residential use before January 1, 1983, matters for exemption purposes and
- 2.) Because exemptions are narrowly construed, post 1983 residential use occurring before the issuance of the certificate of occupancy means that the units should not be exempt as new construction under the Rent Adjustment Ordinance. There is evidence in the record of residential use from at least June 1986—prior to the issuance of the certificate of occupancy in 1987 and
- 3.) The prior case, *Vidor v. City of Oakland*, does not control here because the decision only applied to 4 units in the property and exemption decisions can be overturned upon the showing of fraud or mistake.

The owner then submitted a response, contending that Oakland law does not expressly provide that any residential use before the issuance of the certificate of occupancy removes an exemption claim based on new construction—and that for the prior residential use standard, to preclude a new construction exemption, the residential use must have occurred prior to January 1, 1983. The owner also argued that prior cases holding that the Vulcan Lofts units were exempt should be given deference.

The following issues were presented to the Board:

- 1.) If a unit receives a certificate of occupancy on or after January 1, 1983, as a result of conversion from existing space, does the unit qualify for the new construction exemption, so long as the former unit was not used residentially prior to 1983 or prior to conversion?
- 2.) Did the Hearing Officer's decision adequately connect the finding to the

ultimate conclusion that the property was exempt by applying a clear legal rule?

The tenant representative contended that the tenants are requesting for the City Attorney's recommendation to be adopted—which is based on the *Amory v. Green Sage* case and held that there's no temporal limit on residential use prior to conversion. The tenant representative argued that residential use after January 1, 1983, can be used to preclude exemption and that the facts of this case and the *Amory v. Green Sage* case parallel. The tenant representative contended that in both cases, tenants moved into the property before final permits and certificates of occupancy were issued. The tenant representative argued that in the *Amory v. Green Sage* case, the property was built between 2003 and 2010, and tenants began to move-in throughout 2009—however, the certificate of occupancy wasn't issued until 2011. The tenant representative contended that the Board determined in the *Amory v. Green Sage* case that residential use before or after 1983 precludes exemption and that the tenants are requesting for this to be applied to the current case.

The tenant representative argued that in December 1985, the owners purchased the property, attained permits, and promptly began building 59 live-work units in three buildings—A, B, and C. The tenant representative contended that prior to receiving any finalized permits or certificates of occupancy, the owners began renting the live-work units to tenants, and that this practice continued for two years as construction continued. The tenant representative argued that this practice is unlawful under state and local building codes, which forbid occupancy without a certificate of occupancy. The tenant representative contended that these laws are not mere formalities, they are safeguards that protect tenants from unsafe and dangerous housing. The tenant representative argued that granting exemption when buildings lack final permit inspections rewards owners who engage in illegal construction practices.

The tenant representative contended that the owners obtained a certificate of occupancy in October 1987—but at that point, there were many tenants in the building. The tenant representative argued that the *Amory v. Green Sage* case provides a clear and bright line that can be easily applied and prevents owners from benefiting from unlawful construction. The tenant representative argued that the hearing decision is at odds with the intent and purpose of the Rent Adjustment Ordinance and argued that if the hearing decision is upheld, it will provide a precedent for landlords who violate the law to obtain exemptions, strip tenants who are covered by the ordinance of their protections and punish the tenants for the owners' wrongdoing.

The tenant representative argued that there is evidence on the record of pre 1983 occupancy and that it states in the registrar of voters record that the property was occupied in 1982. The tenant representative contended that people began moving into the Vulcan Lofts in June of 1986, more than two years before the owners received the final certificates of occupancy—and that building C never got a final certificate. The tenant representative argued that the owners had a series of temporary occupancy certificates for some of the units, but not all of them—and that newly constructed units include legal conversions of uninhabited spaces not used by tenants. The tenant representative contended that legal conversions is not a convergence that happens when construction is ongoing and there are no finalized documents—and that a legal conversion is when the building may be legally occupied. The tenant representative argued that the landlords put the tenants in a situation where they were living in a construction zone, that tenants of illegal buildings are still covered by the Rent Adjustment Ordinance, and that the tenants will lose these protections if the property is declared to be exempt—which it is not.

The owner representative contended that the appeal hearing is being held to address the issue of whether the property is exempt—and that the owners in this case met their burden of proof to show that this was new construction. The owner representative argued that the property was an iron foundry in operation in 1985 when it was purchased, and that there was testimony and evidence presented at the hearing, setting forth the fact that the foundry continued in operation after the purchase. The owner representative contended that the evidence shows that when the construction was started, permits were obtained. The owner representative argued that while permits were being finalized, the owners had temporary certificates of occupancy that were issued—and that the final certificate of occupancy was issued in 1987.

