



Rent Stabilization Board
Legal Unit

DATE: May 18, 2023
TO: Honorable Members of the Berkeley Rent Board
FROM: Honorable Members of the LIRA Committee
By: Matt Brown, General Counsel *MBS*
Ollie Ehlinger, Staff Attorney

SUBJECT: Proposed amendments to Regulations 883 [Waiver of Penalties and Interest on Delinquent Registration Fees] and 884 [Other Waiver Requests] to streamline the waiver process – Second Reading

Recommendation

That the Board adopt the proposed changes to Regulations 883 and 884 articulated herein. The LIRA Committee reviewed these amendments on April 3, 2023, and voted to recommend their approval to the full Board. The Board voted to adopt these amendments on first reading at its April 20, 2023 meeting.

Background

The Ordinance requires landlords to fully pay annual registration fees on all rental properties on or before July 1 of each year. Following the July 1 deadline, the Board assesses a 100% penalty on all delinquent registration fees.¹ For all delinquent accounts, the Board assesses a further 100% penalty for unpaid registration fees every six months thereafter.

While the Ordinance does not allow the Board to waive the collection of registration fees, it provides broad authority to waive penalties assessed for late payment. The Board adopted Regulations 881, 883, 884, and 885 to govern the waiver process. The Board's goal for the waiver process has historically been compliance rather than punishment. By creating a system where owners with delinquent accounts may come current with fees and penalties without extreme sanction, the Board hopes to incentivize owners to make timely registration fee payments in the future. Moreover, the Board understands that there is a net benefit to having more properties properly registered.

Regulations 883 and 884(C) govern ministerial waivers – waiver requests where, because of the reason for late payment provided by the owner, the regulations empower Rent Board staff to determine the appropriate amount of the penalty to waive. Ministerial waivers include requests for waiver of penalties that arose from staff errors, waiver requests for registration fees the owner pays within 60 days of the due date, waiver requests from new owners of Berkeley rental property, and a catch-all category based on the owner's payment history. Ministerial waivers provide staff a set schedule as a guide to waive various penalties. For instance, Regulation

¹ BMC Section 13.76.080F.

883(D) allows staff to waive 100% of penalties for a previously registered property which Rent Board staff erroneously failed to bill. Regulation 883(H) applies to owners who fully pay their registration fee within a 60-day period after the due date, and provides staff a schedule to waive penalties, based on the owner's payment history.

Regulation 884(B) contains the provisions for discretionary waivers: waiver requests which require Board staff to weigh a list of factors and provide a recommended waiver amount for Board consideration. Regulation 884(B) does not provide staff with guidance on how to weigh each factor when providing a recommendation to the Board. Therefore, when drafting recommendations to the Board for discretionary waivers, staff must undertake a more extensive, holistic review of the property, and in some cases the owner. For instance, Regulation 884(B)(4) states that one of the factors to be considered when evaluating a discretionary waiver is that two or more of the rental units at the property are not available for rent. Regulation 884(B)(4) does not state how unavailable units affect an owner's waiver request or how to evaluate the unavailable units compared to other factors in the regulation.

Once staff receive a waiver, they review the supporting materials to determine if a discretionary category applies to the request. In that case, the staff prepare an analysis of the request under the factors laid out in Regulation 884(B) and make a recommendation to the Board. If no discretionary categories apply to the waiver, the staff investigate the waiver request as a ministerial waiver.²

Proposed Regulatory Changes

Rent Board staff has identified a few areas in which the waiver process could be improved to promote fairness and administrative efficiency. First, staff has fielded multiple waiver requests from owners who, upon the denial of an initial waiver, assert new and previously undisclosed grounds for a waiver on a subsequent waiver request. Currently, the Regulations do not contain any clear direction regarding the finality of decisions regarding waivers for the Board or staff. The proposed regulations indicate that waiver determinations are final, and no additional requests for waiver may be submitted for the same penalty.

