I. Overview

On July 5, 2017 Hearing Officer Barbara Cohen denied my *uncontested* "substantial rehabilitation" petition seeking a certificate of exemption for a 3-unit building at 3515 Brighton Ave, Oakland pursuant to OMC 8.22.030A.6. I timely filed my appeal to the HRRRB on July 25, 2017. I believe that the Hearing Officer's decision (the Decision) was wrong for the following ***six*** reasons:

1. First and foremost – because I did incur sufficient expenses necessary for a "substantial rehabilitation," and I provided "independent," "corroborating evidence" to support those expenses along with my sworn statements/testimony. In fact, as detailed below, these expenses were well in excess of the minimum threshold amount necessary to qualify the building as "substantially rehabilitated." To remove *any* remaining uncertainty as to those expenses, I also secured additional documents (sworn 3rd declarations from the service providers, etc.) which unambiguously confirm the previously submitted claims. *See* Attachment I - *Summary Table and "Confirming" Documents.* I filed and provided these "confirming" documents to Ms. Taylor, the Manager of Oakland's Rent Adjustment Program (RAP) on July 28, 2017 in support of my request for reconsideration;
2. Because the Hearing Officer erred (1) by finding that certain expenses were *not sufficiently documented* under the HRRRB's decision in *Ulman v. Breen*, T04-0158 (which requires only that there be some "independent" "corroborating evidence" supporting a party's sworn testimonial or summary evidence); and (2) by finding that the *uncontested* evidence I presented, which was supported by "independent" "corroborating evidence" and by my sworn testimony and statements was insufficient under the "*preponderance of the evidence*" standard (which, under governing California law, only requires the party with the burden of proof to show that a fact or claim is "more likely to be true than not true") to prevail;
3. Because evidence, which I prepared in response to the Hearing Officer's request at the end of the hearing in April and which to the best of my belief and knowledge I timely submitted to RAP, was apparently either not actually received or not properly entered into evidence, and as such the Hearing Officer did not have an opportunity to consider it in her Decision;
4. Because certain expenses were unquestionably omitted, underreported, or mistakenly disallowed by the Hearing Officer in her Decision based upon computational, transcription, and classification errors by RAP staff (and/or the Hearing Officer) in the spreadsheet which was incorporated in the July 5th Decision and should be corrected;
5. Because the Hearing Officer erred by concluding that certain expense "*categories*" were "not allowed," including (1) "appliance" costs, (2) the cost of "construction insurance," (3) project-related transportation costs, and (4) credit for "owner-contributed labor" – all of which *have been allowed in one or more recent RAP hearing decisions* and some (if not all) of which are specifically "included cost items" in the *Marshall & Swift* data that the City apparently uses in its Valuation Table (which in turn is used by RAP in determining the "substantial rehabilitation" expense threshold); and finally
6. Because the improperly heightened standard of proof used by the Hearing Officer, the inconsistent treatment of similarly situated petitioners, and the limited public access to prior HRRB and RAP hearing decisions and the dearth of written RAP guidance raise significant due process and fundamental fairness issues. *See People v. Ramirez,* 25 Cal.3d 260, 268-69 (1979) (California Const. Art. 1 § 7's due process clause includes "freedom from arbitrary adjudicative procedures").

II. Background

I am a retired, long-term Bay Area resident. The 3515 Brighton Ave property (where I lived for many years) is my only rental property. It is a 3-unit building built in the 1920s (see Attachment II – ("Before, During, and After" photos of 3515 Brighton Ave building). As a rental property owner, I strive to be a good landlord and have never had any tenant issues raised with the RAP or otherwise.[1] The building at 3515 Brighton had been unoccupied since a fire in July 2014. Since then, I worked diligently to rehabilitate and renovate the building so that it could once again house tenants. It has been my consuming focus, and something I am proud that we achieved in February 2017. The building underwent a "down to studs" renovation with all new electrical, plumbing, HVAC, gas, insulation, sheetrock, doors, windows, trim/baseboard, paint (interior & exterior), floor tiling, three (3) new kitchens (all new cabinets, countertops, appliances), new bathrooms (all new tubs, toilets, vanities, tiling), hardwood floor replacement/refinishing, etc. *See* Attachment II (photos). The process was not easy: struggling to reach a settlement with the insurance carrier, drafting plans, obtaining permits, hiring numerous tradespeople, and doing much of the actual work of rehabilitating the building myself. Fortunately, I had good tradespeople helping, and I had personal experience, having previously worked as a union concrete finisher and as a painter, tiler, and journeyman carpenter doing construction as I worked my way through high school to a post-graduate degree.

In support of this *uncontested* petition, I gathered all the relevant documents that I had and organized them into broad categories (e.g., plumbing, electrical, sheetrock, lumber, etc.) to help facilitate RAP staff review. I submitted hundreds of receipts, cancelled checks, and other "independent" "corroborating" evidentiary items. These documents, on their face, confirmed that the expenses I incurred were *well over* the $212,673 required for a "substantial rehabilitation" designation[2] (totaling roughly $300,000). At the hearings, I endeavored to answer all the Hearing Officer's questions openly and honestly and (as discussed below in section III point 3 below) to supply her with those specific additional items that she requested at the end of the first hearing. No tenants attended the hearings or otherwise challenged any aspect of the petition, even though the Hearing Officer, on her own accord, postponed the original April hearing to June in order to allow the new tenants (who did not move into the building until well after the work was completed and the petition filed) an opportunity to participate (which, again, no one did).[3] The Hearing Officer made no material adverse credibility findings

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[1] I also affirm that my RAP fees are paid and current, as is my Oakland Business Tax.

[2] This "threshold expense amount" is calculated based upon (i) the square footage of the building and (ii) 50% of the average new construction cost. *See* OMC 8.22.030B.2.a. This $212,673 minimum expense was determined by the Hearing Officer and is not in dispute. *See* Decision at 20. As discussed below, these submitted expenses did *not* include any amounts for the literally *thousands* of hours I personally spent working on the project.

[3] This petition was originally filed in December 2016. In my discussions with RAP staff on this issue prior to filing, I was told that since there were no tenants, they would simply mail notices marked to "tenants" to each unit at 3515 Brighton, and retain the returned envelopes as proof of notice – which apparently happened. In the interest of openness/transparency with my new prospective tenants, however, I also explicitly notified each of them in writing (in their respective *draft* leases) that there was a pending petition with RAP for a certificate of exemption from Oakland's Rent Ordinance. No tenant voiced any concern or objection. As such, I was quite surprised when Hearing Officer Cohen proposed canceling the April hearing with no prior notice on the day of the hearing. At the time, I told the Hearing Officer about the notice I had given to the new tenants, but it was only after I requested the legal basis for her decision canceling the hearing - given that no one on the RAP staff or in any of the RAP materials had advised about such a requirement) that she reluctantly agreed to hold a conditional April hearing (with the proviso that if any of the tenants actually did appear at the rescheduled hearing, the entire April hearing would be nullified). Again, other than the potentially prejudicial delay, inconvenience, and lack of legal citation, I had no objection to the current tenants being given notice, as manifested by my *voluntarily* providing each of them with notice of the pending petition prior to their entering into their respective leases.

regarding my testimony; in fact, during the hearing she observed how helpful it was that I understood the expenses and project so well.

On June 30, 2017,[4] the Hearing Officer denied my petition for a certificate of exemption under the "substantial rehabilitation" exemption because she deemed certain rehabilitation expenses that I submitted (and supported with "independent" "corroborating evidence" in the form of bills, invoices, statements, canceled checks, etc. and my sworn statements and testimony) were *insufficiently documented* primarily because they were not *always* supported by <u>both</u> (i) a written invoice and (ii) payment proof. *See* Decision at 20-21.[5] The Hearing Officer also rejected certain other "*categories*" of expenses, such as "appliances" (stoves, dishwashers, refrigerators, washer/dryers, for each unit), "course of construction" insurance, project-related transportation expenses, and a variety of other expenses which the Hearing Officer acknowledged were part of "the project," but that she determined were not "allowable" expenses because they were not "done on the structure of the building," *see* Decision at 13, even though these categories of expenses had been allowed in multiple other recent "substantial rehabilitation" petitions by multiple other hearing officers. As a result, she accepted only $116,008 of the roughly $300,000 in *documented* expenses that I submitted. The difference between the minimum threshold expense amount of $212,673 and the $116,008 in "allowed" expenses is **$96,665**. This is the additional amount of expenses that would be needed for the building to be considered "substantially rehabilitated."[6]

In addition to this HRRRB appeal, on July 28, 2017, I also filed a motion for reconsideration with the RAP. This request included the "confirming" documents showing that the claimed expenses were in

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[4] On July 5, 2017, the Hearing Officer, on her own accord, withdrew her original decision and issued a "Corrected Hearing Decision" correcting various typographical and date errors she had made in the Decision and adding an Exhibit "B" which had been inadvertently omitted from the original Decision. See Decision at 1. References to the RAP "Decision" in this document are to the "corrected" Decision.