The owner representative argued that this case is unlike the *Amory v. Green Sage* case because in that case, the owner converted space without permits, then submitted an application to legalize the existing residential space—which did not occur in this case. The owner representative contended that the Board needs to uphold the hearing decision because this is a pure example of where landlords are incentivized to add new housing, which is necessary and needed in Oakland. The owner representative argued that the owners followed the rules and obtained permits and temporary certificates of occupancy—and that they ultimately got the finalized certificate of occupancy.

The owner representative contended that the tenants are now attempting to go back and recreate history and that they are trying to stop the property

from being exempt from the Rent Adjustment Ordinance. The owner representative argued that the ordinance states that units are exempt as new construction if they are created from a space that was formerly entirely non-residential. The owner representative contended that the tenants attempted to make it look like there was evidence of pre 1983 residency—however, there were a total of five hearings in this case and the Hearing Officer still decided that there was not one scintilla of evidence showing any prior residential use before 1983. The owner representative argued that there is no such evidence of residential history prior to 1983 and that the Board should uphold the hearing decision.

The owner representative argued that in the tenants' appeal, it states that the tenants do not dispute the essential facts stated in the decision—and the decision found that there was no residential use pre 1983 or pre-1985. The owner representative contended that the only evidence the tenants have is one voter registration from 1982, which was not credible—and the fact that the property was an iron foundry that was in operation in 1985 and continued after the purchase in 1985 is evidence in this case. The owner representative argued that this case is completely different than the Amory v. Green Sage case—and that there was no existing residential use or living units at this property prior to the construction to convert this into a residential property.

After parties' arguments, questions to the parties, and Board discussion, Chair Ingram moved to remand the case back to the Hearing Officer for a determination on the exemption based on the Amory v. Green Sage decision. For clarification, to qualify for an exemption, the property must have been entirely non-residential—i.e., no residential use, prior to the issuance of the final certificate of occupancy. The Hearing Officer is also to make a decision on the tenant petitions based on the merits. Member J. deBoer seconded the motion. Member J. deBoer withdrew his second.

Chair Ingram moved to remand the case back to the Hearing Officer for a determination on the exemption based on the Amory v. Green Sage decision. For clarification, to qualify for an exemption, the property must have been entirely non-residential—i.e., no residential use, prior to the issuance of the certificate of occupancy. If the Hearing Officer determines that the property is not exempt, the Hearing Officer is to conduct a hearing and make a decision on the tenant petitions based on the merits. Member K. Brodfuehrer seconded the motion.

The Board voted as follows:

Aye: D. Ingram, C. Oshinuga, M. Goolsby, J. deBoer, K. Brodfuehrer
Nay: None
Abstain: None

The motion was approved.

6. RESOLUTION TO RECOMMEND AMENDMENT OF THE RENT ADJUSTMENT PROGRAM REGULATIONS TO (1) EXTEND AMORTIZATION PERIOD FOR MANDATORY SEISMIC RETROFITS TO 25 YEARS; (2) REDUCE ARGUMENT TIME TO SIX (6) MINUTES PER PARTY; (3) REMOVE APPEARANCE REQUIREMENT FOR APPELLANT AT APPEAL HEARINGS; (4) ALLOW NON-VOTING ALTERNATES TO PARTICIPATE IN BOARD MEETINGS IN NON-VOTING CAPACITY; (5) ADD GOOD CAUSE HEARINGS FOR FAILURE TO APPEAR AT HEARINGS; (6) CHANGE MEETING TIME TO 6 PM; (7) CODIFY EXISTING PROCEDURAL PRACTICES IN REGULATIONS; AND (8) MAKE OTHER CLARIFYING AND REORGANIZATION CHANGES

- a. Chair Ingram and fellow Board members discussed the recent changes to the resolution to recommend amendments to Rent Adjustment Program Regulations. After Board discussion, Chair Ingram moved to adopt the resolution for forwarding to City Council. Vice Chair Oshinuga seconded the motion.

The Board voted as follows:

Aye: D. Ingram, C. Oshinuga, M. Goolsby, J. deBoer, K. Brodfuehrer
Nay: None
Abstain: None

The motion was approved.

7. SCHEDULING AND REPORTS

- a. None

8. INFORMATION AND ANNOUNCEMENTS

- a. None

9. OPEN FORUM

- a. No members of the public spoke during open forum.

10. ADJOURNMENT

- a. The meeting was adjourned at 7:49 p.m.