CITY OF MOUNTAIN VIEW
RENTAL HOUSING COMMITTEE
HEARING OFFICER DECISION AFTER REMAND

Rental Housing Committee Case No.:	17180002
Address of Rental Property:	141 Del Medio Avenue Mountain View, CA 94043
Rental Units Noted in the Petition or Petitions:	101, 102, 105, 108, 109, 110, 112, 113, 115, 116, 117, 119, 121, 123, 124, 126, 127, 128, 130, 131, 132, 133, 135, 201, 205, 206, 208, 209, 210, 211, 213, 214, 215, 218, 219, 220, 222, 223, 224, 229, 230, 232, 233, 234, 235, 301, 304, 306, 307, 308, 309, 310, 312, 313, 314, 315, 317, 318, 319, 322, 324, 327, 328, 329, 331, 332, 333, 334
Date(s) of Hearing	May 22, 2018
Date Evidence Closed after Supplemental Briefing	June 13, 2018
Date of Decision After Remand:	December 10, 2018
Date of Mailing:	See attached Proof of Service.
Hearing Officer:	Jil Dalesandro

I. Definitions:

1. "Petitioner" as used herein shall mean Lindsay Properties, LLC;
2. "Tenants" as used herein shall mean the members of the Del Medio Manor Tenants Association, who are tenants of units 101, 108, 109,128,131,135, 201, 206, 208, 209, 210, 213, 218, 219, 222, 223, 233, 310, 319 and 328;
3. "Original Petition" as used herein shall mean the Petitioner's Petition dated December 22, 2017 and supporting documentation;
4. "Amended Petition" as used herein shall mean the Petitioner's Response to Hearing Officer's Request for Documents, and supporting Documents (Binders 1 and 2) dated April 4, 2018;
5. "The Act" as used herein shall mean the Mountain View Community Stabilization and Fair Rent Act ("CSFRA");

6. "The Property" as used herein shall mean the subject property located at 141 Del Medio Avenue, Mountain View, CA 94043, APN 148-15-011. The Property consists of 104 rental units. The Property has been owned by Petitioner since 1974.
7. "Remand Order" as used herein shall mean that certain order served on all parties on September 7, 2018 by the Mountain View Rental Housing Committee in this matter.
8. "Original Decision" as used herein shall mean that certain Decision dated July 5, 2018 in this matter.

II. Issues Subject to Remand:

1. Denial of Vega Adjustment;
2. Calculation of Adjusted Gross Income in the Base Year;
3. Calculation of Adjusted Gross Income in the Petition Year;
4. Exclusion of California Apartment Association Fees;
5. Determination of whether Petition Year Management Expenses are greater than or equal to the presumed Reasonable Petition Year Management Expenses;
6. Categorization of Base Year salary expenses as Ordinary Repair, Replacement and Maintenance Expenses versus Management Expenses;
7. Categorization of Petition Year salary expenses as Ordinary Repair, Replacement and Maintenance Expenses versus Management Expenses;
8. Determination of whether the pavers installed in the Base year were proper Capital Improvements;
9. Determination of whether the elevator repair and parking lot resurfacing were proper Capital Improvements;
10. Determination as to whether a preponderance of the evidence in the record indicates that the $1,100 check to P.W. Stephens Environmental may have been counted twice;
11. Determination as to why the allocation of the rent increase equally among all affected units supports the interest of justice and provides the Appellant-Petitioner with a fair rate of return.

III. Evidence Used on Remand:

1. Petitioner's Petition dated December 22, 2017 and supporting documentation in this matter was admitted into evidence as Exhibit A;

2. Petitioner's Response to Hearing Officer's Request for Documents, and supporting Documents (Binder 1) dated April 4, 2018 (known also as the "Amended Petition") were collectively admitted into evidence as Exhibit B;
3. Petitioner's Response to Hearing Officer's Request for Documents, and supporting Documents (Binder 2) dated April 4, 2018 (known also as the "Amended Petition") were collectively admitted into evidence as Exhibit C;
4. Respondent Del Medio Manor Tenants Association's Response to Petition and to Hearing Officer's Request for Documents, and supporting Documents were collectively admitted into evidence as Exhibit D;
5. Petitioner's Response Respondent Del Medio Manor Tenants Association's Response to Petition was admitted into evidence as Exhibit E;
6. Analysis: Average Rent Increase Over Life of Tenancy dated 5-1-18 was admitted into evidence as Exhibit E-1;
7. Declaration of Khyrstyn McGarry in Support of Del Medio Manor Tenants Association's Response in Opposition to the Petition Requesting Upward Adjustment of Rent and attached Exhibits were collectively admitted into evidence as Exhibit F;
8. Expert Declaration of Stephen Barton Ph.D. and attached Exhibits were collectively admitted into evidence as Exhibit G;
9. Second Declarations of Emrah Onur Toprak, Elena Francois, Tatiana Bartz, and attached exhibits were collectively admitted into evidence as Exhibit H;
10. Written Statement of Ric Kirk, Tenant in Unit 333 was admitted into evidence as Exhibit I;
11. Petitioner's Tenant Ledger for Unit 233 admitted into evidence as Exhibit J; and
12. Petitioner's Tenant Ledger for Unit 109 admitted into evidence as Exhibit K;
13. On June 12, 2018, Supplemental Brief of Petitioner after Petition was admitted into evidence as Exhibit L, and
14. On June 12, 2018, Supplemental Brief of Del Medio Manor Tenants Association after Petition was admitted into evidence as Exhibit M; and
15. Sworn testimony taken from Witnesses at the Hearing;
16. Evidence was closed without objection, and the Hearing was adjourned on June 13, 2018, thus beginning the time period for the rendering of this Decision. The Hearing was adjourned on said date due to the unusually large volume of documentation submitted by all Parties. As a result thereof, the Hearing Officer made a thorough supplemental review of the same, in light of the newly submitted briefs to ensure that no further evidence was necessary before this Decision could be rendered. Once that review was completed, the hearing was adjourned on June 13, 2018.
17. Any evidence offered in support of the Appeal, but not tendered at Hearing cannot be accepted as evidence (see below).