[5] Prior to filing my petition, I met with RAP staff on several occasions and made repeated requests for written guidance (as I did at the April hearing) – so that I could better understand the specific requirements for the petition including any evidentiary requirements - no one from RAP was ever able to provide or point me to any such materials. After the Decision, I again asked various RAP staff if there were any such written guidelines or materials and was told there were none, save for the general reference to past HRRB decisions (and RAP hearing decisions) – which as discussed below in the "due process" section – are available for public review only in a very limited way. Moreover, while the Hearing Officer did indicate her desire for additional documentation at the truncated April hearing (including for certain additional proofs of invoices or payments), it was *never* my understanding that her (and the RAP's) position was that *any* expense which did not contain *both* an *independently documented* invoice and payment receipt would be summarily disallowed, as appears to be the case. I truly believed the handful of documents that she requested at the end of that hearing (and which I obtained with 24 hours) were the totality of the additional supporting documentation necessary for consideration of the expenses I submitted – which, again, on their face were more than sufficient to meet the required threshold expense amount. Even Hearing Officer Cohen's requirement for having *both* a payment and bill/invoice does not appear to always be consistently applied. See e.g., *Hailu v. Yarbough*, T01-0486 (Hearing Officer Cohen accepted/credited expenses from petitioners showing what "they spent" noting that petitioners must provide evidence of "what was spent, not what was billed" but nevertheless analyzing whether the threshold was met under either method – amount billed *or* amount paid – and ultimately deciding they did not qualify under either).

[6] In this document, "Record Exhibit" citations are to the RAP staff generated "exhibit" and "page" numbers documents in the casefile. I have cited them here primarily based upon the references contained in the Decision and its Exhibit A, but because I have only limited access to the casefile, I have not specifically confirmed their accuracy. Citations to "Attachments" are citations to the materials in the casefile submitted as part of my request for RAP reconsideration submitted on July 28, 2017. Hearing Transcript I & II citations are to the relevant record hearing in April and June respectively followed by the hour, minute, and second location of such reference.

fact fully substantiated and allowable expenses (which in total were well in excess of the required threshold amount). A response from RAP to this request for reconsideration is pending.[7]

III. Law & Facts In Support of this HRRRB Appeal.

This *section III* tracks the ***six*** points raised on page one.

1. <u>Consideration of Additional "Confirming" Documents</u>

On appeal (and in my motion for reconsideration), I request that I be permitted to submit for consideration the additional "confirming" documents in Attachment I (primarily sworn 3rd party declarations and other "confirming" documents) which unambiguously resolve any remaining perceived evidentiary deficiencies (e.g., missing invoices or missing proofs of payment).

In support of this request, I would note that in my initial discussions with RAP staff, I was informed that the process typically was *not* inherently adversarial (particularly in *uncontested* situations like mine); instead I was told it is simply a process to allow the City to establish as *accurately and fairly* as possible if there has been sufficient rehabilitation work performed on a building such that it is entitled to a certificate of exemption.[8] In the absence of written guidelines, I relied on these oral statements and representations. This position is also consistent with the goals of Section 8.22.010D of OMC, under which the Oakland City Council expressed its desire to "reduce ... the adversarial nature of rent adjustment proceedings."

This is my first experience with this type of administrative review, and it has been unexpectedly difficult and stressful. Given the lack of written RAP guidance and conflicting information I was verbally given by RAP staff, I (obviously) did not fully comprehend the apparent expectations/requirements of the process. As noted above, while I did submit independent, corroborating evidence substantiating expenses well in excess of the $212,673 threshold, these documents were typically in the form of (i) invoices/billing statements (or their equivalent) or (ii) cancelled checks (or their equivalent) and often both, *but not always both,* which appears to be the issue. To address this concern, I have now secured additional "confirming" documents (e.g., sworn declarations, etc.) verifying the work and payment in full and confirming the expenses I previously submitted. *See* Attachment I (*Summary Table and "Confirming" Documents*). Given the initial guidance I received from RAP staff (and the lack of written RAP guidance) and my own miscomprehension of the rigid evidentiary approach to be applied, I request that these additional documents be accepted for submission and consideration. Moreover, as noted, this proceeding is *uncontested.* As such, allowing these "confirming" documents to be considered on remand (or upon reconsideration) does not raise any issues of "fairness" to the opposing party, as there is no "opposing" party in this petition. I also believe that these documents are probative in that they are *wholly consistent* with the documents and sworn testimony I previously submitted and strong evidence of the veracity of those previous statements and submissions.

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[7] Section 11521(a) of the Cal. Gov. Code grants administrative agencies, such as the RAP, the power to reconsider "all or part of [a] case on its own motion or on petition of any party" within "30 days after the delivery or mailing of a decision." Moreover, Cal. Gov. Code section 11521(b) also allows for "all the pertinent parts of the record <u>and such additional evidence and argument as may be permitted</u> to be considered as part of the motion for reconsideration" (emphasis added). In addition, RAP's own regulations also permit the RAP Manager or the RAP "Staff" more generally "to intervene in matters [of Certificates of Exemption] for the purpose of better ensuring that *all facts* relating to the exemption are presented to the Hearing Officer." OMC Regulation 8.22.030.C.1.b.

[8] This RAP staff position was expressed to me when I first contacted the RAP program in late November or early December 2016 and spoke with Mr. Costa at a drop-in meeting in RAP's offices.

The vast majority of these "confirming" documents are *not* offered in support of any new expense claims (or new "categories" of expenses), but instead are just providing additional support and confirmation for *existing* expense claims that I previously (and timely) submitted or raised. Again these "confirming" documents are supported by the *original* "independent" and "corroborating evidence" (invoices, cancelled checks, etc.) that I previously submitted. Given these circumstances, allowing these "confirming" documents to be considered in this *uncontested* petition (to simply validate that the previously submitted claimed expenses are true and accurate) would further the goal of ensuring that all *actual and allowable* expense items be included in determining whether there has been sufficient rehabilitation work performed on a building such that it is entitled to a certificate of exemption. It also is in keeping with OMC Regulation 8.22.030.C.1.b and its stated purpose of "ensuring that *all facts* relating to the exemption are presented to the Hearing Officer" (emphasis added).[9]

2. Sufficiency of the Evidence under *Ulman I* and the "*Preponderance of the Evidence*" Rule

Apart from the request above, I believe the Hearing Officer erred in her Decision (i) by finding that the documented expenses I submitted were *not sufficiently documented* under the HRRRB's decision in *Ulman v. Breen*, T04-0158 (heard 11/18/2004 "*Ulman I*"); and (ii) by finding that the *uncontested* "independent" "corroborating evidence" that I provided (along with my sworn statements and testimony) were insufficient under the "*preponderance of the evidence*" standard to prevail or "predominate" over any evidence "on the other side" – especially given the uncontested nature of the proceeding and the lack of any evidence submitted "on the other side". As such, I believe that the Hearing Officer's determination is not supported by substantial evidence or by applicable HRRRB or California case law.

a. HRRRB's Holding in *Ulman I*

Under the HRRRB's precedential decision in *Ulman I*, "a party in interest" (e.g., an owner/petitioner seeking to "substantiate" expenses) cannot rely *solely* on his "own testimony or summaries prepared in anticipation of the hearing," but instead, he must also provide some "independent" "corroborating evidence" in order to have his sworn testimony or statements consider in support his claimed expenses. *See id.* Under the plain language of *Ulman I*, however, once this "independent" evidence (an invoice, a cancelled check, 3rd party testimony or declaration, etc.) has been proffered, then it *and* any sworn statements and testimonial evidence from the "party in interest" becomes part of the body of evidence that the Hearing Officer must analyze in making her determination. *See Ulman I* at 2 (remanding case to determine if there was "corroborating evidence" to support the testimonial evidence of the expenses and the building's square footage). As detailed below, to the extent the Hearing Officer interpreted *Ulman I* to require "independent" "corroborating evidence" of each element of a claimed expense, such an interpretation (a) is contrary to the plain language in the decision; (b) would effectively render the holding in *Ulman I* meaningless; and (c) is inconsistent with prior RAP hearing decisions.[10]

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[9] Allowing consideration of these "confirming" documents would also conserve administrative resources and potentially alleviate the need for the HRRRB to address/resolve some of the potentially more difficult issues raised in this appeal, such as whether the standard of review utilized was appropriate under *Ulman I* and California case law, whether all documents were properly entered into the record, whether the "disallowance" of certain categories of expenses (e.g., "appliances," "construction insurance," etc.) was appropriate in light of the multiple other RAP hearing decisions which reach the opposite conclusion, whether there are additional computational or classification errors in the Decision, and finally more broadly, whether the current RAP process and practices meet due process and pass constitutional muster for "freedom from arbitrary adjudicative procedures."

[10] Even if this heightened standard were somehow deemed permissible, it would still violate due process and fundamental fairness requirements because it is not adequately disclosed to petitioners (either in any RAP written guidelines or in HRRRB precedent). *See* Appeal Brief section III.6. (discussing due process claims).

