RENT BOARD

August 24, 2022
5:00 PM

ZOOM INFORMATION:

Please click the link below to join the webinar:
https://portlandmaine-gov.zoom.us/j/82339838139?pwd=OHdNWGZmRmJlREQ4VlJKMUh0MjVtUT09
Passcode: 767680
Or One tap mobile :
US: +13126266799,,82339838139#,,,,*767680# or +16469313860,,82339838139#,,,,*767680#
Or Telephone:
Dial(for higher quality, dial a number based on your current location):
US: +1 312 626 6799 or +1 646 931 3860 or +1 929 205 6099 or +1 301 715 8592 or +1 564 217 2000 or +1 669 444 9171 or +1 669 900 6833 or +1 253 215 8782 or +1 346 248 7799 or +1 386 347 5053
Webinar ID: 823 3983 8139
Passcode: 767680
International numbers available: https://portlandmaine-gov.zoom.us/u/kbYtvwgkR

ROLL CALL:

APPROVAL OF MINUTES

July 27, 2022 Minutes

COMMUNICATIONS:

Please note: Written public comment must be received via email (rentboard@portlandmaine.gov) by 12pm the day before the scheduled meeting. Please make sure that the subject line reads "Written Public Comment".

UNFINISHED BUSINESS:

Annual Report Update and Drafts Review

NEW BUSINESS

Rent Increase Application - Public Comment
Landlord: Marc Foster
Property Address: 90 Brackett St, all 3 units
CBL: 057-E-006-001
Type of Increase: Capital Improvement Costs

Request for Reconsideration of February 2022 Trelawny Order

ADJOURN

Minutes

Remote Rent Board Meeting - Held Via Zoom
Wednesday, July 27, 2022

Start time: 5:04pm

II. Roll Call

Elliott Simpson, Tenant, District 3 - Chair
Barbara Vestal, Landlord, At-Large - Vice Chair
Amir Familmohammadi, Tenant, District 1
Vacant, District 2
Ian McCracken, Landlord, District 4
Vacant, District 5
Elias Kann, Tenant, At-Large

Staff present:

Katlyn Sawyer, Licensing & Registration Coordinator

III. Minutes - 00:01:08

The Vice Chair moves to accept the minutes as written. Seconded by Elias Kann. Vote: 5-0 (two vacancies on the Board).

IV. Communications - 00:02:40

A. Please note: Written public comment must be received via email (rentboard@portlandmaine.gov) by 12pm the day before the scheduled meeting. Please make sure that the subject line reads "Written Public Comment".

B. Written Public Comment

One written public comment was received.

V. Unfinished Business - 00:05:27

A. Annual Report Update and Drafts Review

The Chair does a brief review of drafts submitted.

It was also requested that this agenda item stays on as Unfinished Business for the next meeting.

The Board had also discussed the timeline in filling the current vacancies on the Board and future ones to come next year.

B. **Rent Increase Application - Public Comment - 00:22:36**
Landlord: East Danforth LLC
Landlord's Representative: David Bergeron with Port Prop Mgmt Property
Address: 71 Danforth St, all 7 units
CBL: 040-A-019-001
Type of Increase: Capital Improvement Costs

The Landlord's Representative, David Bergeron, presented his view on the methodology for a Fair Rate of Return.

00:41:19 - Board returns to the application at hand.

There were no witnesses.

No tenants were addressed to comment.

Public comment was available, however, none were received.

01:01:59 - The Chair makes a motion that the Board accepts the alternative method proposed by the applicant for this specific property, to accept the application as presented. Seconded by Amir Familmohammadi. Vote: 5-0 (two vacancies)

C. **Rent Increase Application - Public Comment - 01:07:57**
Landlord: Eastern Residential LLC
Landlord's Representative: David Bergeron w/ Port Prop. Mgmt Property
Address: 304 Eastern Prom, Units 16-1 to 16-B
CBL: 015-B-001-002
Type of Increase: Capital Improvement Costs

There were no witnesses.

