



New York State
Division of Housing and Community Renewal
Office of Rent Administration

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***Rent Increases for Rent Stabilized
Housing Accommodations Based Upon
Owner Hardship-Guidelines and Procedures.***

Introduction

This Operational Bulletin relates to increases in the legal regulated rents of rent stabilized housing accommodations located inside and outside New York City which may be available to owners who file hardship applications with the New York State Division Of Housing and Community Renewal (DHCR). The DHCR may grant such increases pursuant to the Emergency Tenant Protection Act of 1974 (ETPA), or Title YY of the New York City Administrative Code, which constitutes the New York City Rent Stabilization Law (RSL).

A) Definition of Hardship

The ETPA and RSL provide a mechanism for adjusting rents pursuant to orders issued by the Local Rent Guidelines Boards, which determine, on an annual basis, the rent increase, if any, to which an owner is entitled upon execution of new or renewal leases. Both the ETPA and RSL also provide, in the unusual situation where the guidelines rent adjustments are insufficient to permit a peculiar property to keep up with increased operating costs, that the owner can file with the DHCR an application for building-wide rent increases based upon a hardship. Both the ETPA and RSL contain provisions for a “comparative hardship” pursuant to which an owner may obtain a rent increase sufficient to maintain the same position with respect to certain income and operating expenses as it experienced in defined base years. The precise statutory formulas are markedly different inside, as opposed to outside, New York City. The procedures for processing these applications are of long standing and have been established through usage and practice.

Chapter 403 of the Laws of 1983, which amended both the ETPA and RSL, provides an alternative method for determining a hardship increase based essentially on an owner’s maintaining certain gross rent income, as later defined, at a level which exceeds reasonable operating expenses by five percent.

B) Comparative Hardship Outside of New York City

The comparative hardship formula is stated in Section 6(4) of the ETPA.

It essentially provides that: (1) an owner must establish, by application, the existence of a hardship as further defined, and (2) the DHCR must determine whether additional rent increases are needed to maintain approximately the same average ratio (as defined by usage and upheld by applicable appellate case law) between operating expenses and gross rents for the preceding five year period. The criteria for determining such an application are detailed in Section 34(c), [2502.4(c)], of the Tenant Protection Regulations, Tenant Protection Bulletin No. 20 and Supplement 1 thereto.

This document is being reissued for informational purposes only.

The original document which contains signatures of authorization is on file at DHCR's Office of Rent Administration.



C) Comparative Hardship Inside New York City

Inside New York City the comparative hardship formula is set forth in Section YY51-6.0c(6) of the Administrative Code of the City of New York, and is administered primarily through the Rent Stabilization Code. Pursuant thereto DHCR will, in essence, grant an appropriate rent adjustment where:

- 1) The owner has not maintained the same average net income in a current three year period when compared with the average net income during a three year base period, generally defined as 1968 through 1970;
- 2) The circumstances and accuracy of the information provided in the owner's application has been adequately substantiated by submission of copies of certified financial statements or federal income tax returns and other pertinent documents which might be required; and
- 3) All other requirements of the granting of such rent increases have been met.

To restore the owner's average net income in the current period to the average net income in the base period, the rent adjustment granted by the DHCR, in order to conform with the Rent Stabilization Code, is computed as follows:

- 1) Subtract the average net income in the current period from the average net income in the base period (after adjustments).
- 2) The result represents the dollar amount of annual gross rent adjustment.
- 3) To convert the dollar amount into a percentage rent increase, divide the dollar amount by the annual gross rent roll of the stabilized apartments submitted with the application. (The rent roll should be dated within two (2) months of the date of the filing of the application).

The collection of any increase in the stabilized rent for any apartment cannot exceed six (6) percent in any year from the effective date of the order granting the increase, over the rent set forth in the schedule of gross rents. The collectibility of any dollar excess above said sum is spread forward in similar increments and added to the stabilized rents as established or set in future years. No more than one order adjusting any stabilization rent because of hardship may be issued in any thirty-six (36) month period.

D) Alternative Hardship

Rent increase applications may be filed by owners based upon alternative hardship applications pursuant to Section 6(5) of the Emergency Tenant Protection Act, (EPTA) and Section YY51-6.0c.(6-a) of the New York City Administrative Code. Section 6(5) of the EPTA is directly implemented by Section 34(d), [2502.4(d)], of the Tenant Protection Regulations. The alternative hardship enables an owner of a building not owned as a cooperative or condominium, acquired by the same owner or a related entity three years prior to any application, to receive an appropriate rent adjustment where the DHCR finds (subject to the definitions and restrictions stated in the regulations) that such an increase is necessary because the annual operating expenses are not less than 95 percent. The nature and source of the annual gross rent income is set forth in Section 34(d)(1)(a), [2502.4(d)(1)(i)] of the Tenant Protection Regulations. The instructions and application forms previously issued by the DHCR reflect these regulations.