Second, with the inclusion of Measure MM units in the billing cycle, staff recommends extending the period in which an owner can make full payment for registration fees and request a waiver from 60 days to 90 days. With the increase in units for which the Board currently collects registration fees, registration staff spend much of the month of July processing registration payments. Extending this deadline allows registration staff extra time to thoroughly review all accounts as well as pursue informal collection efforts which often lead to increased compliance without a complicated waiver process.³

² In very simple cases where Board staff is able to waive a significant majority or all of the penalty, staff will process the waiver request using the regulatory ministerial relief outlined in Regulation 883. For example, if a landlord has paid the fee late only once in the past six years, staff has the authority to waive 100% of the penalty without having the Board review the application for waiver.

³ For the last several years, the Board has adopted an amnesty period to allow the staff to work with the landlord community to address delinquent accounts. Adding 30 days to the process outlined in Regulation 883(H) will provide a more workable framework for dealing with these penalties and hopefully increase compliance without

Third, the proposed regulations narrow the scope of factors staff must consider for a discretionary waiver recommendation. To the extent possible, the proposed regulations remove factors from discretionary review and place them into the ministerial review. This allows staff to more quickly review a greater amount of waiver requests. To effectuate this, the proposed regulations create new subsections in Regulation 883.

- Proposed Regulation 883(J) applies to waiver requests filed after the Rent Board has started legal action to collect fees and penalties; the corresponding factor in the current discretionary waiver process is Regulation 884(B)(2). The schedule in this proposed subdivision matches the Board's internal policy for settlement of accounts during a small claims or superior court collection action. Adding this subdivision would prevent a landlord from receiving a larger penalty waiver than what the landlord would be entitled to by settling their court case with the Board.
- Proposed Regulation 883(K) applies to waiver requests filed for a property subject to a rent ceiling reduction or a rent withholding order; the corresponding factor in the current discretionary waiver process is Regulation 884(B)(5). The schedule in this proposed section provides incentives for landlords to quickly comply with hearing orders and encourages compliance with the Ordinance and often times helps to ensure that units are brought to acceptable levels of code compliance with habitability issues.
- Proposed Regulation 883(L) applies to waiver requests for properties with two or more units not available for rent; the corresponding factor in the current discretionary waiver process is Regulation 884(B)(4). The schedule in this proposed section matches staff's current recommendations for units unavailable due to permitted rehabilitation work.

The proposed additions to Regulation 883 also include the introduction of subparagraph numbering for the existing schedules in Regulation 883, in order to improve readability.

Additionally, the proposed regulations remove certain discretionary waiver factors. The Proposed regulations remove current Regulation 884(B)(3), the discretionary waiver factor for a landlord who has tried to perform a no-fault eviction since 1999. Staff's rationale for removing this factor is that this factor requires a search through the eviction history of all a landlord's property since 1999 and creates an administrative burden. Moreover, this provision was first introduced in 2003 when Costa-Hawkins vacancy increases were relatively new and might have been more indicative of a landlord's increased rental income and thus ability to pay a penalty.

The proposed regulations remove current Regulation 884(B)(9) which allows landlords to assert that they have received foreclosure paperwork as good cause for failing to pay their Rent Board registration fees. Staff's rationale for removing this factor is that inclusion of it may incentivize a property owner delinquent on their mortgage payments not to attempt to bring their property accounts current if their mortgage delinquency may be factored against granting them a waiver.

To the extent that these proposed regulations direct more waiver requests into ministerial review

having to process so many discretionary waiver requests.

with set schedules, the regulations still allow for Board review of waiver requests with unique facts. Proposed Regulation 883(M) allows the Executive Director to deviate from the schedules in subsections (H) through (K) if “the interests of justice require” such modification. Additionally, Proposed Regulation 884(B)(7) allows the Executive Director to suggest a waiver amount for discretionary waivers in the interest of justice, which will provide staff the flexibility needed to address the range of reasons for nonpayment that owners provide.

In circumstances where any of the ministerial categories conflict, the proposed regulation amendments state the Executive Director will apply the greater penalty waiver, which is consistent with the Board’s goal of compliance.