No tenants were addressed to comment.

Public comment was available, however, none were received.

01:11:31 - Amir makes a motion to approve the application using the straight-line 10-year amortization. Seconded by Elias. Vote: 5-0 (two vacancies).

D. **Rent Increase Application - Public Comment - 01:12:35**
Landlord: Shepley LLC
Landlord's Representative: David Bergeron w/ Port Prop. Mgmt Property
Address: 18 Casco St, all 62 units
CBL: 037-C-006-001
Type of Increase: Capital Improvement Costs

There were no witnesses and no tenants spoke as objectors.

Public comment was available, however, none were received.

01:28:10 - Ian makes a motion to accept the application as a 10-year amortization. Seconded by the Vice Chair. Vote: 3-2 (Amir & Elias voted against the motion, and there are 2 vacancies on the Board). This did not pass.

01:39:09 - Amir makes a motion to accept the Landlord's application using the straight-line amortization schedule, but for 20-years. Seconded by Elias. Vote: 2-3 (Ian, the Vice Chair, and the Chair voted against the motion - with two vacancies on the Board). This did not pass.

01:51:37 - Ian makes a motion to accept the application using the straight-line amortization over 10 years. Seconded by Amir. Vote: 5-0 (two vacancies on the Board).

E. Rent Increase Application - Public Comment - 01:52:47
Landlord: Ambassador LLC
Landlord's Representative: David Bergeron w/ Port Prop. Mgmt Property
Address: 37 Casco St, all 92 units
CBL: 037-D-007-001
Type of Increase: Capital Improvement Costs

There were no witnesses.

No tenants were addressed for comments.

Public comment was available, however, none were received.

01:55:37 - Amir makes a motion to approve the Landlord's application with straight-line amortization over 10 years. Seconded by Elias. Vote: 5-0 (two vacancies).

01:56:15 - The Board returns to the decision forms for final edits and votes. Elias has taken over drafting these forms for the Chair.

37 Casco Street

Some edits were made to the form

02:05:08 - The Chair made a motion to accept the decision form as written. Seconded by Amir. Vote: 5-0 (two vacancies)

18 Casco Street

Some edits were made to the form

02:10:57 - Amir makes a motion to accept the decision form as written. Seconded by the Chair. Vote: 5-0 (two vacancies).

02:10:03 - The Chair made a motion that the decision form for 37 Casco Street be edited to remove the following sentence regarding "an average 1.60% increase" from the Background section. Seconded by Elias. Vote: 5-0 (two vacancies).

304 Eastern Prom. (aka Walnut Street)

Some edits were made to the form

02:15:42 - The Chair makes a motion to accept the decision form as written. Seconded by Amir. Vote: 5-0 (two vacancies)

71 Danforth Street

Some edits were made to the form

02:20:02 - Amir makes a motion to approve the decision form as written. Seconded by the Vice Chair. Vote: 5-0 (two vacancies).

VI. New Business

There were no items for this section.

02:20:50 - Elias motions to adjourn. Seconded by Amir. Vote: 5-0 (two vacancies).

VII. Adjourn

Meeting end time:7:25pm

CITY OF PORTLAND
LANDLORD APPLICATION FOR RENT INCREASE SUMMARY

Date of Hearing:
Wednesday, August 24, 2022

Landlord Name and Address:
Marc Foster
29 Taylor Street #2
Portland, ME 04102

Owner Name and Address:
Same as above

Property Address, Unit(s), and CBL:
90 Brackett Street, Units 1-3
CBL: 057-E-006-001

Tenants/Interested Parties:
Yes, in all 3 units

Type of Request:
Capital improvement costs, including financing costs (6-234(b)(5)(a))

Base Rent, Current Rent, Proposed Rent, and Number of Bedroom/Bathroom:
See attached

Summary of request:
The Landlord has filled out and submitted the accompanying worksheet for the type of request marked on the application. The total amount of capital improvement costs is $53,356.94, which spanned from 2020-2022.