First, as noted, this heightened interpretation of *Ulman I* is not supported by the plain language in *Ulman I*, which requires only that there be "independent" "corroborating evidence" before sworn testimony and statements can be offered in support of an incurred expense. See *Ulman I at 2.*[11] *Ulman I* sets no quantum or other elemental requirement on the character of this evidence other than it simply must just be "independent" and "corroborative."

Second, if it were truly necessary to prove each element *only* through "independent" evidence (e.g., to have both independent proof of an "invoice" and independent proof of payment) then there would be no need for sworn "testimony" or "summaries" to prove the expense, because the independent "corroborating" evidence would have already proven it. Such a result would render the holding in *Ulman I* meaningless and is not a reasonable reading of *Ulman I* (as it does not comport with the plain language in *Ulman I* and as discussed below has not been followed in practice in other RAP hearing decisions). By contrast, the middle path that the HRRB adopted and articulated in *Ulman I* is the more reasonable and appropriate approach. Namely to require some initial "independent" "corroborating evidence" to be introduced before allowing a party's "testimony" or "summaries prepared in anticipation of the hearing" to be considered as supporting evidence of a claimed expense. *See id.* This approach allows a petitioner (again, after he or she have submitted some "independent" "corroborating evidence") the opportunity to "make his or her case" before the hearing officer, who can then assess the credibility and accuracy of the supporting testimony and any prepared summary - along with whatever "corroborating evidence" was supplied – and make a determination if it is (or isn't) credible and weigh it against any contrary or opposing evidence under the "*predominance of the evidence*" rule. This approach provides both a practical check on any potentially inappropriate self-serving testimony from a party in interest and is reasonable. *See Ulman I* at 2 (remanding the case for consideration of the petitioner's "corroborating evidence" supporting the testimony about the claimed expenses). Even in the RAP's own *Appeals Decision Index,* which is a short summary created by RAP staff of certain HRRRB decisions, it describes the holding in *Ulman I* as simply requiring that "[a]n owner must provide evidence beyond testimony and summaries prepared in anticipation of the hearing"[12] – which I did.

Third, in practice RAP hearing officers do not always require "independent" "corroborating evidence" before accepting a party's sworn testimony to prove an allowable incurred expenses or other material elements of a "substantial rehabilitation" petition. For example, in *Nguyen v. Tenants*, L15-0008 at 4, it appears that the Hearing Officer credited the owner/petitioner for $42,964 in "owner-contributed" labor (to reach his required minimum threshold expense of $212,951) based only on his "credible" testimony that he had "extensive experience in construction" and worked supervising his workers for 10 months. In marked contrast, I was expressly told by RAP staff prior that *no credit* could be given for owner-contributed labor (let alone being told that it could be substantiated by "credible" testimony alone) and was never offered the opportunity to make such a claim even though I repeatedly noted the issue at the hearing with the Hearing Officer. *See e.g.*, Hearing Transcript II at 0:34:00; Decision at 2 (noting my testimony about the work I did on the project); *see also Tengeri v. Allen Associates*, T00-0132 (a party's reasonable reliance on erroneous information by RAP staff was basis for remanding case for to submission of additional evidence and decision on the merits). This disparate treatment also raises issues of due process and fundamental fairness discussed below.

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[11] In the context of statutory interpretation, the California Supreme Court has held that "[i]f the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences." *Sierra Club v. Superior Court*, 57 Cal. 4th 157, 165, 302 P.3d 1026, 1031 (2013). Here, the plain language in the HRRRB's *Ulman I* is clear, unambiguous, and does not result "in absurd consequences." As noted above, the only "absurd consequence" would be to construe the language in such a way as to make its holding meaningless.

[12] See http://www2.oaklandnet.com/oakca1/groups/ceda/documents/agenda/oak053551.pdf at 28.

b. The "*Preponderance of the Evidence*" Standard

Once the testimonial evidence (supported by "corroborating evidence") has been introduced, the Hearing Officer's "analysis" and "weighing" of that evidence is performed. Whether a petitioner has met his or her burden of proof to show that the building is exempt from the Rent Ordinance is determined under the "*preponderance of the evidence*" standard. *Ulman v. Breen, T04-0158 at 1 (heard 2/23/2006 "Ulman II")* (HRRRB decision finding that the appropriate standard of review is the "*preponderance of the evidence*" standard). In this Decision, Hearing Officer Cohen also explicitly confirmed that the "*preponderance of the evidence*" standard was the applicable standard of review for "substantial rehabilitation" petitions like mine. *See* Decision at 12 (noting standard is "preponderance of evidence").

Both Federal and California state courts have consistently held that *"the 'preponderance of the evidence' standard simply requires the trier of fact to decide whether the existence of a fact is more probable than its nonexistence." Concrete Pipes & Prods, Inc. v. Constr. Laborers Pension Trust for S. Calif.,* 508 US 602, 622 (1993) (applying California state law); *Kennedy v. S. Calif. Edison Co.*, 268 F3d 763, 770 (9th Cir. 2001). In *People v. Bryden*, the Court of Appeals stated that *"[a] party required to prove something by a 'preponderance of the evidence' need prove only that it is more likely to be true than not true. Preponderance of the evidence means that the evidence on one side outweighs, preponderates over ... the evidence on the other side ...."* No. A148203, 2017 WL 383389, at *2 (Cal. Ct. App. 2017) (emphasis added and internal citations and quotations omitted). These holdings are well-settled under California law and govern both judicial and quasi-judicial administrative proceedings. For example, the model California Civil Jury Instructions § 200 states "in civil cases, the party who is required to prove something need prove only that it is more likely to be true than not true."[13]

c. Application of *Ulman I* and the "*Preponderance of the Evidence*" Rule to My Petition

Applying the *Ulman I* and the "*preponderance of the evidence"* standard is a *two-step* process. *See generally* Decision at 12 (citing both *Ulman I* and the *preponderance of the evidence* standard).

The first step, as noted above, is to determine if there is any "independent" "corroborating evidence" supporting a claimed expense. If so, then, under *Ulman I*, sworn "testimony or summaries prepared in anticipation of the hearing" can be introduced as evidence of the claimed expenses. *See Ulman I* at 2. In my petition, virtually *every* claimed expense I submitted was supported by some form of "independent" "corroborating evidence" (a bill, a statement, a canceled check, etc.). *See* Decision Exhibit A (spreadsheet of submitted expense items noting which ones were supported by payment, invoice or both).[14] As such, under *Ulman I*, my sworn statements and testimony regarding those

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[13] As you may be aware, there are three main standards of proof used in judicial or quasi-judicial settings, (i) "*preponderance of the evidence,*" (ii) "*clear and convincing,*" and (iii) "*beyond a reasonable doubt.*" Each standard is relatively self-explanatory based on its respective name, but the "*preponderance of the evidence*" standard is the *lowest* threshold of the three and simply requires a showing that a fact or claim is "more likely to be true than not true" and that the evidence on one side "predominates" over the evidence offered by the other side. *See* 1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions.

[14] In her Decision, the Hearing Officer justified requiring "independent" evidence of both a bill *and* a payment by asserting that "it is common knowledge that many invoices are renegotiated after work is done." Decision at 13. In this case, however, that assertion is easily belied by (i) the numerous bills I previously submitted that *did* have both the statement and showed that I paid *exactly* what was billed, (ii) my sworn statements and testimony (that I paid all claimed expenses in full), and (iii) now by the "confirming" declarations and other documents in Attachment I - *all* of which match the amounts that I had previously submitted/claimed and had previously corroborated with "independent" evidence as required under *Ulman I*; *see also* OMC § 8.22.110 (requiring that "[t]he decision of the examiner shall be based entirely on evidence placed into the record.") Here, again, there was no evidence in the record of any pattern or practice of billing "renegotiation"– in fact, just the opposite.

expenses (along with the "corroborating evidence"), then became part of the evidentiary record to be assessed by the Hearing Office, under the "*preponderance of the evidence*" standard in "step two."

Under step two, the Hearing Officer must determine if the petitioner's claimed expenses are "more likely to be true than not true." *Bryden at 2.* To make this determination, the Hearing Officer must "weigh" the evidence presented on both sides and determine which side's evidence "predominates over... the evidence on the other side" based upon the totality of the evidence. *See id.* Here, there is a voluminous record of "independent" and "corroborating evidence" (which on its face exceeds the required threshold expense amount) and along with my sworn testimony and statements detailing the claimed expenses, which provide a strong (and overwhelming) basis for finding that such expenses are "more likely to be true than not true." *See id.* Moreover, as noted, the petition was *uncontested;* there was no appearance or participation by any tenants or any contrary "evidence [presented] on the other side." *Id.* Given these circumstances, it was error for the Hearing Officer to not find that the claimed expenses were "more likely to be true than not true" and that the evidence I provided "predominate[d]" over the (non-existent) "evidence on the other side," particularly when viewed in the context of the whole record, the hundreds of pieces of "corroborating evidence" (over 400+ separate bills, statements, checks, etc.), my almost 4 hours of detailed testimony, and the obvious and extensive rehabilitation work (documented through the permit history, photos shown to the Hearing Officer, and my sworn testimony). *See Bryden at 2; see also* Attachment II - *photos.* Accordingly, substantial evidence does not support the Hearing Officer's Decision. This analysis assumes that the record is limited to only those documents and testimonial evidence in the record as of the June hearing. Obviously if the additional "confirming" documents are considered, this determination becomes even easier.