Alternative Hardship Forms and Procedures

The following is designed to give further guidance as to the DHCR policy and procedure in processing these applications after the forms are completed by owners in accordance with the instructions and the applicable Regulations. Instructions which accompany the forms referred to in this operational bulletin, provide further details. The DHCR has broad discretion under the applicable regulations to, *inter alia*, accept or reject applications, extend time for filing, hold hearings, and require production of documents. See Sections 85 and 86, [2507.5], [2507.6], of the Tenant Protection Regulations. In the absence of a Rent Stabilization Code containing Alternative Hardship Provisions, the DHCR has authority and discretion in accordance with Chapter 403 of the Laws of 1983 to utilize reasonable procedures in carrying out its statutory mandate. Nothing herein should be construed as a waiver of that discretion. This bulletin advises on how that discretion will ordinarily be exercised.

A) Applicable Forms

RTP 45, RTP 45A-G Owner's Application for Rent Increase Based on Alternative Hardship

RTP 45.1 Notice to Tenant of Commencement of Proceeding for Rent Increase Based on an Alternative Hardship

RTP 45.2 Instructions for Filing an Owner's Application for Rent Increase Based on Alternative Hardship

RTP 45.3 Owner's Certification of Service of Notice to Tenant; Re Commencement of Proceeding for Rent Increase Based on Alternative Hardship RTP 45.4

RTP 45.4 Instruction for Notifying the Tenants that a Proceeding for a Rent Increase Based on an Alternative Hardship Has Been Commenced.

RTP 3 Tenant's Answer

RAR 1, RAR 2 Petition for Administrative Review (PAR)

B) Procedure

I. Docketing

An owner shall file three copies of the application form, including appropriate schedules (RTP45, RTP45A through G with the District Rent Office (DRO) in the district in which the building is located. The DRO will assign the application a docket number.

II. Preliminary Review

The DHCR will then perform a preliminary review of the application to determine whether the application on its face indicates eligibility for an alternative hardship increase. To affirmatively pass such review:

- (1) the building, as evidenced by the application, must be experiencing a hardship as defined in Section 34(d)(1), [2502.4(d)(1)], of the Tenant Protection Regulations. (See RTP 45D of the application forms);
- (2) the owner must answer a series of threshold questions which further determine if the owner has met all the requirements which otherwise may bar the owner from filing or receiving increase (See Section 34(d)(2), [2502.4(d)(2)], of the Tenant Protection Regulations entitled Restrictions; see also RTP 45A, B, and C of the application forms); and
- (3) all the forms must be completed and all relevant supporting schedules attached.

If the application is not complete, the DHCR will reject it and return two copies of the submission to the owner. Such a rejection is a Final Order subject to review by the Commissioner. (PAR) (See Sections 131-142, [2510 *et seq.*], of the Tenant Protection Regulations, and Part XI of this Operational Bulletin). However, the rejection is without prejudice to refile a completed application with the DRO, as a new application with a new filing date, provided the owner is still eligible to use the same test year as defined in Section 34(d)(1)(g), [2502.4(d)(1)(vii)], of the Tenant Protection Regulations. For good cause shown, the DHCR may, in exceptional cases, provide a reasonable cure period in its rejection which would enable an owner to preserve the right to use a particular test year. See Section 85(d), [2507.5(d)], of the Tenant Protection Regulations. If the application passes preliminary review, the owner shall be notified on Form RTP 45.4 that he/she may thereafter notify the affected tenants that an alternative hardship proceeding has been commenced.