In addition to the worksheet, the Landlord provided their own breakdown for each receipt submitted that entailed what the capital improvement was for, the unit(s) it applied to, and in what year it occurred.

The capital improvements made to the property included:
-a new heating system for unit 2
-egress deck and stairs for units 2 and 3
-a new roof
-furnaces for units 1 and 3
-a water heater for unit 2

90 Brackett Street					
Unit #	**Base Rent**	**Current Rent**	**Proposed Rent**	**Number of Bedrooms**	**Number of Bathrooms**
1	$985.00	$1,083.00	$1,310.00	1	1
2	$720.00	$792.00	$1,043.00	1	1
3	$1,585.00	$1,664.00	$2,073.00	2	1

JEWELL & BULGER, P.A.
Attorneys at Law
511 Congress Street, Suite 502
Portland, ME 04101
T: (207) 774-6665
F: (207) 774-1626

Thomas F. Jewell, Esq.
tjewell@jewellandbulger.com

Paul S. Bulger, Esq.
pbulger@jewellandbulger.com

July 15, 2022

rentboard@portlandmaine.gov

Mr. Austin Sims, Chair
Rent Board
City of Portland
389 Congress Street
Portland, ME 04101

RE: Trelawny Tenants Union v. 657 Trelawny, LLC
Request for Reconsideration

Dear Mr. Sims:

I am writing on behalf of Geoffrey I. Rice and Trelawny 657, LLC ('the Landlord"). The purpose of this letter is to request reconsideration of a portion of the ruling relative to the application of the Rent Control Ordinance, Article 6-234(b)(2). What follows is a reference to the provision and the issues related to interpretation of the Ordinance followed by a brief summary of rules of statutory construction and argument. A copy of the decision is attached.

Rent Control Ordinance 6-234(b)(2)

The Portland Rent Control Ordinance is set forth is §6-230 et seq. of the Portland Code. §§6-233 and 6-234 describe the terms and requirements for rent increases. §6-233 defines Base Rent as follows:

> (a) Base Rent for Current Covered Units. Beginning on January 1, 2021, each Covered Unit shall be registered with the City in accordance with Section 6-151(c). Such registration must include proof of the rent charged by the Landlord for each Covered Unit as of June 1, 2020 (i.e., through presentation of a valid Rental Agreement, rent payment receipt of other acceptable means within the opinion of the City). This amount shall be the Base Rent for purposes of the Rent Stabilization Ordinance.

§6-234 describes and limits circumstances for rent increases.

§6-234(b) defines and limits rent adjustments for *New Tenancy*, as follows:

> §6-234(b)(3) A Landlord may increase the rent on a covered unit by 5% of the Base Rent in addition to any other allowable

> increases when a new tenant occupies a unit. The increase may be applied at most once per year, regardless of the number of new tenancies.

The Landlord does not dispute portions of the decision pertaining to stipulated Landlord allocations or DID as part of tax assessments for application of TRRA.

Trelawny 657, LLC is requesting reconsideration of the following:

Issues

1. Decision dated February 23, 2022 (par. 14). The Landlord requests that the methodology for allocation of the TRRA exclude unoccupied and unfinished square footage; and

2. Paragraph 19 levies fines against the Landlord based upon illegal notices of rent increases which violations are not expressly prescribed in the Ordinance.

Facts

Mr. Rice, and the Rice companies increased rents on 43 turnover units ("new tenants") during the period between June 1, 2020 and the 30th day of November of 2021. In each case, except for one, rents were increased by 5% or less in accord with the limitation on new tenancies under §6-234(b)(3).

The building, unit and rent increase are described in the attached summary. In addition to the New Tenant List, rent increases were imposed on new tenants at the 657 Congress Street building ("the Trelawny"), owned by Trelawny 657, LLC, also owned by Mr. Rice.

Mr. Rice first received notification that the rent increases under new tenants who leased between June 1, 2020 and November 3, 2020 (the effective date of the ordinance), were unlawful. (See summary attached).