VI. Legal Analysis:

1. Statement of the Procedural Nature of the Case

Petitioner submitted its Original Petition on or about December 22, 2017 and formally accepted by the Rental Housing Committee on January 4, 2018. *See, Exhibit A.* A Hearing on the Petition was scheduled for March 27, 2018 to allow for a Pre-Hearing Settlement Conference to be held. The Hearing Officer, Jil Dalesandro, found that there was substantial lack of admissible evidence in support of the Petition. Petitioner submitted no invoices, evidence of cleared checks, or other types of admissible non-hearsay evidence. Rather, Petitioner submitted hundreds of pages of typewritten lists of invoices and checks, but did not submit actual -- or even copies of -- invoices or checks to substantiate its internally created lists. *See, Exhibit A.* Tenants raised objections to the lack of evidence to support the claims in the Petition. *See Exhibit D, Del Medio Manor Tenants' Association Response.*

On or about February 28, 2018, Hearing Officer Dalesandro requested the underlying documents in a Request for Documents and set a Pre-Hearing Conference, in part, to discuss this issue. The Request for Documents and notice of the Pre-Hearing Meeting were included with the Notice of Hearing that was served on all parties by email and mail on February 28, 2018. The Pre-Hearing Meeting was held in person at Project Sentinel's offices on March 7, 2018. Petitioner Representatives Elizabeth Lindsay and Wilson Walch appeared in person. Tenants were represented by counsel who also attended in person.

At the lengthy Pre-Hearing Meeting, the Hearing Officer discussed – in detail -- Hearsay evidence, and the fact that it was not admissible under California law and was not "credible evidence" under the Act. She informed the Petitioner that, should the Petition be unsupported by invoices and checks, or other evidence of expense, income and payment, the Petition would certainly be denied in its entirety. Petitioner agreed to provide the underlying source documents and requested a two-month delay in the hearing as the Petitioner's Representatives had travel plans and needed the time to gather documents. The Hearing was reset to May 22, 2018. Petitioner submitted its Response to Hearing Officer's Request for Documents, and supporting Documents (Binders 1 and 2) known also as the "Amended Petition," on April 4, 2018. *See, Exhibits B and C.*

The Hearing was held on May 22, 2018. Petitioner Representatives Elizabeth Lindsay and Wilson Walch appeared. Tenants were represented by counsel and appeared through lengthy

and detailed declarations. The Hearing Officer told Petitioner that it had the Hearing in which to present their evidence, and allowed Petitioner to use the time and to present its case as it wished.

The Hearing Officer requested supplemental briefing on issues. The Hearing Officer informed the Petitioner and Tenants that if they had further evidence to submit on any issue – not only those on which supplemental briefing was requested -- to do so in their Supplemental Briefing, in an effort to give both parties one further opportunity to present any evidence that would support the parties' positions. Petitioner's representatives asked for further time in which to submit the evidence and briefs as a result of vacation schedules. The Hearing Officer granted their request and the Parties submitted the evidence they wished, as well as their briefs and responses to those of the other party. Evidence was closed and the Hearing adjourned on June 13, 2018.

The Hearing Officer understood that Petitioner was not represented by counsel in these proceedings while the Tenants' association was represented by counsel. In light of this -- and Petitioner's representatives' self-professed lack of knowledge or experience with petitions and hearings -- the Hearing Officer afforded the Petitioner's representatives ample opportunity to submit evidence to prove its case.

2. **Burden of Proof**:

Petitioner has the burden of affirmatively proving that it is entitled to adjustments by a "preponderance of the evidence." *See, the Act* § 1711(h) and at Regulations, Chapter 5E (G)(1). "Preponderance of the evidence" is defined as:

> [S]uch evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced . . ., so that [a jury is] unable to say that the evidence on either side of the issue preponderates, then [the jury's] finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue.

See, California Civil Jury Instructions (formerly BAJI) 21; *see also California Civil Jury Instructions* (CACI) 200 (2017); *see also California Evidence Code* § 115. Preponderance of the evidence is that evidence, which on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed. *Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 325 (quoting *People v. Miller* (1916) 171 Cal. 649, 652. Further the Act requires "the parties to the

Petition at issue present[ing] evidence to the Hearing Officer" at the Hearing. *See, the Act* at Regulations, Chapter 5. A. 1. Emphasis added. Thus, the Act requires that Petitioner must prove each element of their petition by "presenting evidence to the Hearing Officer and testimony from the parties to the Petition at issue and witnesses identified in accordance with Chapter 4, Sections (D)(2)-(3)." *See, the Act* at Regulations, Chapter 5.A.1, and subsection E.

The Petitioner must affirmatively prove each element of its Petition. Miriam Webster's Dictionary defines the term, "to prove" as "to establish the existence, truth, or validity of" a fact. *See, https://www.merriam-webster.com*/dictionary/prove. Similarly, Black's Law Dictionary defines the term as "To establish a fact or hypothesis as true by satisfactory and sufficient evidence." *See, https://thelawdictionary.org*/prove/. Petitioner must establish each element of its Petition; it may not rely on the Hearing Officer to do so.

In fact, the Hearing Officer must be neutral and impartial and may not assist either party. The Act Requires:

> The Hearing Officer shall at all times in the conduct of the Hearings and in otherwise performing the duties of the Hearing Officer act neutrally and impartially as between the Petitioner and the tenants.

See, the Act at Regulations, Chapter 5.E.8. Emphasis added. Thus, a hearing Officer may not prove a case or prove evidence for any party. In fact, the Act in its Regulations states:

> [The] Hearing Officer will conduct an administrative Hearing to resolve the issues raised by a Petition. In accordance with the procedures established by this Chapter, a Hearing shall involve the parties to the Petition at issue presenting evidence to the Hearing Officer and testimony from the parties to the Petition at issue and witnesses identified in accordance with Chapter 4, Sections (D)(2)-(3). Following a Hearing, the Hearing Officer shall issue a written Decision on the issues raised in the Petition.

See, the Act at Regulations, Chapter 5-E, section 1. Emphasis added.