3. Additional Documentation Submitted (I believe) but *Not* Included in the Record/Decision

At the conclusion of the initial hearing on April 10, 2017, the Hearing Officer requested that I provide *four* specific additional documents confirming (i) the square footage of the building, (ii) that the work was "finaled," (iii) that the $28,964.61 Restoration Management Company (RMC) bill had been paid, and (iv) an electronic copy of the summary spreadsheet that I had previously prepared and provided in hard copy. *See* Hearing Transcript I at 02:04:52. Earlier the Hearing Officer had also indicated a concern with the lack of an "invoice" for the personal services for Mr. Jesus (Chuy) Martinez, a painter and carpenter on the project. In support of Mr. Martinez's expense, I had submitted a series of *weekly* canceled checks (typically issued on Fridays) covering the relevant time of construction (typically with notations on the checks that they were for "Brighton work") along with my sworn statements and testimony confirming and detailing his work on the project.[15] *See* Record Exhibit 19, at 3-15.

To address these requests, immediately after the hearing, I contacted the City of Oakland Building Department and the Alameda County Assessor's Office and obtained official statements confirming respectively that the project was "finaled" and that the square footage of the building was exactly as I had previously claimed it to be. Later that day I also contacted Mr. Martinez and arranged for him to sign a declaration (under penalty of perjury) confirming his work at 3515 Brighton, his terms of service ($23 per hour plus lunch), and that he had been paid in full. *See* Attachment I at 2 (Jesus Martinez Declaration and a screen shot of my April 10th text message arranging to meet with him to sign the

[15] Please note that during the course of his work, Mr. Martinez's father became ill, and Mr. Martinez requested a couple emergency loan/advances to help provide treatment to his father. I did so, and we agreed that he could repay the interest-free loans over time through his work typically every other week (in $100 or $200 increments that were subtracted from my subsequent payments to him) – which he did. I only raise this issue because in the Decision the Hearing Officer observes that one of the checks to Mr. Martinez was noted as a "loan." *See* Decision at 8. But again, these "loans" were all "advances" for work which he later did on the project.

document). That night, I also emailed RMC requesting proof of payment. That following day, RMC provided a "service statement" (dated April 11, 2017) showing the $28,964.61 amount billed with a "zero" balance amount due. *See* Attachment I at 3 (*RMC - Zero Balance Statement*).[16] These documents *fully* supported and confirmed the exact figures I claimed in the "corroborating evidence" that I had submitted and in my sworn testimony/statements. See Record Exhibit 3 at 3, 6 &7.

Thus, within 24 hours of the Hearing Officer's request, I obtained each item of additional evidence that the Hearing Officer had requested at the end of the April hearing. *See* Hearing Transcript I at 02:04:52. With these documents in hand, I truly believed that I had been fully responsive to her request for additional supporting documents. That following day, on April 11, 2017, I sent the Hearing Officer an email with an electronic copy of my spreadsheet attached (as requested) and in the email I wrote:

> Please note, I submitted yesterday a print out from the Alameda County Assessor's office confirming the building square footage at 2,848 sq. ft. (as represented in my petition). I also had copies of the permits showing them all as "final" printed at the DBI desk on the second floor and submitted those as well.
>
> In terms of your other requests, I also obtained confirmation from RMC that the $28,964.61 invoice for demo/asbestos abatement work has been paid in full with a zero balance, same for the $510 Phoenix Environmental bill for asbestos testing. I also got a signed affirmation from Jesus Martinez confirming his work.

I closed the email to her by again reiterating my willingness to provide any other supporting documents she needed to confirm the submitted expenses or otherwise substantiate the petition. *See* Attachment III *Missing Documents Evidence* at 1 (April 11, 2017 email) Ms. Hearing Officer Cohen confirmed her receipt of this email but made no request for additional supporting documentation.[17]

In anticipation of the June hearing, on or about May 1, 2017, I provided these documents and a variety of additional receipts I had gathered[18] to Laurel Beeler, my "significant other," and asked her to scan the documents and email me scanned copies and printout hard copies for submission, which she did (in 3 separate scanned batches). Ms. Beeler has provided a signed declaration attesting to these actions. *See* Attachment III *Missing Documents Evidence* at 2 (Beeler Declaration and confirming email screen shots), I have also included a screenshot of my Gmail account "inbox" showing receipt of the 3 sets of scanned documents from Ms. Beeler on May 2nd). "Scan 1" was a 27-page scan with various additional receipts; "Scan 2" was a 15-page scan and contained the RMC and Phoenix statements/receipts (among many other); "Scan 3" contained the declaration from Mr. Martinez. *See* Attachment III *Missing Documents Evidence* at 3 (copies of the 3 sets of scanned documents). Ms. Beeler has attested that she also provided me with a "hard copy" printout of all three sets for filing with the RAP. *See* Attachment III *Missing Documents Evidence* at 2. As I declared in my sworn request for RAP reconsideration, to the best of my knowledge and belief under penalty of perjury, I then submitted hardcopies of all scanned materials to RAP staff at their 6th floor office at 250 Frank Ogawa Plaza in

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[16] I also contacted Phoenix Environmental (who provided the asbestos testing) for payment confirmation because the Hearing Officer had earlier noted the lack of proof of the $510 payment for them as well. (*See* Hearing Transcript I at 00:35:45; *See* Attachment I (Phoenix Zero Balance Statement)).

[17] I did not attach the RMC, Phoenix, and Martinez statements to the email, because Ms. Cohen had requested that I not send anything other than the spreadsheet to that email address. *See* Hearing Transcript I at 2:05:30.

[18] My initial submission of documents only covered the period to roughly mid-December 2016. These additional documents covered expenses incurred since then or older receipts which I had managed to find or retrieve.

Oakland in early May in advance of the June hearing. It is clear from the record that RAP received at least some of the documents contained in those scans. *See* Record Exhibit 33 (which match receipts contained in Scan 1), but it is not clear if they received/processed all the scanned documents.

At the June hearing, I believed that Hearing Officer Cohen had received *all* those documents because she did not raise any issue about them (or their absence) - despite her having specifically requested them at the prior hearing (*See* Hearing Transcript I at 02:04:52) and my having explicitly noted their existence in my April 11th email to her. In the Decision, however, the Hearing Officer does not appear to have had the benefit of these documents (specifically those documents contained in Scan 2 and Scan 3 verifying the RMC, Phoenix statements, and Mr. Martinez's declaration). *See* Decision at 14 & 17 (denying $28,965 RMC bill and the $16,525 in labor expense for Mr. Martinez, but oddly approving the Phoenix bill for $510 – even though she had asked for additional documentation of payment at the April hearing – *See* Hearing Transcript I at 00:35:50).

From the information I have,[19] it is unclear whether the absence of these documents in the record was due to a filing oversight/error on my part or in RAP's processing of these documents.[20] In any event, there is ample evidence of my good faith effort to be responsive to the Hearing Officer's requests and to obtain the requested documents in a diligent and timely manner (within 24 hours of the Hearing Officer's request at the April 10th hearing). As such, *and given the uncontested nature of the proceeding*, I request that these "missing" documents be considered on appeal (or on remand) or as part of a RAP reconsideration – as they were produced before the June Hearing and were only excluded from consideration because of an unknown filing error (again a full set of these documents is attached as *See* Attachment III at 3). These documents are relevant not only because they support/confirm the specific amount I previously claimed and supported with "corroborating evidence," but they are also probative and worthy of consideration because they more broadly validate the veracity of my earlier representations and testimony regarding these claimed expenses.

4. <u>Miscalculations, Omissions, and Classification Errors in the Decision</u>

It appears that certain expenses were omitted, underreported, or disallowed by the Hearing Officer Cohen in her Decision based upon computational, transcription, and classification errors. See Decision Exhibit A. While I have *not* undertaken a full line-by-line computational re-review of the spreadsheet attached to the Decision as Exhibit A or the hundreds of receipts incorporated into the RAP's Decision (nor do I think it is necessarily required for RAP staff or myself to do so in order to determine if there are sufficient allowable expenses to qualify the building as a "substantial rehabilitation"), there are several notable errors or omissions in the Decision that should be reviewed and corrected.

a. "Paint Category" Errors

The first example is in the "Paint" category, where the *total* "allowable amount" was determined by RAP staff to be $2,597. *See* Decision Exhibit A at 2-3. A simple addition of each line item listed as an "allowable amount", however, totals $3,899, not $2,597 as erroneously stated in the Decision *See* Decision at 20 (and it's Exhibit A); *see also* Attachment I at 7 (detailing this error). It is not clear (to me) the source of this error; while a few items were disallowed (totaling $116) and the Hearing Officer,

[19] I have requested that the casefile be pulled for my review, but I did not retain a hard copy of the submitted documents, as I had the originals and scans sent by Ms. Beeler.