Mr. Rice immediately notified the 8 new tenants in the Trelawny Building that their rents were being reduced to comply with the notice form the City of Portland.

Mr. Rice submits that the notice is erroneous and that all "New Tenants" whose leases increase rents by 5% given any calendar year beginning June 1, 2020 are lawful under §6-234(b)(3).

Legal Argument

Rules for the interpretation of ordinances are well established in the law and rules of statutory construction. The administrative officer (the Portland Housing Safety Office) is entitled to a reasonable interpretation of the Ordinance.

Where the Ordinance is unambiguous, it is not subject to interpretation and must be applied in accordance with its plain meaning. When reviewing construction of a statute, the reviewing authority must look to the plain meaning of the statutory language as a means of effecting legislative intent. *Coker v. City of Lewiston*, 1998 ME 93, ¶. 7§6-234(b)(3) clearly and unambiguously addresses one particular situation involving turnover leases for which the Landlord relets the property to "New Tenants". A "New Tenant" is not an existing tenant subject to lease renewal. The term "New Tenant" is not defined in the definitions section of the Ordinance, §6-221. That said, the plain meaning of the term is clear and requires no explanation.

Taken as a whole from the four corners of the Ordinance, it is clear that Landlords may not increase rents for new tenants over Base Rent. Furthermore, for new tenants after November 3, 2021, rent cannot be increased more than 10% (annually) when taking into account "other allowances" permitted under §6-234(b).

1. Methodology for allocation of the TRRA.

At the Public Hearing on January 26, 2022, continued to February 9, 2022, the Rent Control Board (hereinafter the "RCB") excluded basement square footage in its calculations of the property tax increase attributable to tenant square footage. The Order does not articulate a specific calculation in its order. Based upon the discussion, and the Landlord's stipulation, the Board concluded that the increase in property taxes for the current calendar year is $89,000 and that the Landlord's first floor commercial space and the Landlord's apartment should be excluded from the calculation of property tax increases allocable to Tenants under TRRA. The RCB further concluded that the basement square footage should be similarly excluded from the total square footage when allocating the tax increase to Tenants. In other words, basement space is not part of Tenant square footage and is therefore allocable to the Landlord when determining allocation of tax increases. The effect of such determination is excluding the basement, the first floor, and the Landlord's apartment when determining the percentage of the total building allocable to Tenants.

Calculations of percentages are as follows:

Total building square footage **including** basement:

13,390 sq. ft. x 8 floors + basement = 120,510

Landlord sq. ft. (1st floor and penthouse) = 13,390 + 3,300 = 16,690

Tenants' share of sq. ft. = 103,820/120,510 = 86.15%

Landlord's share of sq. ft. = 16,690/120,510 = 13.85%

Tax increase of $89,000 allocable to Tenants = $89,000 x 86.15% = $76,673.50

The logic of including the basement square footage in the Tenants' share of the building is compelling. For example, consider a 6 unit building in Portland with 3 stories and a basement. In that case, the basement represents 25% of building square footage. However, if taxes increase by $12,000 in one year, the Landlord will reasonably expect to allocate 100% of the increase to his 6 tenants, the equivalent to $2,000 per unit. Only by excluding the basement from the calculation can the result be obtained.

The Trelawny building at 657 Congress Street cannot be distinguished from other buildings with respect to inclusion of the basement or exclusion of the basement.

Landlord's Position

The Landlord agrees that the entire first floor is not Tenant square footage. However, the Landlord disagrees that the basement is not part of Tenant space footage. The basement is used exclusively for storage of appliances and boilers, pumps and systems servicing the Tenants in the building. Either the basement should be excluded from building square footage when making the allocation, or, the basement should be included as part of Tenant square footage when making the allocation.

At the 657 Congress Street building, the allocable property tax increase can therefore be expressed as follows:

First Concept

Total building square footage includes the basement square footage.