The Decision shall include findings of fact and conclusions of law which support the Decision. *See, the Act* at Regulations, Chapter 5.F.2. No individual claims shall be approved by a Hearing Officer unless supported by the preponderance of the evidence in the Hearing record. *See, the Act at Regulations*, Chapter 5.G.3. Petitioner must prove that each element of claimed income and expense is proper by a preponderance of the evidence. As set forth herein, and in the Original Decision in this matter, in many

instances Petitioner failed to do so.

3. **Petitioner is Precluded from Raising Arguments for the First Time on Appeal**:

The Act, at Section 1711(h) states:

> (h) Quantum of Proof and Notice of Decision. No Petition for Individual Rent Adjustment, whether upward or downward, shall be granted unless supported by the preponderance of the evidence submitted prior to and at the hearing. All parties to a hearing shall be sent a notice of the decision and a copy of the findings of fact and law upon which said decision is based. At the same time, parties to the proceeding shall also be notified of their right to appeal to the Committee and/or to judicial review.

See, the Act at Section 1711(h). Emphasis added.

If the Petitioner fails to present evidence or testimony on a point at the hearing, it has long been California law that said issue, evidence, or argument is forfeited or waived thereafter, and may not be raised for the first time on appeal. *See, Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4; *see also, Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1 ("The court has no obligation to develop the appellants' arguments for them."); *see also, In re Marriage of Fink* (1979) 25 Cal.3d 877, 888 ("It is neither practical nor appropriate for the court to comb the record on [appellant's] behalf."). The Hearing Officer must "act neutrally and impartially as between the Petitioner and the tenants." *See, the Act* at Regulations, Chapter 5.E.8.

Petitioner raised several points on appeal that it did not argue at the Hearing on this matter. Specifically, Petitioner presented no testimony or evidence at the Hearing as to the elevator expenses or pavers. Petitioner raised arguments regarding these expenses for the first time on appeal, relying on conflicting statements and vague documents (never specified at the Hearing) that were buried in thousands of documents presented after the Hearing Officer gave Petitioner a substantial second chance at providing credible evidence.[1]. Petitioner may not rely on the Hearing Officer to affirmatively prove any expense by unearthing evidence buried in thousands of pages of documents. In fact, as a neutral, the Hearing Officer is prevented from

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[1] In fact, the "evidence" presented with the Original Petition was not credible, but was mostly comprised of hearsay lists of invoice and check numbers and amounts, without any support whatsoever. No invoices or checks were produced. Had the Hearing Officer proceeded to Hearing on that "evidence," the Petition would most certainly have been denied for lack of evidence. Instead, to be fair to Petitioner, at the Pre-Hearing Conference, the Hearing Officer allowed – over Tenants' vociferous objection – Petitioner to provide the actual invoices and checks in support of its Petition. *See, above.* The fact that Petitioner failed to call out or specify documents or arguments in support of its claims at the Hearing is its choice.

doing so; such acts would be those of an advocate. In accordance with the Act, the Petitioner must prove each element of its claim affirmatively.

In accordance with California law, Petitioner waived any argument or attempt at proof not presented at the hearing.[2] No such argument or evidence may or will be used as a basis for determining this Decision on remand.

4. **Petitioner is Not Entitled to a *Vega* Adjustment**:

A *Vega* adjustment is unwarranted where

> [T]he physical condition of the property or any individual [unit], the market conditions that related to the property or any individual [unit], and/or any other relevant evidence" demonstrates "that a recalculation of the Base Year Gross Income ... is unnecessary for the Petitioner to receive a fair return on investment for the property, fails to ensure fairness, or is otherwise contrary to the purposes of the Act."

See, the Act, at Regulation 6(G)(3)(d).

a. **The Property is Old and the Tenants' Units are Not Newly Remodeled**.

The average rents were reviewed in this matter and even though some rents may have been lower than those suggested by HUD, no *Vega* adjustment is warranted as set forth in the Original Decision and in the further discussion below. A preponderance of the evidence indicates that units recently remodeled and/or reconditioned in the Base Year[3] would command greater rents than older units that had not been remodeled or reconditioned.

It was uncontested that the Property is an aged property located next to a lumberyard and Caltrain, which shakes the units as it passes and is noisy. Further, the Property contains asbestos. *See, P.W. Stephens invoice 42-35488 for Asbestos Removal*, at Exhibit C dated 7/28/2017.

Although the regulations presume that the Petition is entitled to a *Vega* adjustment if the rents charged by the Petitioner in the Base year are less than the HUD rents, , tenants may challenge the application of the *Vega* adjustment based on the various factors listed in Chapter 6.G.3.d., including the physical condition of the property and "market conditions."

In this matter, Tenants did so. Petitioner presented no evidence to rebut Tenants' allegations that the Property is old and the Tenants' Units were not newly remodeled. Petitioner

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2 In fact, this "evidence" was contradicted by evidence previously submitted. *See, below*.

3 These units were not among the Affected Units.

testified that the Tenants' declarations were exaggerated, and that the noise and train issues were not nearly as bad as the Declarations made them appear. The Declarations of Affected Tenants, as well as Petitioner's testimony, documentary evidence, and photographs were all reviewed. Taken together, the evidence is clear and credible that the building is old and that most of the Affected Tenants' units have not been remodeled, re-carpeted, or modernized.

A preponderance of the evidence indicates that some units for which a *Vega* adjustment was sought had substandard heating facilities and balconies in disrepair. Tenants testified that they are disturbed by the sound of large vehicles idling and the train's vibrations. *See, Tenants' Declarations* at Exhibits D and H. Petitioner testified that lumber trucks did not park or idle in front of the property. *See, Testimony at Hearing*. Said unsupported testimony was controverted by photographs of large lumber trucks parked in front of the building. *See, Declaration of Tatiana Bartz in Support of Response at 2; Declaration of Kathy Bam Anyanwu in Support of Response at 2; Declaration of Freddie Farris in Support of Response at 2; Declaration of William Yu in Support of Response at 2; Declaration of Sonya Allen in Support of Response at 2; Supplemental Declaration of Tatiana Bartz*, at Exhibits D and H. Further, Petitioner concedes the train and lumberyard exist. *See, Exhibit H*, page 2, at Bullet Point 1. Petitioner also stated, "The location of the building has been the same for 50 years. The train tracks have been there as has the lumberyard." *See, Exhibit A, B, and E, Response by Lindsay Properties, LLC*, dated April 18.2018, at 7.