[20] While generally I would have a fairly high degree of confidence in the filing practices of an organization like RAP, as noted below, the number of issues and errors associated with this "corrected" Decision gives one pause.

without comment, omitted a $63 receipt/proof of payment, *see* Decision Exhibit A at 2; Record Exhibit. 5 at 12 (Home Depot receipt), neither of these items accounts for this large discrepancy.

In addition, *and wholly independent of the issue above*, as a sample "test," I re-reviewed the RAP staff's actual entries of the "Paint" receipts into their spreadsheet and discovered more errors. First, a $785 paint receipt was erroneously entered in as a $79 dollar receipt.[21] *See* Record Exhibit 5 at 13: Attachment I at 7. A similar problem occurred with another paint receipt for $241, which was incorrectly entered as $70. *See* Record Exhibit 5 at 16; Attachment I at 7 (copies of the misreported receipts). As a result, the "allowable amount" of expenses in this category, which should have been $4,839, instead was erroneously reported as $2,597, a significant underreporting in just one category.

b. Dump Fees & Demo Labor Misclassifications & Errors

Page 1 of Decision Exhibit A lists various demolitions "dump fees" as "drainage rock" expenses and denies them as un-allowed "landscaping" expense. At the initial hearing in April, the Hearing Office mistakenly thought that they were invoices from "Oakland Landscaping Supply." *See* Hearing Transcript I at 00:37:33. On their face, these receipts, however, stated that they were disposal fees from "Commercial Waste & Recycling LLC." It appears that the Hearing Officer was misled by an ad on the bottom of the invoices for a company called "Oakland Firewood & Landscaping Supply" (to be fair, the advertisement was prominent and did make it somewhat confusing). At this first hearing, when asked about them, I reviewed the receipts and explained to her that they were dump fees (as I had previously handwritten on each receipt), which the Hearing Officer appeared to understand and accept. *See* Hearing Transcript I at 00:37:50. For some reason, at the second hearing in June, the Hearing Officer again queried this same expense and again mistakenly described the receipt as coming from "Oakland Landscaping Supply," which she then suggested could be "for dirt?". *See* Hearing Transcript II at 00:02:35. Given the verbal description she provided, and seeing one of the receipts, the only item sold "by the ton" from a "landscape supplier" used on the project would be "drainage rock." In the Decision, itself, the Hearing Officer continues to misidentify these receipts as coming from "Oakland Landscape Supply." *See* Decision at 14; *see* also Decision Exhibit A at 1; *see also* Attachment I at 7. This $2,133 error was more than the total amount of expenses allowed for this entire category.

In a similar vein, the Hearing Officer also incorrectly recorded a $4,450 payment to Pablo Filipe for demolition work as a receipt for only $450 – a difference of an additional $4,000 – see Decision Exhibit A at 12 & ex.19 at 1.[22] The Hearing Officer acknowledged in a footnote to her Decision that it could be a receipt for $4,450 but found it "ambiguous" (although I disagree with that characterization, I have attached a larger printout copy of the receipt which *unambiguously* shows that it was for $4,450 (and I also have included a declaration under penalty of perjury from Mr. Filipe confirming the $4,450 amount and that it was paid in full).[23] *See* Attachment I - *Pablo Felipe Declaration* at 4.

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[21] These RAP staff errors appear to have occurred when a "total *discount*" amount shown on the relevant "Lowes" receipt was inadvertently entered instead of the "total *payment*" amount. This is potentially problematic as many "Lowes" receipts were submitted in numerous different categories.

[22] To facilitate paying his crew, Mr. Felipe requested to be paid in cash. As you know, Oakland is a "sanctuary city." While I did not ask the contractor, Mr. Felipe (or his crew), about their immigration status, I do know from working alongside them that they originally hale from the Guatemalan Highlands, an area of the world historically known for political violence and refugees. Moreover, low income immigrants – regardless of their immigration status - often have difficulty opening and maintaining banking services. As such, I was happy to comply with his request for a cash payment (and is why I asked for him to provide me with the written receipt).

[23] Moreover, to the extent the Hearing Officer also denied a separate $2,600 payment to Mr. Felipe (which I paid and documented by electronic check) because it was for work *prior* to the issuance of the permit, it does not seem

c. "Unreadable" Ashby Lumber Receipt

Finally, Decision Exhibit A at page 10 lists a $698 Ashby Lumber bill as "unreadable" and gives it $0 credit. The invoice, which is actually quite "readable," clearly shows the purchased items, their cost, and even the taxable amount and CA lumber tax. The only reason I can surmise for it being rejected as "unreadable" is that a second page (which had *no purchased items* on it, but did contain the "total" was not included). I had, however, handwritten that total ($698) at the top of the invoice's first page (which again matched exactly the invoice total on the second page of the receipt). For avoidance any further confusion, I have included the 2nd page along with the original submission page as *See* Attachment I – *Ashby Lumber Receipt* at 8.

* * * * *

Because I have not conducted a detailed review into each of the 32 categories of expenses listed on Decision Exhibit A, I am not sure if there are other similar issues in these other categories which would warrant a full line-by-line re-review of all expenses (by either RAP staff and/or myself). As noted above, however, if the handful of disallowed but independently corroborated expenses in Attachment I were accepted (either with or without the additional "confirming" documents), they would be more than sufficient to meet the required expense threshold and would avoid the need for anyone (myself or RAP staff) to have to undertake the burdensome task of a complete re-review of each in Decision Exhibit A.

By noting these various errors, I do not mean to be overly critical of the work of the RAP staff. I recognize their hard work and understand how daunting a task it is to review this voluminous amount of evidentiary material (I think there were upward of 400 different receipts). I also understand that things can and do occasionally get missed or confused – and that mistakes happen; none of us is perfect.[24] My goal throughout this process - which I believe (and hope) is the same shared by the HRRB (and the RAP staff) is (to the best of our abilities) simply make sure that all "allowable" expenses are *completely and accurately* captured to make a *fair and accurate* assessment of whether or not the rehabilitation project meets the expense threshold necessary for a certificate of exemption. I am confident if that can occur, it will confirm that the project meets (and indeed exceeds) the expense threshold.

5. Disallowed "*Categories*" of Expenses

In her Decision, Hearing Officer Cohen denied a number of expenses - not because of the adequacy of the evidence supporting those expenses - but because they fell within certain "*categories*" of expenses that she deemed to be "not allowable cost item[s]." *See* Decision at 13. In the discussion below, I focus on the larger (dollar-wise) categories, though I believe that many smaller "categories" were inappropriately excluded as well.[25] Significant excluded categories include: (a) appliance costs,

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warranted. I would note that OMC Regulation 8.22.030.B.3 does not address the issue of work performed prior to the issuance of the permit, it only requires that "work be completed within a two (2) year period after the issuance of the building permit for the work unless the Owner demonstrates good cause for the work exceeding two (2) years." Thus for example, the fact that architectural drafting, structural engineering and other expenditures are undertaken prior to the actual permitting does not invalidate such costs (or even require a showing of good cause for their acceptance). *See e.g., Carta Holdings LLC*, L15-0034 permitting architectural and engineering fees as allowable expenses. Likewise the asbestos abatement and other demolition work done in anticipation of, but performed prior to, the issuance of the renovation permit should not be automatically excluded. As noted above, after the fire, I worked diligently to secure the necessary funds for the work, perform the site remediation, obtain the City inspections and work permits, and complete the work as quickly as possible.

[24] Even the "corrected" Decision, fixing errors and omissions shouldn't be considered problematic as it evidences the desire of the Hearing Officer to get things "right" – even if it means revision and re-issuing of the Decision.

[25] Curtain rods are just one example of these smaller, but I believe, inappropriately denied categories. In her Decision, the Hearing Officer, without citation, declared that "curtain rods are not attached to the building and not

(b) construction insurance costs, (c) transportation expenses (bridge tools/mileage cost to the jobsite or supplying materials or hauling waste to recycling), and (d) credit for "owner-contributed" labor.

The first three are examples of categories that were explicitly and (I believe) inappropriately denied by the Hearing Officer in a manner inconsistent with prior RAP precedent (which allowed such expenses) while the last, "owner-contributed" labor, is an issue which I repeatedly raised with RAP staff, both prior to filing my petition (where I was told by RAP staff that it was *not* an expense that could be credited) and at the hearing (where my work was acknowledged by the Hearing Officer, but not credited or even noted to me that it was a category of expense that *could* be credited, despite, as I now have learned, there being established RAP precedent allowing for such work to be credited).