III. Restrictions

The restrictions against filing or receiving an alternative hardship increase are fully set forth in Section 34(d)(2), [2502.4(d)(2)] of the Tenant Protection Regulations. They are listed below, with further explanations where appropriate.

a) Maintenance of Services

Section 34(d)(2)(b), [2502.4(d)(2)(ii)], of the Tenant Protection Regulations sets forth the DHCR's broad discretionary authority with respect to alternative hardship and the requirement of maintenance of services. That discretion is limited by YY51-6.0.3 which specifically bars an owner from applying for or collecting further rent increases upon a determination by the DHCR that an owner has failed to maintain services as defined therein. Thus, where the DHCR has issued an order determining that an owner has failed to maintain services as defined in the applicable law and regulations, the DHCR may not grant an alternative hardship application pending service complaints or tenant answers which raise lack of maintenance of services as an issue do not, in and of themselves, bar the hardship application or the granting of an increase. The DHCR will act with respect to those applications in accordance with its discretionary authority and may issue an order granting the increase conditioned on the removal of violations or conditions affecting services.

b) Pending Tax Certiorari Proceedings or Objections

Section 34(d)(2)(a)(v), [2502.4(d)(2)(i)(e)], of the Tenant Protection Regulations provides for the resolution of legal objections to real estate taxes and water and sewer charges for the test year. This restriction is derived from the requirement that the applicable increase be based on expenses that are both actual and reasonable, as well as the DHCR's authority to safeguard tenants from practices which would otherwise subvert the levels of rent adjustment as provided by the applicable law. In lieu of an absolute bar, the DHCR as a reasonable alternative, will accept submission by an owner, of applicable proof of taxes based upon the proposed assessed value (as set forth in its certiorari petition or duly filed objection to such tax), together with proof of actual payment in accordance with applicable law. If after such tax objection is resolved, the owner's actual and reasonable tax expense allocable to the test year exceeds the amount the DHCR used in determining the application, an additional increase may be granted prospectively, if warranted. Similar reasonable alternatives will be entertained as to unresolved water and sewer charges.

c) Ownership by the Same or Related Entity for 36 Months

Section 34(d)(2)(a)(ii), [2502.4(d)(2)(i)(b)], of the Tenant Protection Regulations sets forth the requirement that an owner or an entity related to the owner must have acquired the building at least 36 months prior to the date of the application in order to be eligible for alternative hardship increases. A cooperative corporation or the Board of Managers of a condominium will not be considered the owner of the building, nor are individual shareholders or unit owners or building owners for the purpose of eligibility for the alternative hardship and as such will be unable to file alternative hardship applications.

d) Five Percent Equity in the Property

Owner's equity is defined in Section 34(d)(1)(e), [2502.4(d)(1)(v)], of the Tenant Protection Regulations. That equity must exceed five percent of the sum of the amounts listed in Section 34(d)(2)(a)(iii), [2502.4(d)(2)(i)(c)] of the Tenant Protection Regulations. (See Form RTP 45B.) Owners will generally satisfy this requirement and avoid the more complex statutory calculations required, if the arms length purchase price of their property, less the unrepaid principal of any loan or mortgage used to finance the purchase of the property exceeds five (5) percent of the arms length purchase price. (The precise formulation is set forth in Form RTP 45A, questions 5 through 9 and the applicable instruction therefor).

e) The Grant of a Previous Hardship Increase

Section 34(d)(2)(a)(iv), [2502.4(d)(2)(i)(d)], of the Tenant Protection Regulations has the effect of prohibiting the filing or granting of an application where the building had been granted a hardship increase within

36 months of the effective date of the issuance of a previous hardship application order, or if a six (6) percent increase is still in effect based on a prior application.

IV. Owner Notification to Affected Tenants

Within twenty (20) days of receipt of the RTP 45.4, the owner must hand deliver or mail a complete set of the application forms submitted to the DHCR, to the affected tenants, plus a DHCR Notice of the Proceeding (RTP 45.1) and 3 copies of the DHCR answer form (RTP 3).

A complete copy of the owner's submission to the DHCR including all required schedules and all supporting documentation, plus a copy of the DHCR's Instruction Booklet (RTP 45.2) must be made available at the DRO and at the subject building or complex in the office of the resident manager, managing agent or superintendent during normal working hours. If such office is not available on site, these documents must be made available at a near-by alternative location. If such location is not available, as attested to by affidavit of the owner, such documents may be inspected at the DRO.

V. Filing of the Application with the DHCR

After completing notification to the affected tenants, the owner must then complete and file with the appropriate DRO the DHCR's form "Owner's Certification of Service" (RTP 45.3). The date that this form is received by the appropriate DRO will be considered the date of completion of filing with the DHCR. The DHCR will, where necessary, take appropriate action to verify the accuracy of the owner's certification of service. At the time of filing the RTP 45.3, the owner must also submit a certified rent roll as of the date of the filing of the application.

VI. Tenant Answer

Tenants shall submit two copies of their answers, if any, to the appropriate DRO within twenty (20) days of receipt unless, for good cause shown, an extension is granted by the District Rent Office.