A preponderance of the evidence indicates that units recently remodeled and/or reconditioned in the base year would command greater rents than older units that had not been remodeled or reconditioned. Petitioner conceded that new tenants (not the subjects of this Petition) live in remodeled units, with new kitchens, some new bathrooms, and new flooring. Petitioner testified that:

> Many of the tenants have been offered remodeled units ... but they have chosen to stay in their older apartments at the lower rates...Upgrades that are performed on turnovers take place because we can charge market rent for the unit.

See, Exhibit E, Response by Lindsay Properties. LLC, dated April 18, 2018, at 7-8. Emphasis added. Petitioner also testified that if the Tenants request new carpeting, if it is old enough, Petitioner will clean or replace it. Petitioner also testified that Petitioner has not made this practice known to tenants and has not published the opportunity. *See, Testimony at Hearing.*

Tenants -- according to their testimony, the photos attached to their Declarations, and emails provided by Petitioner -- reside in units that have not been remodeled since they moved in, and which contain worn carpets, minimal outdated heating with little to no temperature control (they can turn the heater on or off, but cannot control it further), faulty plumbing, no air conditioning, and leaking pipes. Petitioner testified that the Tenant in Unit 222 committed perjury in her Declaration as Petitioner replaced the stove and hood after Tenant moved in, and had replaced the carpet a few months before Tenant moved in and steam cleaned it. *See, Testimony at Hearing*. Unit 222 Tenant, Elena Francois, testified that the appliances were old, and that only the toilet and stove had been replaced. *See, Declaration of Elena Francois* at Exhibit D and H. Petitioner provided no other evidence of remodeling of the Affected Units at the Hearing.

A preponderance of the evidence indicates that some units for which a *Vega* adjustment was sought had substandard heating facilities and balconies in disrepair. Tenants testified credibly that since the heaters do not work effectively to heat all the living spaces in most of the Affected Units; many are forced to supplement with space heaters in the cold months. Tenants also testify that the Units, especially on upper floors are sweltering in the hot months. Petitioner provided no evidence to controvert said evidence; instead, Mr. Walch and Ms. Lindsay testified that they were called to repair these items and kept them in good repair, and admitted that the Property has no air conditioning. *See, Testimony at Hearing*. Further, Petitioner testified that "Many windows in the building are original". *See, Exhibit E at Petitioner's Response to Respondent's Attachments* at 3. Petitioner also testified,

> We have only had one work order request regarding a heating unit over the past 18 months ... When notified, wall heaters are tested and replaced as needed.

See, Exhibit E at Petitioner's Response to Respondent's Attachments at 3.

Tenants proved, by a preponderance of credible evidence (declarations and photographs), that although some units have balconies, photographs show apparent structural deficiencies, such as wood pulling away from the wall, cracked and aging wood, and in some cases, dry rot. Petitioner provided no evidence to controvert said evidence; instead, Mr. Walch and Ms. Lindsay testified that they were called to repair these items and kept them in good repair. In fact, Petitioner states:

> After 40 years of weather, sections of the structure have dry rot and/or termite

> infestation. We continue to identify damage as we turn over units and we repair it before handing the keys to a new tenant. We have even purchased scaffolding in order to access all balconies for necessary maintenance and repairs and use it regularly.

See, Del Medio Narrative Quarter 4 Report (2015), "Balcony Repair" at Exhibits B and E *Petitioner's Response to Tenant's Response* dated May 17, 2018 at 7. Emphasis added.

The statement quoted above as well as the purchase of scaffolding indicates that although Petitioner knows that at least some of the balconies are unsafe and unusable, Petitioner allows existing Tenants (those Affected by this Petition) to remain in those units and access the balconies without repair. Petitioner stated:

> We continue to chip away at the list of maintenance projects that are inherent to a 40+ year old building…After many years of patching leaks, Durafoam has applied a coat of high-density foam that will insulate the third floor and prevent leaks for many years to come.

See, Exhibits B and E, Del Medio Manor Narrative Q2 2015. Thus, Petitioner concedes that the building is old and in need of repair.

A preponderance of the evidence showed that the somewhat low[4] rents charged by Petitioner were appropriate given the physical and market conditions of the units. Tenants also testify that (1) some of the facilities listed in the Petition such as covered parking and storage units are available only for some tenants, (2) the elevator breaks down frequently and (3) the on-site manager is very difficult to reach; tenants are often advised to call a locksmith for lockouts rather than contact her.

Petitioner failed to prove by a preponderance of the evidence that the Tenants' testimony was incorrect. Petitioner provided no evidence other than the testimony of the onsite manager, Ms. Valle, who testified that she lived on the premises but conceded that she called locksmiths for late night lockouts and could not be on the premises at all times. *See, Testimony at Hearing; see also* Exhibits D and H *at Declaration of William Yu in Support of Response: Declaration of Tatiana Bartz in Support of Response: Declaration of Shiovawn Farrar in Support of Response: Declaration of Marion Pauek in Support of Response: Declaration of Ryan Shelley in Support of Response: Declaration of Sergey Buynitskiy in Support of Response: Declaration of Elena*

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[4] The rents actually charged cannot be termed "unusually low" as set forth in the Act, as they were less than a hundred dollars lower than the HUD Rents in most cases.

Francois in Support of Response: Declaration of Emrah Donur Toprak in Support of Response: Declaration of Laura Ikuta in Support of Response.

A preponderance of the evidence supports a rebuttal to any presumption a *Vega* Adjustment to the Net Operating Income for the Base Year is warranted. Credible evidence – as stated above -- clearly shows that the physical and market conditions of the property show that the Base Year rents as charged adequately reflect the condition of the property in the Base Year and so such an increase is "unnecessary for the Petitioner to receive a fair return on investment for the Property." *See, the Act*, at Regulation 6.G.3.d. In fact, Petitioner conceded that the rents reflected the condition of the Property and testified, "We do not charge anything close to market… We have always kept our rents 10-15% below market." *See, Exhibit E, Response by Lindsay Properties, LLC*, dated April 18, 2018, at 8.