Finally, there are also a couple of miscellaneous "categories" of expenses that were denied that are worth noting because they illustrate the "heightened" evidentiary standard used by the Hearing Officer: (i) her disallowance of $21,200 in sheetrock work because the invoice/agreement was documented *by an SMS text message* outlining the terms (price, scope of work, etc.) rather by some other form of writing even though it was also supported by evidence check payments, and (ii) another expense that was rejected because the payment proof was a *handwritten* "Paid" notation on the invoice - even though I testified that it was signed by the service provider and the handwriting was clearly different than my own. These heightened evidentiary standard employed by the Hearing Officer throughout her review and assessment and are not requirements supported by statute or case law (HRRRB or judicial) and are inconsistent both with prior RAP precedent and (in the case of "handwritten" notations) inconsistent with the Hearing Officer's own treatment of other expenses in this petition.

I discuss each of these "categories" in turn and in more detail below.

a. Appliances

Hearing Officer Cohen denied any "appliance" expenses based on her determination that they were *not* "structural improvements" and therefore the "costs expended for appliances are not allowable cost items." *See* Decision at 13. The Hearing Officer provided no statutory, regulatory, or case law citations in support of this conclusion. In my limited review of other RAP hearing decisions, however, it appears that her position is contrary to the position adopted by multiple other hearing officers in a number of

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an allowable expense." Decision at 15. Under California law, however, curtain rods, like the ones used at 3515 Brighton Ave, which are screwed/attached into walls, are *explicitly* considered a "fixture" and are a permanent part of the building. *See Pacific Mortg. Guaranty Co. v. Rosoff*, 20 Cal App. 2d. 363, 385 (1937); *see also* Cal. Civ. Code § 660 which provides: "A thing is deemed to be affixed to land when it is attached ... by means of cement plaster, nails, bolts, or screws." Thus even under a *very narrow* interpretation of allowable expenses which only included things that are "affixed" to the structure (a restrictive interpretation which is *not* supported by the OMC or its regulations and is contradicted by past RAP decisions), curtain rods should be included, as should stoves, and built-in dishwashers, microwaves ovens, disposals, and other attached appliances. Blinds which are screwed into the window frame would also qualify under this restrictive interpretation. (I also believe that curtains that are purchased exclusively for use in the building should also be included). *See Carta Holdings*, L15-0034 (crediting a "CostPlus" expense for what is described by the Senior Hearing Officer as "lobby furniture").

Another example is bottled potable water, which I purchased for the crews, which the Hearing Officer also disallowed, even though for much of the project, we did not have water at the site. By law, both OSHA and CAL OSHA *require* that workers to be provided with potable drinking water (at no expense to them). CALOSHA regulation T8CCR 3395(c) states the following: "[workers] shall have access to potable drinking water meeting the requirements ... that it be fresh, pure, suitably cool, and provided .... free of charge." To me, it wasn't about the regulation, it was just the right thing to do, but (in my opinion) it should also have been treated as a legitimate allowable expense. Similarly, for some of the service providers, like Jesus Martinez, I provided their lunch as part of their non-cash compensation. Under IRS Publication 5137, the expense of such fringe benefits is a legitimate business expenses and deduction. Again, because the dollar amount of these items is low, and are unlikely to be dispositive in meeting the required threshold, I have not focused on them in this appeal.

other "substantial rehabilitation" decisions.[26] Specifically, in *Nguyen v. Tenants*, L15-0008 at 3, the Hearing Officer credited as an "allowable" expense the building owner's receipts from "Santa Clara Appliances," "Appliance Repairs," and "Best Buy" – which were all presumably for appliances or appliance servicing costs. Likewise, in *Carta Holdings LLC v. Tenants*, L15-0034 at 5, the RAP's Senior Hearing Officer was even more explicit, permitting over $16,327 in expenses from a company called "Appliance Parts Distributor" which she listed under her "description" heading as "Appliances." In *Mapel v. Tenant*, L16-0057 at 2 & 3, the Hearing Officer allowed appliance expenses from "Airport Home Appliances" and "on a Roll Appliance Service." The RAP hearing decisions in *Nguyen*, *Carta Holdings,* and *Mapel* are all recent RAP hearing decisions (decided in 2015, 2016, and 2017 respectively). Notably, these contrary decisions were issued by two different Hearing Officers, including the RAP's Senior Hearing Officer.[27] In further support of the position that appliance expenses are a reasonable and legitimate expense item, I also contacted CoreLogic, which produces and maintains the *Marshall & Swift* Residential Cost Handbook database, which I understand is used by the City of Oakland's Bureau of Building in creating their Construction Valuation table (which in turn is used by RAP staff to determining the "substantial rehabilitation" expense threshold under the RAP ordinance). *See* Decision Exhibit B (noting the use of CoreLogic's *Marshall & Swift* data). At CoreLogic, I spoke with a Mr. Xaq Bychowski on their technical support team, who confirmed that "appliance" costs were one of the cost items included in the Handbook for calculation cost estimates. Because I do not personally subscribe to CoreLogic's *Marshall & Swift* database, he could not give me any specific data, but he was able to confirm that it was part of the cost variables included in the Handbook and sent me a confirming email message. *See* Attachment I CoreLogic *Denied Categories* at 19 – Bychowski Email. Given its use in determining the required minimum expense threshold amount (i.e., the minimum expense a petitioner must document in order to qualify one's building as "substantial rehabilitated"), I believe that it is reasonable to include that expense as an allowable expense item - for a more appropriate "apples to apples" comparison – as apparently do several other RAP hearing officers, including the "Senior Hearing Officer."

b. "Course of Construction" Insurance

As part of the rehabilitation work, I secured "course of construction" insurance while the project was under construction. This type of insurance is commonplace while a building is under construction or undergoing a "substantial rehabilitation." This insurance incorporates the additional risk and potential liability involved in such a project. As shown in Attachment I at 18 (Construction Insurance), the annual "course of construction" insurance premium for 3515 Brighton during the rehabilitation was $7,249 and $7,079 respectively in 2015 and 2016. The Hearing Officer disallowed this expenses "category" in its entirety stating that "[c]onstruction insurance is not a cost to the building." Decision at 18. Again, the Hearing Officer offered no supporting citation for this position. In *Carta Holdings LLC*, L15-0034 at 5, however, the RAP's Senior Hearing Officer allowed the petitioner/owner to claim an $8,756 "Constr. Insurance policy" as an allowable expense. As with appliance costs above, Mr. Bychowski from CoreLogic also confirmed that construction insurance was also an "included cost" item used in its *Marshall & Swift* Handbook which, again, is apparently indirectly used in determining the rehabilitation

[26] Because of the limited public access to RAP hearing decisions and HRRRB decisions imposed by RAP, I can speak only to the handful of decisions that I have been able to review to date. If, however, they are at all reflective of the other decisions to which I have not yet had access, I can only assume that inconsistencies and issues will become evident as any administrative or judicial review process unfolds.

[27] These decisions unquestionably support the Appeal Grounds #2 on the HRRB Appeals Form, showing that the Decision is "inconsistent with the decisions issued by other Hearing Officers." This inconsistent treatment also raises significant due process issues and implicates the fundamental fairness of the RAP's adjudicatory process.

expense threshold. *See* Decision Ex. B. Given the clear RAP precedent and its apparent use in determining the threshold expense amount, I believe that it is reasonable and appropriate to include that expense as an allowable expense item – as apparently does RAP's Senior Hearing Officer. *See Carta Holdings LLC* at 5.

c. Transportation Expenses

In support of this expense, I submitted independently documented bridge toll expenses records (FastTrack statements) (as "corroborating evidence") and mileage calculations (based on the IRS code approved mileage allowances) for travel to and from the jobsite, to suppliers, and to recycling. As I testified (and as is confirmed in JTM's, my general contractor's, affidavit), I worked at the jobsite "daily" and was also primarily responsible for procuring building supplies and materials to keep the trades' work going (electrical, plumbing, HVAC, etc.). This work often involved multiple daily trips to various suppliers. I used my truck (a maroon 1999 Dodge Ram – shown in Attachment II) to take building material waste to various recycling centers or to pick up bulky items - or my Toyota Prius - when picking up smaller items or just traveling to the jobsite. I believe that these travel expenses were (1) reasonable and independently documented by corroborating evidence (FastTrack receipts, supplier store purchase receipts, dump fee receipts, etc.) and (2) necessary for the completion of the substantial rehabilitation work at 3515 Brighton Ave, and as such should be included as an "allowed" expense.[28]