Conclusion

This staff report is submitted by the LIRA Committee for the Board’s consideration based on staff review of the waiver process. The proposals are particularly timely in that, if adopted prior to July 1, the regulatory amendments will help guide staff and the Commissioners in processing registration fee penalties that come due for the 2023/2024 Fiscal Year. Staff believe the proposed amendments equitably address the goals of administrative efficiency and fairness to the landlord community while at the same time preserving the Commissioners’ broad authority to address cases that require discretionary review.

Attached is a draft of the proposed amendments to Regulations 883 and 884. Additions are underlined. Deletions are marked by strikethrough.

Financial Impact

Unknown. It is anticipated that this proposal will reduce the amount of time staff spends on waivers. These proposed regulatory changes should not significantly impact the amount of penalties the Board or staff waive but will hopefully increase compliance with the Ordinance.

Name and Telephone Number of Contact Person

Matt Brown, General Counsel (510) 981-4930

Attachments:

1. Proposed Amendments to Regulation 883
2. Proposed Amendments to Regulation 884

883. Waiver of Penalties and Interest on Delinquent Registration Fees

A landlord who is assessed a penalty pursuant to Regulation 881 may request ~~that~~ the Board to waive all or part of the penalty by showing good cause for the delinquent payment. In order to implement the provisions of Section 8(f) of the Rent Stabilization Ordinance, the Board has determined that the following circumstances constitute good cause for waiver of penalties. When substantial delays in billing or delays in reconciling accounts are attributable to City staff, the penalties otherwise due ~~will~~ shall be waived. Additionally, when a landlord discovers that they failed to pay registration fees through their inadvertence and promptly makes full payment of registration fees, penalties may be waived or reduced as set forth in subsections (H)-(L). The Rent Board Executive Director, or his or her designee, is empowered to waive late payment penalties under the following circumstances:

(A) An invalid or erroneous account number was assigned, which resulted in billing errors or improper crediting of payments by the landlord.

(B) The landlord was billed for a fewer number of units because of errors in property records maintained by the City where the error was not attributable to information supplied by the landlord. The penalties are waived only for unbilled units; the billed units should be paid on time.

(C) The billing address of the landlord has not been corrected after the owner had notified the Board in writing of a change of address.

(D) A previously registered property was not billed as a result of staff error.

(E) A property account was erroneously closed for reasons not attributable to the landlord, and the account is subsequently reopened and billed.

(F) The determination of whether or not the property was subject to the Ordinance required an analysis by Rent Board legal staff. Penalties ~~will~~ shall be waived only while the legal opinion is pending. If the landlord raised the issue requiring legal determination, penalties ~~will~~ shall be waived only from the date of the first written contact with the Board in which the issue was raised.

Waiver of penalties ~~will~~ shall not be granted if the legal staff determines that the issue raised is already settled and/or has no substantial merit. If the legal issue was raised by Rent Board staff, the waiver period commences on the date on which the legal opinion was requested by the staff.

In all situations in which a legal opinion was requested, the waiver period terminates when the landlord is notified of the legal determination regarding the status of his/her property.

In all cases in which a waiver is granted pursuant to the provisions of this subsection, penalties ~~will~~ shall again accrue if the bill is not paid within 30 days after the error has been corrected and the landlord has been notified of the determination of the status of his/her property under the

Ordinance.

(G) Other errors in billing or reconciling accounts are directly attributable to Rent Board or City staff.

(H) The late payment of a fee due on July 1st is made, without deliberate delay, by ~~August 30th~~ September 30th of the same year (within ~~60~~ 90 days of the July 1st due date), and all other balances due are paid within that time. In such case, the Executive Director ~~will~~ shall, except as provided in subsection (J) below, waive the penalties based on the landlord's payment history for the property in accordance with the following schedule:

1. For the first late payment within the prior six years, - 100% of penalties waived;
2. For the second late payment within the prior six years, - 90% of penalties waived;
3. For the third late payment within the prior six years - 75% of penalties waived;
4. For the fourth late payment within the prior six years - 55% of penalties waived;
5. For the fifth late payment within the prior six years - 30% of penalties waived;
6. For the sixth late payment within the prior six years - waiver denied.