There are two ways to achieve a full allocation of the property tax increase to the Tenants in the building for example:

First concept, the basement square footage can be included in the entire rentable square footage of the building, with all Tenants responsible for the tax increase attributable to basement square footage, pro rata. Or;

Second concept, the basement can be **excluded** entirely from the building square footage calculation. Afterall, the tax valuation of a property is based upon improved occupied square footage, and generally speaking, does not include square footage use for storage or square footage below grade.

8 floors at 13,390 =	107,120 sq ft.
Basement	13,390 sq ft
	120,510 sq ft.
Allocable to Landlord:	
First floor commercial space	13,390 sq. ft.

Landlord apartment	3,300 sq. ft.
Total	16,690 sq. ft.
Landlord's Share	16,690/120,510 = 13.85%
Tenants' Share	103,820/120,510 = 86.15%

Concept 2: Exclude basement from building square footage

Total improved building square Footage (excludes basement)	107,120
Landlord's square footage:	
A. Commercial/first floor	13,390
B. Landlord apartment	3,300
Total Landlord percentage	16,690/107,120 = 15.58%
Tenants' share	90,430/107.120 = 84.42%

These two concepts fully account for the unimproved basement space as the formula could be applied to all multi-unit buildings in the City and the proper allocation of unimproved space for purpose of determining a percentage allocation between Landlord and Tenant.

Consider further that the same allocation applies equally as well to capital improvements in the common areas. For example, a new boiler or furnace, or, or a sprinkler system, the elements for which take up basement space and benefit all rental units based on square footage of each unit.

Issue II
Rent Freeze

The RCB adopted a retroactive rent freeze effective June 30th through December 31, 2020 by opinion of corporation counsel. The Ordinance itself does not include a rent freeze and certainly does not include a retroactive rent freeze.

Furthermore, the Rent Control Ordinance adopted by citizen initiative does not authorize a rent freeze retroactive to June 1, 2020. There is no statutory construction or authority in the law that permits such a radical application of the law.

It might be necessary to implement a rent freeze in order to establish a mechanism by which to collect rent data (baseline rent) before adopting rent control, but such ends could be established by freezing rent prospectively instead of retroactively.

A retroactive rent freeze is an *ex post facto law* that prevents a Landlord for adopting a rent increase before the rent control law had been adopted. As stated above, Mr. Rice had 43 rent renewals during the period beginning June 1, 2020, 8 of which were "new Tenants" in the 657 building. Eight new leases were negotiated establishing increased rents between June 1 and December 31, 2020. The Rule established by the RCB requires that the Landlord abrogate the lease contract and refund rent for the period June 1, 2020 and November 2020 for each of the 8 leases, based on a law that did not exist until November 3, 2020 when rent control was adopted.

Assuming arguendo that for the sake of argument that the City must establish a waiting period during which to process baseline rent data for each Landlord, and each building and each apartment, the ill effects of a taking of property without due process could be achieved by freezing rents for a period beginning December 1, 2021 and ending June 1, 2022 during which time rent data and baseline rents could be collected.

Issue III
Penalty for Defective Notices

1. Penalty

The Landlord has been penalized based upon the decisions of the Board that cannot be sustained.

As set forth above, the allocation of taxes to TRRA is incorrect.

Further, the text of the ordinance does not include a retroactive rent freeze for June 30, 2021 to November 3, 2021. Yet, the RCB and City counsel adopted such a rent freeze. The rent freeze, the allocation and the penalty must therefore be reconsidered.

There is no question that notices sent to Tenants during the time frame in question beginning January 1, 2020 were defective in light of the RCB's interpretation of provisions of the Ordinance. However, it is incontrovertible that the defects in the notices are a direct consequence of the vague provisions of the Ordinance and the vague definitions set forth in the Ordinance.

The RCB Order of February 23, 2022 provides, with respect to notices:

> 18. Based on the findings with respect to the method of allocation of calculating TRRA for the Tenants, the notices of rent increases issued to the Tenants are incorrect.

Consider that the Tenants challenged the Notices on three grounds (see Order, p. 2 Par 2), and the Landlord stipulated to most of the disputed issues (commercial space and office allocation and personal space allocation) and prevailed on the issue of whether the DID assessment is a tax allocable to the Tenants.