d. Owner-Contributed Labor

None of my labor spent on the project was credited in support of the "substantial rehabilitation" petition. When I initially spoke with RAP staff in late 2016, I was explicitly told that such an expense claim would not be "allowable" (because of verification/valuation issues). Nevertheless, I did raise this issue on several occasions during both hearings. *See e.g.*, Hearing Transcript II at 0:34:00 (where I note that even if I were paid only "minimum wage," it would be "tens of thousands of dollars"). I also provided "independent" "corroborating" evidence" in the form of FastTrack records, tracking my travel to and from the jobsite and the literally hundreds of receipts from Lowes, Home Depot and numerous other suppliers showing my multiple trips to suppliers, as well as by my sworn testimony and statements attesting to this work and by the 3rd party declaration from Michael Northover, the owner of the JTM Developments LLC, (the general contractor), confirming my daily presence at the jobsite. See Decision Exhibit A (and supporting Record Exhbits); *see also* Attachment I at 6 "JTM Declaration." In reviewing other recent RAP decisions on "substantial rehabilitation" for this motion/appeal, I learned that there is established RAP precedent for allowing a "labor" credit for owner work based upon the percentage materials and service provider cost in an amount up to 25% of those costs. *See Nguyen v. Tenants*, L15-0008 at 4 (granting the petitioner credit of over $42k towards meeting his $212k threshold for his 10 month work "supervising" his labors). This RAP practice of crediting for owner-contributed labor was not disclosed to me either by RAP staff (in responses to my specific inquiry), or in any of the RAP materials, or by the Hearing Officer when I made my repeated statements during the hearing about the substantial work I did on the project. Again, as noted above, I had been explicitly told just the opposite by RAP staff - that credit for such work was *not* be allowed. Given these circumstances at any HRRRB evidentiary hearing or upon remand (if need be) or upon RAP reconsideration, I request the opportunity to seek such credit for my work towards satisfying the $212,673 expense threshold. *See*

[28] In addition to the general transportation costs, during one trip a plumbing supplier, my Prius front window was shattered when an employee of the supplier improperly loaded some cooper pipe. I eventually paid $300 for the replacement of the windshield myself and included that as an expense item since the vehicle was damaged while loading supplies for the project. I would have done the same if I had borrowed the General Contractor's truck and it was similarly damaged. The Hearing Officer also denied this repair expense.

Tengeri v. Allen Associates, T00-0132 (a party's reasonable reliance on erroneous information by RAP staff was basis for remanding case for to submission of additional evidence and decision on the merits).

e. Denial of "Proof of Payment" if Payment Notation ("Paid") was *Handwritten*

JC Ironworks custom-built and installed a small steel balcony railing for $550. The Hearing Officer denied this because the payment was confirmed by a *handwritten* "Paid" notation on the invoice - even though I testified under oath that it was signed by the service provider and the handwriting was clearly different than my own. *See* Record Exhibit 21 at 6; Hearing Transcript II at 00:44;20. The Hearing Officer denied the expense in its entirety on the grounds that there was "no proof of payment." The Hearing Officer concluded that a handwritten "paid" notation on an invoice was insufficient because "anyone could write the word 'paid' on an invoice."[29] *See* Decision at 17. Again, the Hearing Officer offered no supporting citation for her position, which is not even internally consistent within her own Decision, where she approved numerous invoices with the handwritten notation "paid" on them.[30] Moreover, in this instance, one does not need to be a handwriting expert to readily see that *my* handwriting, which as the Hearing Officer noted in her Decision (on page 17) is on many of the documents[31] – including this balcony railing receipt - does not at match the handwriting of the person who wrote "paid" on the invoice balcony. Instead, although the handwriting is not easy to read, the "paid" script matches the style of the person who prepared the invoice - the owner of JC Ironworks. See Attachment I – JC Ironworks receipt at 15. Even putting aside these facts, as discussed above, under *Ulman I* and the "*preponderance of the evidence*" standard, this expense should be allowed because (i) the receipt was "independent" "corroborating evidence" of the claimed expense; (ii) it was supported by my sworn testimony and summary statements; and (iii) there was no contradictory evidence "on the other side" (and there was no indication of fraud or mistake). *See Ulman I & Bryden.* Under such circumstances, denial of such claims is not supported by substantial evidence.

f. Denial of Expenses Evidenced by SMS text messages

This final example is another disallowed "category" that I believe illustrates the improper "heightened" standard of proof applied by the Hearing Officer in this petition.[32] In her Decision, the Hearing Officer denied a $21,200 "sheetrock" expense - *in its entirety* - based on the fact that the agreement/invoice was contained in an SMS text message. *See* Decision at 18. Based on a strong recommendation from a contractor, I hired Jorge Martinez (no relation to Jesus Martinez, the painter discussed above) and his crew to install the fire-rated sheetrock (and metal soundproofing "channels"

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[29] Would it have been accepted if it was stamped "Paid" instead of handwritten? Who knows? It seems like that was the "problem," but honestly I can't say, given the inconsistencies evident in the Decision.

[30] For example, the Hearing Officer approved over a dozen "dump fee" receipts from SMART demolition which were all handwritten and hand noted as "paid." See Decision Exhibit A at 1; Record Exhibit 3 at 3-5. Although I have not yet pulled additional "substantial rehabilitation" casefiles, I am confident that it will also reveal further instances where RAP hearing officers have accepted handwritten "paid" notation to support claimed expenses.

[31] To help the RAP review process (and for my own spreadsheet calculations), I wrote the total dollar amount on the top of almost every receipt I submitted (rounded up or down to the nearest dollar) – so there was no shortage of my handwriting exemplars.

[32] Despite the Hearing Officer's offhand reference to a California Code of Evidence section in her Decision, administrative proceedings, like the one here, are not governed by that Code, but instead use a lower and more flexible/lenient standard for admissible evidence than would be required at a civil trial (let alone at a criminal trial). *See* Cal. Gov. Code § 11513(c). *See also* OMC Regulations § 8.22.110.E.4. ("[u]nless otherwise specified in these Regulations or OMC Chapter 8.22, the rules of evidence applicable to administrative hearings contained in the California Administrative Procedures Act (California Government Code Section 11513) shall apply").

between the units) at 3515 Brighton Ave in preparation for painting. Mr. Martinez agreed to supply all the sheetrock and soundproofing materials and labor for a total price of $21,200. We reached this oral agreement after meeting and walking the jobsite together,[33] but it also was confirmed by in writing by an SMS text message from Mr. Martinez. To substantiate this expense, I provided the SMS text message from Mr. Martinez in which he confirmed his proposal to do the "[t]otal dry wall and RC channel [the soundproofing]" with a "smooth level 4" finish and to do "patch work on [any] existing drywall" for all "3 units" for the price of "$21,200." See Attachment I at 5; Record Exhibit 24. I also provided checks paid to Mr. Martinez as further "corroborating evidence."

At the hearing, the Hearing Officer queried the work performed by Mr. Martinez and his crew and the SMS text message documenting the contract, but gave no indication that it was insufficient or deficient and would be rejected. *See* Hearing Transcript II 00:50:35 (Hearing Officer's only reaction to the SMS/text document which she called the "invoice" was "yaah...okay" and to note that I also had provided some cancelled checks and to ask about the actual work performed, as she was not familiar with the RC channel soundproofing). In her Decision, however, she disallowed *the entire* $21,200 expense, concluding that "[a] text message is not the kind of business record on which people reasonably rely." Decision at 18. Again, the Hearing Officer provided no statutory or case citation in support of her position that an SMS text message was not "reasonable" or "admissible" evidence of a contract or invoice (particularly under the light evidentiary rules applicable to administrative hearings). This is likely because neither California case law (nor any statutes) contain such prohibitions on SMS text messages being entered and considered as admissible evidence. In fact, a California court of appeals recently held that SMS text messages were properly admitted as evidence in a *first degree murder case* (where the rules of evidence are substantially more restrictive and the stakes significantly higher). *See People v. Fisher*, No. C081810, 2017 WL 2200156, at *3 (Cal. Ct. App. May 19, 2017) (California appeals court found that "the trial court did not abuse its discretion in admitting the text messages" as evidence in the murder trial governed by the "beyond a reasonable doubt" standard).

As such, it was error for the Hearing Officer to reject this "corroborating evidence" because it was in the form of an SMS text message – especially when the SMS text message specifically outlined the relevant contractual terms (parties, scope of work, price, date, etc.) and was supported by various canceled checks to Mr. Martinez (additional "corroborating evidence" under *Ulman I*) and by my sworn testimony and statements that Mr. Martinez had done the work and had been paid in full. Given these circumstances, substantial evidence does not support the Hearing Officer's disallowance of the expense. To avoid *any* doubt as to the veracity of this expenses, I also contracted Mr. Martinez, who provided a sworn declaration (under penalty of perjury) on July 14, 2017 confirming the sheetrock work he and his crew did at 3515 Brighton, the total payment amount of $21,200, and confirming that it was paid in full. This declaration is in Attachment I at 5 - Jorge Martinez Declaration.

6. Procedural Due Process & Fundamental Fairness of the Proceeding

The California Supreme Court has held that the California Constitution's due process clause includes "freedom from arbitrary adjudicative procedures". *People v. Ramirez* 25 Cal.3d 260, 268-69 (1979); *see also People v. Mary H.,* 5 Cal. App. 5th 246, at 257 (2016) ("[a]n individual has a constitutional right to procedural due process when the government deprives an individual of a ...