As a result of all of these factors, although a number of Petitioner's units presumptively qualify for a *Vega* Adjustment based on the HUD rents contained in the Act at Regulation Chapter 6.G.3.a., a preponderance of the evidence supports a rebuttal to the presumption as discussed above. As a result of all of these factors, Petitioner's request for a *Vega* adjustment for these units is hereby denied.

5. **Adjusted Gross Income in the Base and Petition Years**:

Credible evidence and testimony shows proper Adjusted Gross Income of $1,662,979 in the Base Year and $1,863,756.14 in the Petition Year[5]. The Act requires Gross Income to be calculated using rents that are "lawfully collectible," not simply rents that were actually collected. *See, The Act* at Regulation 6.D.1. It appears that Petitioner used the *Vega* calculations to calculate income in the Base Year. Application of the *Vega* adjustment in this Petition would result in an increase in Gross Income for the Base Year as compared to the actual rent collected. Since no *Vega* adjustment is justified for any of the units in the building, those calculations shall not be used.

Upon a careful review of the Decision and a re-evaluation of the calculations made to arrive at Adjusted Gross Income for the Base Year and Petition Year, computation errors were found. Those errors are corrected in this Decision on Remand and corrections are incorporated

[5] See Appendix A.

herein[6]. Petitioner's stated total Rent Collected, imputed value of the manager occupied unit, and laundry income for the Base Year (together totaling $1,662,979.00) remains unchanged in this Decision.

The Petition Year income must include all lawfully collectable rent, including annual adjustments not yet taken. *See The Act* at Regulation 6.D.1. Credible evidence was presented by Tenants that unimplemented, available Annual General Adjustments were not included in this calculation by Petitioner as required by the regulations. Using amounts and information produced by Petitioner, Tenants show that the unimplemented general adjustments totaled $7,126.14. *See Exhibit 3 to Second Supplemental Response* at Exhibit M. Gross Income for the Petition Year shall include this amount and shall be adjusted to $1,863,756.14, as set forth in Appendix A.

6. **Total Operating Expenses in the Base and Petition Years**.

a. **Business License Fees**:

Evidence presented shows that Petitioner claimed $ 860.25 for California Apartment Association Fees as "Business License Fees" on December 22, 2017. It is clear that the Act prohibits "lobbying expenses" and specifically prohibits

> Contributions to lobbying efforts or organizations which advocate on behalf of apartment owners on local, State, or Federal legislative issues. . .

See, Act at Regulation 6(E)(2)(j). Emphasis added. At the Hearing both Parties discussed the CAA at length and cited the organization's website which shows that it is a predominantly lobbying organization. On its "About CAA" page, it states:

> What we achieve:
>
> Whether in city halls — or under the dome of the state Capitol — we have a proven track record of defeating onerous proposals that threaten the rental housing industry. We remind policymakers of our vital role our members serve in providing homes to the state's workforce, providing lawmakers with key insights as they frame key decisions. We provide members with up-to-date information on new and pending legislation, keeping our members abreast of California's complex web of laws and regulations. We help you navigate legal issues, master risk management and put best business practices in place. We help you better serve your customers and grow your business.

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[6] A detailed worksheet comparing the calculations averred in the Petition worksheets and the calculations made by the Hearing Officer is included as Appendix A to provide further clarity on how the adjustment was determined.

See, https://caanet.org/caa/. Emphasis added. It is clear from this credible evidence that this organization is at least 90% lobby-driven. Petitioner provided no evidence to controvert this fact other than vague testimony that it "used some forms" and that the CAA provides legal assistance (but did not specify for what). *See, Testimony at Hearing.*

Further, the evidence also clearly shows that Petitioner worked closely with the CAA's lobbying and legislative arm to overturn the CSFRA. Petitioner's lawyer, Hopkins and Carley, worked with the CAA in its intervention suit for several months to overturn the Act. *See, Invoice 469717, dated October 11, 2017* at Exhibit C, Tab N. Clearly this activity by the CAA was "advocate[ing] on behalf of apartment owners on local, State, or Federal legislative issues." *See, Act* at Regulation 6(E)(2)(j).

It is the Petitioner's burden to prove each alleged expense and demonstrate how it is included within the Operating Expenses as defined in the Regulations. Here, Petitioner failed to meet the Act's definition of Operating Expense, and failed to demonstrate why this expense should not be excluded by the Act at Regulation 6(E)(2)(j). Further, Petitioner did not apportion this fee to claim only its non-lobbying expenses.

Since the Act prohibits "Contributions to lobbying efforts or organizations which advocate on behalf of apartment owners[7] on local, State, or Federal legislative issues," this "fee" was properly excluded. *See, Act* at Regulation 6(E)(2)(j). Petition Year Business License Fees remain reduced to $11,661.82.

b. **Reasonable Management Expenses:**

The *Act* at Regulation 6(E)(l)(g) states:

> Reasonable management expenses (contracted or owner-performed), including necessary and reasonable advertising, accounting, or other managerial expenses. Management expenses are presumed to be six percent (6%) of Gross Income, unless established otherwise. Management expenses in excess of six percent (6%) of Gross Income are presumed to be unreasonable and shall not be allowed unless it is established that such expenses do not exceed those ordinarily charged by commercial management firms for similar residential rental properties;

See, The Act at Regulation 6(E)(l)(g). Emphasis added. As set forth above, Petitioner must prove, by a preponderance of the evidence, that its expenses did not exceed those "ordinarily charged by commercial management firms for similar residential rental properties." Petitioner presented absolutely no evidence on this issue. Petitioner's Management Fees -- according to its

[7] The Act is silent as to the percentage of these actions, but its clear language forbids them all.

own worksheets -- were 20.9% and 17.1% in the Base and Petition Years, respectively – far higher than management fees presumed reasonable in the regulations. Because Petitioner provided no evidence to rebut the presumption that the amounts identified in the Petition were reasonable in accordance with the regulations, Management Expenses were properly capped at 6% of Gross Income or $ 99,778.74 in the Base Year and $ 111,825.36 in the Petition Year. *See, Exhibits A and B* at Worksheets 2 and 3; *see also,* Appendix A.