VII. Mortgage Interest as an Includable Expense and its Impact on Processing

The alternative hardship, unlike the two comparative hardship formulas, allows for the inclusion of interest on a bona fide mortgage as an allowable expense in computing the appropriate rent adjustment. (See Section 34(d)(1)(b), (c), and (d), [2502.4(d)(1) (ii)(iii) and (iv)], of the Tenant Protection Regulations; Form RTP 45E and instructions therefor.) Even where the mortgage is "bona fide", as defined by Sections 34(d)(1)(c) and (d), [2502.4(d)(1)(iii) and Qv], of the Tenant Protection Regulations, the DHCR on its own initiative where warranted, or in the face of a meaningful tenant objection, will also ascertain whether the claimed mortgage interest expense is reasonable, actual, applicable to the operation and maintenance of property, reasonably allocable to the test year and in keeping the general legislative purposes and intent.

Because mortgage interest, as an allowable expense, is a new feature belonging solely to this hardship, adjudication of mortgage interest expense issues can only be further defined by a case by case determination. Where a unique unprecedented issue regarding claimed mortgage interest expense is raised in a meaningful manner it will be reviewed by a mortgage interest committee established by the DHCR to aid the District Rent Administrator (DRA) or the Director of Processing in his/her determination. However, two general examples of proposed adjudications by the DHCR are set forth below:

Example 1

Where there has been a change in mortgage debt since the effective date of the addition of the alternative hardship provisions to the applicable law, the DHCR will make appropriate adjustments to the claimed mortgage interest expense, to disallow interest on that portion of the principal balance of the current mortgage which exceeds the expiring balance of the previous mortgage. This will assure that the mortgage interest expense reflects the actual and reasonable cost of maintenance of the property. Monies otherwise utilized from refinancing for the

operation and maintenance of the property, to the extent compensable by application, is covered by Operational Bulletin 84-4, issued November 13, 1984, entitled Major Capital Improvements/Substantial Rehabilitation/Increased Services and Equipment and the applicable law, code and regulations cited therein.

Example 2

Points and some charges payable during the test year which represent prepayment of interest (and are therefore a non-recurring expense) will be allocated over the term of the mortgage, or a reasonable period, to more accurately reflect the reasonable and actual expenses of the operation and maintenance of the property. In addition, they will be adjusted to reflect that portion of the mortgage expense allowed for mortgage interest computations.

VIII. Issuance of the Order

The DRA or the Director of Processing, after taking all necessary and appropriate action, shall issue a determination either dismissing the application if it fails to substantially comply with the provisions of the Regulations, or granting the application, in whole or in part.

In the event an application is granted, the collection of any rent increase shall not exceed six (6) percent of the legal regulated rent in effect on the filing of the application. The collectibility of any amount above that sum shall be spread forward in similar increments and added to the rent as established or set in future years. In buildings containing residential apartment units subject to Rent Control or otherwise exempt from regulation, adjustments for both income and expenses will be made to calculate the appropriate share for those apartments subject to this application. No application may be made for any hardship until such time as the increase based on a prior hardship application falls below six percent for a given year. In no event may an application for hardship be made within thirty-six (36) months of the effective date of the issuance of a previous hardship application order.

IX. Effective Date of the Order

In New York City, the DHCR will use the Rent Stabilization Code to ascertain the effective dates of any order granting an increase, with due consideration to all factors bearing on the equities involved, as required by the Rent Stabilization Code.

The effective date of the rent increase for buildings located outside of New York City is governed by Section 32, [2502.2], of the Tenant Protection Regulations, which provides that adjustments of legal regulated rents are effective at the date of the issuance of the order unless the order itself provides otherwise. Rent increases shall be expressed on a percentage basis.

X. Petition for Administrative Review (PAR)

A PAR is the method of review of a DRA or Director of Processing order and is a prerequisite in order to obtain judicial review.

Any person aggrieved by an order of a DRA or a Director of Processing may file a PAR (Forms RAR-1 and 2) within 33 days after the date of such order. A PAR served by mail, postmarked not more than thirty-three (33) days after the date of such order, shall be deemed in compliance with this paragraph. See Operational Bulletin 84-1 and Sections 8 and 131-143, [2500.8, 2510 *et seq.*], of the Tenant Protection Regulations for the relevant procedure by the DHCR upon administrative review.¹

¹Pursuant to Chapter 888 of the Laws of 1985, the DHCR has been authorized to amend the Rent Stabilization Code for New York City. At such time as the amended Code is promulgated, the DHCR will issue a supplement to this Bulletin providing cross references for the new Code to the ETPA Regulations contained in this Bulletin.