[33] For avoidance of doubt, in California, oral contracts are legal and valid (and actually quite commonplace in the construction industry). California state law specifically acknowledges and codifies this fact in California Civil Code § 1622, which provides that "[a]ll contracts may be oral, except as are specially required by statue to be in writing." In any event, the *written* SMS text sent by Mr. Martinez and submitted in support of the petition should also serve as a written "invoice" – even if it was in the form of a SMS text message.

property interest") (citations and quotations omitted); *Gresher v. Anderson*, 127 Cal. App. 4th 88, 105–06, (2005) ("[t]he required [due process] procedural safeguards are those that will, without unduly burdening the government, *maximize the accuracy of the resulting decision and respect the dignity of the individual subjected to the decision-making process.*") (emphasis added).[34]

Here, the RAP's hearing decisions have resulted in an inconsistent application or misapplication of (i) *Ulman I*'s evidentiary requirements, (ii) the required "*preponderance of the evidence*" standard of proof, and (iii) the "allowable" *categories* of expenses in "substantial rehabilitation" petitions (and potentially other types of associated petitions). These results are indicative of a quasi-judicial adjudicative process that is "arbitrary" and in violation of the California Constitution's due process clause. *See Ramirez* 25 Cal.3d at 268-69.; California Const. Art. 1 § 7. For example, "[o]ne component of procedural due process is the "standard of proof" used to support the deprivation [which] must satisfy the constitutional minimum of 'fundamental fairness." *See People v. Mary H.,* 5 Cal. App. 5th 246, at 257 (2016) (citations and quotations omitted). Here, Hearing Officer Cohen's imposition of a heightened standard of proof that is more akin to a "*clear and convincing*" standard (or even higher) instead of the required "*preponderance of the evidence*" standard is a due process violation both in its misapplication of the required standard, but also by the RAP's failure to adequately inform petitioners of this heightened standard of proof, effectively depriving them of a meaningful opportunity to be heard. *See Gresher*, 127 Cal. App. 4th at 106 ("[t]he primary purpose of procedural due process is to provide affected parties with the right to be heard at a meaningful time and in a meaningful manner," including adequately "informing individuals of the nature, grounds and consequences of the [matter] and of enabling them to present their side of the story....."). By cloaking this heightened standard of proof in the guise of a "preponderance of the evidence" standard, RAP violates due process and "fundamental fairness." Likewise, RAP's apparent lack of written guidelines and policies in this area coupled with the erroneous (and conflicting) statements provided by RAP staff, and the significant RAP-imposed restrictions on public access to past RAP hearing decisions and HRRRB decisions (which is apparently the only source for written guidance)[35] also violates the "fundamental fairness" of the proceeding and deprives petitioners a meaningful opportunity to effectively "present their side of the story." *See id.*[36]

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[34] Under *Ramirez* and *Gresher,* procedural due process rights arise when there is "a statutorily conferred benefit or interest of which [the petitioner] has been deprived" Here, the denial of a statutory exemption from Oakland's Rent Ordinance is such "a statutorily conferred benefit or interest." *See generally Gresher* at 105-06.

[35] To create some modicum of visibility into past HRRB decisions, RAP staff has created an Appeals Decision Index which is available online to the public. This Index, however, is woefully inadequate as it only contains 2-3 sentence descriptions of the cases (which are just subjective characterization by RAP staff). Moreover, it appears that even this "resource" is *not* being regularly maintained or updated. The "current" document indicates that the last time it was reviewed or updated by RAP staff was over two years ago at "1:00 PM 6/11/2015."

[36] While RAP staff's "keeper of records," Ms. Maxine Visaya, has been responsive and cooperative, the fundamental limitations on access are profound. Current RAP procedures to access prior decisions requires one to (i) request to view specific cases with little or no way of knowing the contents of such cases (except for the out of date "Appeals Decision Index" noted above), (ii) scheduled an appointment time for viewing that is typically 2 to 5 days out (if the requested documents are recent cases) and an indeterminate amount of time if the documents have been archived and need to be retrieved or if a casefile is requested, and (iii) then limit the actual time in which he or she can view to any requested documents or listen to any hearing recording to only one (1) hour per scheduled session. This process, while perhaps understandable for a RAP resourcing perspective, significantly undercuts (and effectively renders meaningless) the value and reasonableness of looking to the prior RAP or HRRRB cases as an effective or reasonable source of guidance to the public and does not satisfy the due process requirements articulated in *Ramirez* and *Gresher.* Moreover, Ms. Visaya has confirmed that she has no way to do even a basic "keyword" search on any documents. Similarly she also stated that she has no way to identify previous "substantial rehabilitation" petitions denied by RAP hearing officers.

At best these shortcomings result in demonstrably inconsistent RAP hearing decisions and disparate treatment of similarly situated petitioners, not to mention unnecessary confusion, stress, and work for both RAP staff and the public who petition and appear at RAP hearings. More fundamentally, these deficiencies also appear to lead to decisions that are inconsistent with California law (e.g., the Hearing Officer (mis)interpretation of the "preponderance of the evidence" standard) and HRRRB precedent (e.g., *Ulman I*), and that are undeniably inconsistent with RAP's own past hearing decisions. This raises significant due process and fundamental fairness concerns by, *inter alia*, effectively denying petitioners adequate notice and a fair opportunity to prepare/present their petitions and to meet the unwritten "required" evidentiary criteria and the heightened standard of proof utilized by the Hearing Officer. *See Gresher*, 127 Cal. App. 4th at 106 (citing *Ramirez – the process must "*provide affected parties with the right to be heard at a meaningful time and in a meaningful manner,... informing individuals of the nature, grounds and consequences of the [matter] and of enabling them to present their side of the story...."); *see generally* 2 Witkin, California Procedure, Jurisdiction Section 263 (5th ed. 2008) (under general principles of due process, notice must be of a type reasonably calculated to give the person with the property interest at issue *knowledge of the requirements of the proceedings*).[37]

* * * * *

IV. Conclusion

Given the tireless hours I spent working on this project, the Hearing Officer's Decision came as an unexpected and discouraging blow. As is reflected on the face of the hundreds of receipts, invoices, cancelled checks, and other independent corroborating documents I submitted, the building at 3515 Brighton Ave more than meets the threshold expenses requirements (~$212k) for a certificate of exemption as a "substantially rehabilitated building." Moreover, the record is clear that I provided "independent" "corroborating evidence" and sworn statements/testimony, substantiating those amounts and satisfying the evidentiary requirements outlined in *Ulman I* and meeting my burden of proof, under the "*preponderance of the evidence*" standard, to show that the submitted expenses are "more likely true than not true" and that such evidence "predominates" over the (non-existent) evidence "on the other side." A view that is only strengthened by the additional 3rd party "confirming" documents I have been able to secure – which I provided to RAP as part of my request for reconsideration and which *unambiguously and conclusively* confirm my previously claimed expense amounts and attest to the veracity of my statements/testimony.

I am also heartened by the knowledge that many of my claimed "categories" of expenses (which were denied by the Hearing Officer) had previously been validated and accepted by other hearing officers in multiple recent RAP hearing decisions and by the knowledge that - despite RAP staff's explicit statements to the contrary - my own extensive work on the building (which I testified to at the hearing) should have been credited under the RAP's prior decision in *Nguyen*, which would only further add to the level of qualifying expenses (as will the correction of the various computational and classification errors by the Hearing Officer in the Decision). I am also strengthened by constitutional

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Even RAP staff recognize the difficulty arising from this lack of written guidance and are themselves confused by the process. For example, on July 25, 2017, I spoke with one of the RAP's senior program analyst's (Margaret) at the "drop-in" desk, who acknowledge the lack of written RAP guidance but noted that RAP and HRRRB decisions were readily available to the public online. When I told her that actually HRRB and RAP hearing decisions were actually *not* publicly available online (and only available under the procedures I outlined above), she expressed surprised and indicated that she had not been aware that they were not available online.

[37] Given the noted limitations on access to potentially relevant RAP and HRRRB precedent, I am still gathering data and developing this claim, which I expect to enhance and develop for HRRB or other review as need be.

safeguards recognized by the California Supreme Court and other courts designed to ensure that administrative adjudicatory proceedings like these are free from "arbitrary" and inconsistent decision-making and require agencies, like the RAP, to establish reasonable procedures/guidelines to provide petitioners, like me, with clear and adequate notice of the "rules of the game" such that we can "meaningfully" participate and "present [our] side of the story" all with the goal of "maximizing the accuracy of the resulting decision." *See Gresher.*

I appreciate the HRRRB's consideration of this appeal and respectfully request that the HRRRB grant the petition for exemption or in the alternative remand for the Hearing Officer to make such a determination in a manner consistent with the points raised in this Appeal Brief.

Respectfully submitted and declared under penalty of perjury on August 4, 2017 in San Francisco, California.

William Wiebe,
petitioner/owner