Under the Ordinance, the Landlord must give 75 days' notice of a rent increase which, by admission, cannot be accurately calculated under the definitions and terms of the Ordinance without a decision by the RCB providing the definition.

The proceedings before the RCB on these questions demonstrated painfully the deficiencies in the Ordinance, and the difficulty of applying the law. In this case, by way of example, the questions of whether DID is a tax or an assessment seems facially self-evident. Yet, the RCB debated the question for hours.

Secondly, the Ordinance is clear that a property tax increase may be passed along to Tenants as part of TRRA, but the Ordinance says nothing about basements and common areas in residential buildings.

That said, the increased tax for 657 Congress Street was due and payable beginning April 2021. The Landlord would either have to assess Tenants for the increased cost or suffer the loss. Furthermore, the Landlord must provide 75 days' notice of the rent increase to *Tenants for whom leases would be renewing*.

Furthermore, the Ordinance is silent on methodology to allocate tax increases to individual units as TRRA. Undoubtedly, most Landlord's will allocate equally to each unit. The RCB rejects this methodology in favor of pro rata rent increases based on relative square footage.

Mr. Rice takes no issue with the determination of the RCB relative to its ruling on how to allocate under these circumstances. However, to the extent that the RCB finds that equal allocation is "unreasonable" therefore justifying a penalty (see Order, par. 14). Mr. Rice disagrees.

Respectfully, the Board should reconsider the imposition of a penalty under these circumstances. Clearly, there is no intent to favor or disfavor individual Tenants. Per capita distribution, by units will be the rule for most properties and most Landlords, and the Ordinance provides no guidance on how to allocate property taxes among units of varying sizes. Unfortunately, there is no rule to follow.

Now that the RCB has adopted rules for the definition of a property tax and for allocation, it is fair to say that Landlords should follow all of such published rules. On the other hand, it is unjust to impose a penalty on the Landlord *in this case* in which the Ordinance is either ambiguous, or more often, silent with respect to the rule to be enforced.

Wherefore, the Landlord prays for the following relief:

1. That the retroactive effect of the rent freeze adopted June 1, 2020 be rescinded;

2. That leases and all rent increases adopted between June 1, 2020 and November 3, 2020 (the date of enactment) be declared lawful;

3. That Notices to Tenants for rent increases related to tax increases for which there is not a specific rule or guidance not be subject to penalty; and

4. That the RCB fines against Trelawny 657, LLC be vacated.

Remedy Requested

Wherefore, Mr. Rice requests that all new tenant increases of 5% be approved for the calendar year beginning November 3, 2020. In addition, Mr. Rice request approval of all New Tenant increases of 5% or less between June 1, 2020 and November 3, 2020, the period prior to adoption of the Rent Stabilization Ordinance.

Furthermore, Mr. Rice requests that all violations, notices of violations, and penalties related to New Tenant rent increases under 6-234(b)(3) be rescinded. In that connection it is noteworthy that the Rent Control Board failed to make findings of fact relative to "so-called violations" and notices of violations of the Ordinance alleged to have been committed by Mr. Rice and the Rice Companies. The Rent Control Board did not allow public comment or participation by the affected party, or his counsel. The process and the ruling are clear abuse of discretion. Given the order made on February 10th, and the publication of such fines, Mr. Rice requests that the Rent Control Board issue a public apology to Mr. Rice in order to mitigate reputational harm. Moreover, the finding of violations of rent control provisions not expressly set forth in the ordinance, as with the suspension of rent increases between June 30, 2021 and November 3, 2022 are a clear abuse of discretion and therefore must be reversed.

Respectfully Submitted by,

Paul S. Bulger

PSB/cmk

Attachments

cc: Zachary Lenhert (via email zlenhert@portlandmaine.gov)
Kari Twaite, Esq. (w/attachments)
Geoffrey I. Rice (w/attachments)