For the purposes of this subsection (H), "landlord" means the current property owner . However, if the landlord was not a bona fide purchaser for value, this definition includes the immediate predecessor owner.

(I) A new owner with no other residential rental property in Berkeley was unaware of the property registration requirements of the Rent Ordinance and registered the property within 12 months of acquiring title to the property. In such case, the Executive Director ~~will~~ shall, except as provided in subsection (~~J~~M) below, waive the penalties in accordance with the following schedule:

1. The property contains 1 or 2 rental units - 100% of penalties waived;
2. The property contains 3 to 5 rental units - 90% of penalties waived;
3. The property contains 6 to 10 rental units - 75% of penalties waived;
4. The property contains 11 to 20 rental units - 50% of penalties waived;

If a property covered by the above schedule is registered between 12 and 24 months after the new owner acquired title, the percentage of penalties waived ~~will~~ shall decrease by 10%. Waiver requests for new owners of property containing more than 20 units or of properties that were not registered within 24 months of acquiring title ~~will~~ shall be evaluated pursuant to Regulation 884(B).

~~This subsection (I) does not apply if a prior owner incurred penalties that are outstanding and subject to review under any circumstance listed in Regulation 884(B), except subsections 884(B)(5) and (B)(6).~~

(J) The waiver request was filed following the referral to and initiation of legal action by the Rent Board to recover unpaid registration fees. In such case, the Executive Director shall, except as provided in subsection (M) below, waive the penalties in accordance with the following schedule:

1. The waiver request was filed during the period when the property was identified for additional collection efforts by Rent Board staff but prior to the filing of a complaint in small claims or Superior Court- 50% of penalties waived;
2. The waiver request was filed after the filing of a complaint in small claims or Superior Court but before the date of a small claims trial or dispositive motion or hearing- 40% of penalties waived.

(K) Within the past 5 years, as the result of a petition filed by a current tenant at the property or relating to the current tenancy, the Board has reduced the rent ceiling at the property or issued an order to the landlord to register the property. In such case, the Executive Director shall waive the penalties in accordance with the following schedule:

1. The rent ceiling reduction order or order to register is active - waiver denied;
2. The landlord complied with the Board's order within the past year- 40% of penalties waived;
3. The landlord complied with the Board's order greater than one 1 year but less than 3 years before the request - 60% of penalties waived;
4. The landlord complied with the Board's order greater than 3 years but less than 5 years before the request- 80% of penalties waived.

In such cases where there is a dispute regarding compliance with an active rent ceiling reduction order or order to register, the request shall be considered by the Board as a discretionary waiver.

(L) Two or more rental units on the property were not available for rent due to substantial construction or rehabilitation. In such case, the Executive Director shall, upon receipt of proof of such construction or rehabilitation, waive 100% of the penalties for the period in which the units were not available for rent. In order to qualify for this waiver, the construction or rehabilitation must be fully permitted by the appropriate City of Berkeley department.

(M) The payment schedules in subsections (H) and through (L) above shall not apply if the Executive Director, or his or her designee, recommends that the Board review the request under Regulation 884(B) because the interests of justice require that a greater or lesser amount be waived.

(N) If two or more of the above categories apply to a waiver request, the Executive Director shall apply the subdivision which allows for the greater penalty waiver. This subdivision shall not apply to a waiver request that arises under section (K)(1), where the property is subject to an active rent ceiling reduction or rent withholding order.

884. Other Waiver Requests

(A) Waiver requests for good cause that do not meet the criteria enumerated in Regulation 883 ~~will~~ **shall** be referred to the Executive Director for review. The Executive Director, or his or her designee, ~~will~~ **shall** evaluate the request and determine if it should be reviewed ministerially by staff, or on a discretionary basis by the full Board. The Board ~~will~~ **shall** examine whether there is good cause to waive some or all of the penalties. If the landlord's request does not arise under the circumstances set forth in subsections (H) or (I) of Regulation 883, the Executive Director, or their designee, may forward waiver requests to the Board for discretionary review, when the Executive Director recommends that the Board review the request.