c. **Reasonable Costs of Ordinary Repair, Replacement and Maintenance – Salaries**:

Petitioner has the burden of proving by a preponderance of the evidence as to what "salaries" were included in the "Management" rather than the "Operating Expense" categories in either the Base or Petition Years. At the Hearing, neither Petitioner's Representatives nor its bookkeeper, Ms. Whitman, could explain the difference and the documents provided with the Petition contained documentation for all of the salaries in the "Management Expense" section. *See, Testimony at Hearing.*

The paystubs provided by Petitioner demonstrated that claimed salary expenses were paid by Petitioner's management company, and not directly by Petitioner, and referenced work performed for several unrelated properties and entities – without breaking out what was done or why the expense was so categorized. *See, Exhibits A and B.*

At Hearing, neither Petitioner nor its bookkeeper could determine which salaries (1) were properly attributable to the Property (as opposed to its three others), or (2) for what exactly the amounts of salary were paid. No time sheets were produced and no evidence was presented as to what jobs each employee performed at the Property. Resumes failed to state exactly what each employee did, and often stated that different employees had the same skills, implying that the salaries overlapped for the same work. *See, Exhibit B*, at Tab E. Petitioner also failed to introduce any evidence that the salaries attributed to ordinary repair, replacement and maintenance costs were different from those classified as management expenses. *See, Exhibits A and B; see also, Testimony at Hearing.*

As set forth in attached Appendix A, the claimed Base Year Reasonable Cost for Ordinary repair was $ 333,782.62. The Hearing Officer disallowed the salaries in this category in the amount of $ 180,732.13, bringing the total expense allowed to $153,050.49 for the reasons stated herein and in the Original Decision. Petitioner failed to meet its burden of proving these differing costs by a preponderance of relevant and credible evidence. The Decision stands as to

this issue and the calculations shall not be revised.

7. **Base and Petition Year Capital Improvements – Pavers**:

There are several independent reasons for which the cost of pavers was properly excluded from Base Year Capital Improvements. First, Petitioner is prohibited from raising this issue for the first time on appeal. Petitioner thus waived this argument and it may not be considered on remand.

Second, the record was thoroughly searched and although this cost is listed on the worksheets, no evidence of an estimate, invoice, or payment was provided in the thousands of pages of Petitioner's documents.

Third, even if the Hearing Officer could consider Petitioner's new argument, the record, in fact, contradicts it. Apparently, on appeal, Petitioner stated that pavers were necessary so that electrical lines around the pool could be accessed.

In its documentation included with the Petition, Petitioner stated:

> We have begun the final phase of paving around the pool deck and remaining walkways. This has required the upgrade of 45 year old electrical lines that were running under the pavement.

See, Exhibit A, B, and Exhibit E at Petitioner's "Status Report for Del Medio Manor Apartments for the Period Ending 31 December 2015" at 1. Emphasis added. The installation of the pavers (the over-improvement) necessitated the moving of the electrical lines, not *vice versa*, as Petitioner would have the Committee believe.

Fourth, the Act prohibits capital improvement costs that are not necessary to achieve or maintain compliance with health and safety codes[8]. *See, Act* at Art. XVII, Sec. 1710 (a)(3)(C). Pavers create accessibility issues and can be dangerous for disabled tenants such as those who reside at the Property, and do not comply with health and safety codes as the Act requires. For example, Advisory R302.7.1, entitled, "Vertical Alignment" states:

> Pedestrian access route surfaces must be generally planar and smooth… Surfaces that are heavily textured, rough, or chamfered and paving systems consisting of individual units that cannot be laid in plane will greatly increase rolling resistance and subject pedestrians who use wheelchairs, scooters, and rolling walkers to the stressful and often painful effects of vibration. Such materials should be reserved for borders and decorative accents located outside of or only occasionally crossing the pedestrian access route. Surfaces should be designed, constructed, and maintained according to appropriate industry standards, specifications, and

[8] By so requiring, the Act incorporates those codes by reference.

recommendations for best practice.

See, United States Access Board, Guidelines and Standards, Advisory R302.7.1 "Vertical Alignment." Emphasis added. Further, the ADAAG regulations under the Americans with Disabilities Act require only certain pavers, installed to certain specifications. *See, https://www.access-board.gov/*guidelines-*and-standards/buildings-and-sites/113-ada-standards/background/adaag/422-a-guide-to-adaag-provisions.*

While Petitioner has the burden of proving by a preponderance of the evidence that the improvement complies with health and safety codes in order to claim it as an allowable expense under the Act, Petitioner provided no evidence that the pavers complied with ADA requirements or that they were installed to those specifications. The over-improvement may not comply with the ADA and thus is not "necessary to achieve or maintain compliance with health and safety codes." *See, Act* at Art. XVII, Sec. 1710 (a)(3)(C).

Petitioner failed to prove this element by a preponderance of any credible evidence. This expense shall remain excluded as a precluded expense and an over-improvement in both the Base and the Petition Year.

8. Petition Year Capital Improvements – Parking Lot Resurfacing:

Costs "that could have been avoided by ... reasonable diligence in ... making timely repairs" and "[o]ver-improvements" not approved of by the tenant in writing are also prohibited. *See, Act* at Regulation 6(F) (2)(a)-(c). Petitioner provided no evidence that the parking lot resurfacing was a necessary cost rather than an unnecessary over-improvement and provided only two "after" pictures to support parking lot resurfacing expenses of over $44,000[9].

The fact that Petitioner apparently failed to supply all relevant evidence in its possession to support its Petition -- after being given numerous opportunities to do so (see discussion above) -- is not a proper basis to challenge the Decision, and any evidence not presented at the Hearing cannot be considered herein.

Conversely, Tenants testified that the property had been resurfaced two (2) years prior. *See, Exhibits D and H.* This expense was excluded from the calculation in the original decision as an over-improvement and said calculation shall not be revised here.