The decision the Board reaches for each waiver request shall be final, and the Board shall not further review waiver requests associated with the same penalty.

(B) Discretionary Waivers. The determination of good cause for a waiver of penalties depends on the totality of the circumstances in the following categories:

(1) The good cause asserted in the waiver request is a death or illness in the landlord's family and the landlord provides sufficient documentation to support their request;

~~(2) — The waiver request was filed following the initiation of legal action by the Rent Board to recover unpaid registration fees;~~

~~(3) — Rent Board records indicate that, on or after January 1, 1999, the landlord requesting the waiver had served a notice of termination of tenancy pursuant to Civil Code section 1946, 1946.1, or 1954.535, or a notice of intent to withdraw accommodations pursuant to Berkeley Municipal Code section 13.77.050 (Ellis Act);~~

~~(4) — Two or more rental units at the property for which the waiver is requested are not available for rent;~~

~~(5) — A tenant at the property for which the waiver is requested filed an Individual Rent Adjustment or Rent Withholding petition during the prior five years;~~

~~(6) — The landlord requesting the waiver owns or manages 11 or more rental units;~~

~~(7) — The landlord requesting the waiver was not the owner of the property when the penalty first accrued;~~

~~(8) — The penalty has accrued because registration fees have not been paid for three or more fiscal years;~~

~~(9)~~ A notice of default or notice of sale for the property has been recorded with the county recorder's office pursuant to Civil Code section 2924, within the past five years;

~~(405)~~ The landlord has paid late each year for the prior five years;

~~(446)~~ The Executive Director, or his or her designee, recommends that the interests of justice require that a greater or lesser amount be waived.

~~(427)~~ The property is on the inventory of potentially hazardous soft story buildings, as defined in the Soft Story Ordinance (Berkeley Municipal Code Chapter 19.39), but the landlord is not in compliance with that ordinance. For the purposes of this Regulation, compliance with the Soft Story Ordinance means that the landlord has notified tenants and posted a notice as required by B.M.C. section 19.39.060, and submitted an Initial Screening and seismic engineering evaluation report as required by B.M.C. section 19.39.070, by the applicable deadline under B.M.C. section 19.39.090.

(C) Ministerial Waivers. For all other waiver requests, the landlord's recent payment history ~~will~~ shall determine penalties using the following schedule:

First late payment within the prior five years -	100% of penalties waived;
Second late payment within the prior five years -	80% of penalties waived;
Third late payment within the prior five years -	60% of penalties waived;
Fourth late payment within the prior five years -	40% of penalties waived.
Fifth late payment within the prior five years -	the waiver request will shall be decided by the full Board in accordance with Regulation 884(B)(10).

(D) For the purposes of this Regulation 884, "landlord" means the current property owner. However, if the landlord was not a bona fide purchaser for value, this definition includes the immediate predecessor owner.

(E) Where a waiver of penalties paid to the Board is granted in whole or in part, the amount of the waiver ~~will~~ shall be credited to the landlord's account to offset future registration fees unless the Executive Director, upon written request of the landlord, determines that there is good cause to issue a refund.

(F) A waiver of penalties granted under this regulation is conditional upon payment of the balance due within the time period designated by the Executive Director or the full Board.

[Amended February 5, 1999; amended August 21, 2000 by changing the initial review of

requests for waiver of late registration penalties from a Board Commissioner to a Hearing Examiner and setting forth grounds for waiver of late registration penalties as listed in A through F; amended June 24, 2003, eliminating former A – F and adding (B) 1 - 8 and various other changes; amended December 13, 2010, by clarifying the Executive Director's role in (A), eliminating service of a 3-day notice as triggering a discretionary waiver in (B) 3, adding (B) 9 – 11, establishing a new schedule in (C), defining landlord for this regulation in (D), and making various other changes. Amended July 30, 2012 by adding subsection (12) to Section (B), which adds compliance with Soft Story Ordinance as criterion for discretionary waiver requests.]