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[9] Petitioner's representative apparently informed the Rental Housing Committee that she would have provided more photos if asked by the Hearing Officer. It is the Petitioner's burden to provide all available evidence to support its Petition by a preponderance of the evidence, whether or not the Hearing Officer requests it. This Petitioner was given at least four (4) opportunities to do so and chose not to afford itself of them.

9. Petition Year Capital Improvements – Elevator

Similarly, Petitioner failed to provide any evidence that the $14,000 elevator "modernisation [sic]" expense was justified in the Petition Year. *See, Invoices 44109,44123, 44467 and 44468, citing estimate for proposal 7907 for Elevator* at Exhibit C. The Act at 1710(a)(2)(C) only allows capital improvement costs to be factored in a fair rate of return determination

> "[W]here such capital improvements are necessary to bring the Property into compliance or maintain compliance with applicable local codes affecting health and safety, and where such capital improvement costs are properly amortized over the life of the improvements."

See, The Act at §1710(a)(2)(C). *Emphasis added.* The only evidence Petitioner provided in the record is four invoices for progress payments for a "modernisation [sic] job". Petitioner provided no elevator permits, inspection documents, proposal documents or otherwise that would describe further the work done and for what purpose, for either the Base or Petition Years.

The elevators were not functional thereafter, as evidenced by subsequent invoices, and credible testimony by several Tenants. *See, Exhibits D and H at Declaration of Leah Symekher in Support of Response: Declaration of Marion Pauck in Support of Response; Declaration of Kathy Anyanwu in Support of Response; Declaration of Elena Francois in Support of Response.* A review of elevator service provider invoices in the Base Year, when the modernization work was allegedly performed, and the service provider invoices in the Petition Year seems to support Tenants' testimony. The service provider categorizes invoices as either "maintenance", "other" or "modernization [sic]". Maintenance invoices seem to be issued monthly and for a constant amount. Invoices in the "other" category reference problems and service calls where the elevator was nonfunctional. The amount of invoices in the "other" category is $1,480 in the Base Year as compared to $4,580 in the Petition Year, well after the modernization work was done. *See, Trans Bay Elevator Invoices* at Exhibit C.

Petitioner offered no testimony at the Hearing regarding this expense. Whether the unexplained modernization expense was a necessary pre-condition for further repairs appears to be an issue of fact that should be supported by a preponderance of the evidence. Petitioner failed to do so. Petitioner failed to provide any parts lists, laborer hours, or any discussions of the work actually performed in support of this claimed expense.

Conversely, many Tenants testified that the elevator failed to work after the repairs were

performed, and Petitioner's subsequent invoices confirm that the elevator was not functional thereafter. This evidence is considered to be credible and calls into question the efficacy and necessity of the repair. Since there are apparently disabled tenants living on upper floors, this elevator problem causes accessibility issues, and may violate the ADA. *See, Exhibits D and H at Declaration of Leah Symekher in Support of Response: Declaration of Marion Pauck in Support of Response; Declaration of Kathy Anyanwu in Support of Response; Declaration of Elena Francois in Support of Response*. Since Petitioner failed to prove this expense was necessary and the Tenants showed by credible evidence that the expense did not benefit them, or their Units, said expense is excluded from both the Base Year and the Petition Year, reducing Base Year Capital Expenses to $ 11,495.20 and Petition Year Capital Expenses to $11,495.20.

10. <u>The $1,100.00 P.W. Stephens Environmental Expense was Double-Counted.</u>:

Petitioner presented no evidence, either at the hearing, or in its documentation to refute that the P.W. Stephens Environmental Expense of $1,100.00 was double counted in the Petition Year as Tenants argued. The check was listed twice for the same amount in Petitioner's documentation. *See, Exhibits B and C*. Petitioner failed to challenge the issue with any evidence or explanation, much less by a preponderance of the evidence. Thus, the Petition Year calculation shall not be revised.

11. <u>Total Operating Expenses</u>:

As set forth in Appendix A, Operating Expenses for the Base and Petition Years will be amended as set forth herein:

<u>Category</u>	<u>Base Year</u>	<u>Petition Year</u>
Rental Housing Fees	N/A	$ -0-
Business License Fees	$ 3,588.79	$ 11,661.82
Real Property Taxes	$ 36,387.16	$ 37,008.88
Petitioner Utility Costs	$ 128,463.67	$ 155,103.23
Insurance	$ 28,364.89	$ 21,005.43
Reasonable Repair, etc.	$ 153,050.49	$ 168,141.88
Reasonable Management Expense	$ 99,778.74	$ 111,825.37
Reasonable Capital Improvement	$ 11,495.20	$11,495.20
Allowable Attorneys' Fees	-0-	-0-
Owner Performed Labor	-0-	-0-

Other Operating Expenses	$ 58,922.73	$ 51,819.10
TOTAL OPERATING EXPENSE	$ 520,051.67	$ 568,060.91

12. The Adjustment Shall Be Divided Equally Across all Units

The Act states:

> Upward Adjustments of Rents authorized by Hearing Officers and/or the Rental Housing Committee shall be allocated equally among all Rental Units in the property, subject to the condition that in the interests of justice, a Hearing Officer and/or the Rental Housing Committee may allocate Rent increases in another manner necessary to ensure fairness and further the purposes of the Act.

See, Act at Regulations 6 (J). Petitioner admitted that it does not charge expenses to any specific unit, but charges expenses across all of them, thus, the same should apply to any rent increases under the Act. *See, Amended Petition*, at Worksheet 6.

Petitioner demanded that any rent increases allowed be applied only to 56 of the 104 units on the Property in arbitrary amounts ranging from $115 to $445. Petitioner failed to cite any provision of the Act in support of her demand. Further, Petitioner failed to provide any evidence that an equal allocation would fail to ensure fairness and further the purposes of the Act. Fairness dictates an equal rent increase allocated over all of the Units in the Property. On the contrary, to apportion the upward adjustment in inconsistent, excessive amounts to only certain tenants -- rather than applying a modest increase to all units in the Property, clearly conflicts with the Act's purpose of promoting affordable rents "to the greatest extent allowable under California law." *See, the Act* at Art. XVII, Sec. 1700.

As a result, any rent increase hereby granted shall be applied equally to all 104 units of the Property. Since Petitioner only petitioned for rent increase for 67 of the 104 units, the 67 Affected Units shall be charged based on using 104 total units for the calculation.

V. Rent Increase Calculation:

In light of corrections made to both the Base Year and Petition Year Adjusted Gross Income and calculations of net operating income (See Appendix A), the maintenance of net operating income adjustment is as follows:

	Base Year	Petition Year
Adjusted Gross Income	$ 1,662,979.00	$ 1,863,756.14

Total Operating Expense	$ 520,051.67	$ 568,060.91
Net Operating Income ("NOI")	$ 1,142,927.33	$ 1,295,695.23
NOI Plus CPI Adjustment	Base Year	Petition Year
Net Operating Income	$ 1,142,927.33	$ 1,295,695.23
CPI	371.075	421.940
CPI Percentage	14% or 1.14	
Adjusted NOI	$ 1,302,937.16	
Petitioner NOI Adjustment		($ 7,241.93)
Allowed Rent Increase/Month		$ 603.49
Allowed Increase/Unit/Month		$ 5.80

Petitioner may charge rent in the amounts set forth above after this Decision becomes final and upon Petitioner's serving proper notice of such increase to each tenant at least 30 days prior to implementing the rent increase pursuant to California Civil Code Section 827.

VI. Decision

Based on the above findings of fact and conclusions of law, it is hereby decided that, The Petition filed by Petitioner is **hereby granted in part and denied in part** as follows:

1. The Petition is **GRANTED** in that Petitioner is hereby granted a rent increase in the amount of $ 5.80, which may be imposed on the Affected Units in the Property that were subject to this Petition and is separate from and in addition to any Annual General Adjustment that may be applicable from 2017 or 2018.
2. The Petition is **DENIED** as to the request to apportion all of the available upward adjustment against only the Affected Units in differing amounts;
3. Petitioner may charge rent in the amounts set forth above after this Decision becomes final and upon Petitioner's serving proper notice of such increase pursuant to California Civil Code Section 827.

SO ORDERED.

Dated: December 10, 2018

Jil Dalesandro, Hearing Officer

MNOI Fair Return Calculation - 141 Del Medio

differences from Applicant's Petition Submissions noted with bold outline

		Using BY Rents Lawfully Collected WS 2, Line 1.a.1					
		Petitioner Worksheets submitted 12/22/17	**Petitioner Worksheet Submissions on 4/4/2018**	***Hearing Officer***	**Petition Worksheets submitted 12/22/17**	**Petitioner Worksheet Submissions 4/4/2018**	***Hearing Officer***
Units on Property	**104**						
		Base Year			**Petition Year**		
CPI	14%	**371.072**			**421.94**		
Gross Income							
Rent Collected (WS 2, Line 1.a.1)		1,636,315.00	1,636,315.00	*1,636,315.00*	1,815,296.00	1,827,596.00	*1,834,722.14*
Vega Adjusted Rent (WS 2, Line 1.a.2)							
Imputed Rental Value - Ppty Mgr occupied Unit (WS 2, Line 1.b.)		17,028.00	18,000.00	*18,000.00*	15,403.00	19,800.00	*19,800.00*
Laundry Income (WS 2, Line 1.c.)		8,664.00	8,664.00	*8,664.00*	9,234.00	9,234.00	*9,234.00*
Interest from Sec. Dep. (WS 2, Line 1.d.)		25.00			25.00		
Adjusted Gross Income (WS 2, Line 5)		**1,662,032.00**	**1,662,979.00**	***1,662,979.00***	**1,839,958.00**	**1,856,630.00**	***1,863,756.14***
Less Allowable Operating Expenses							
1. Rental Housing Fees		-	-	-			
2. Business License Fees		3,588.79		*3,588.79*	12,522.07	12,522.07	*11,661.82*
3. Real Property Taxes		36,387.16	36,387.16	*36,387.16*	37,008.88	37,008.88	*37,008.88*
4. Utility Costs		128,463.67	128,463.67	*128,463.67*	155,103.23	155,103.23	*155,103.23*
5. Insurance		28,364.89	28,364.89	*28,364.89*	21,005.43	21,005.43	*21,005.43*
6. Reas. Costs for Ord. Repair (WS 3.1A, 3.1B)		311,357.83	333,782.62	*153,050.49*	320,456.21	358,811.13	*168,141.88*
7. Reasonable Mgmt. (WS 3.2)		84,747.00	71,709.00	*99,778.74*	108,918.00	111,397.80	*111,825.37*
8. Reas. Cap. Imprv. Amortized (WS 3.3)		17,624.02	18,538.38	*11,495.20*	24,363.34	23,016.57	*11,495.20*
9. Allowable Attys fees					17,262.93	17,262.93	-
10. Owner Performed Labor (WS 3.4)						6,144.00	-
11. Other Op. Exp. (WS 3.5)		79,335.06	79,335.06	*58,922.73*	123,391.54	84,103.54	*51,819.10*
Total Operating Expenses (WS 2, Line 12)		**689,868.42**	**696,580.78**	***520,051.67***	**820,031.63**	**826,375.58**	***568,060.91***
Consideration for unusually high or low expenses (WS 3.6)							
Net Operating Income (WS 4, Line 3)		**972,163.58**	**966,398.22**	***1,142,927.33***	**1,019,926.37**	**1,030,254.42**	***1,295,695.23***
NOI Adjustment = 100% of CPI Increase (428.26/371.075)-1 (WS 5, Line 2)		**14.0%**	**14.0%**				***14.00%***

BOLDED FRAME = ADJUSTED AMOUNTS IN DECISION

Petition Year NOI (WS 5, Line 1)	*1,295,695.23*
Adjusted Base Year NOI Entitlement = Base Year NOI x CPI Increase (WS 5, Line 3)	*(1,302,937.16)*
MNOI Adjustment (Current NOI - Entitlement) (WS 5, Line 4)	*(7,241.92)*
NOI Adjustment/Unit /Mo (WS 5, Line 6)	***(5.80)***

APPENDIX A