

Chapter 39

MAXIMUM RENEGOTIATED LEASE RENT*

[*Editor's Note: Ordinance No. 91-96, Section 2, which was codified as this article, was held to violate the Fifth Amendment to the U.S. Constitution in Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997), cert. den. 119 S.Ct. 168 (1998), 119 S.Ct. 275 (1998), and 119 S.Ct. 544 (1998).]

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1. Maximum Annual Renegotiated Lease Rent

Article 1. Maximum Annual Renegotiated Lease Rent

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Sec. 39-1.1 Definitions.

For the purposes of this chapter:

"Apartment," "association of apartment owners," "condominium," "declaration of horizontal property regime," and "declaration of condominium property regime" mean the same as defined under HRS Chapter 514A.

"Apartment lease" means an apartment owner-occupant's lease for the owner-occupant's apartment and includes any lease to an apartment owner-occupant for the land upon which the owner-occupant's apartment is situated, including, but not limited to, a ground lease and/or a condominium conveyance document.

"Apartment owner" means a person holding, or the persons jointly or in common holding, a leasehold interest in a residential apartment.

"Apartment owner-occupant" is defined in Section 39-1.2.

"Condominium project" means a building containing at least one residential apartment.

"Consumer price index" means the Consumer Price Index For All Urban Consumers (CPI-U) for Honolulu published by the Bureau of Labor Statistics of the United States Department of Labor.

"Declaration" means a declaration of horizontal property regime or declaration of condominium property regime.

"Department" means the department of housing and community development.

"Fixed rent period" means the period of a lease during which the lease rent for a residential apartment is stated in the lease, even if the rent is not held constant for the entire period.

"Initial lease rent" means the beginning lease rent specified in an apartment lease or the reasonable market value rent prevailing at the effective date of the apartment lease determined as specified in Section 39-1.4, whichever is greater. This term specifically excludes any lease rents that reflect reduced rent at the beginning of the lease due to construction of the project or due to special negotiations between the developer and the land owner.

"Land owner" means the person holding the leased fee interest in the land on which a condominium project is situated.

"Lease" means a lease or master lease, including any sandwich interest, affecting a residential apartment. A sandwich interest means any lease or sublease in the chain of title between the land owner's interest in the land and the apartment lease.

"Lease rent" means the rent payable by a lessee to a lessor for the leasehold interest for a residential apartment under an apartment lease.

"Lessee" means any person to whom land on which a condominium project is situated is leased or subleased.

"Lessor" means any person who leases or subleases land on which a condominium project is situated.

"Maximum annual renegotiated lease rent," "maximum lease rent," or "maximum" means the maximum annual renegotiated lease rent applicable to an apartment owner-occupant, as determined under Section 39-1.5 or biennially adjusted under Section 39-1.6.

"Renegotiated lease rent" means the lease rent determined in accordance with this chapter on the renegotiation dates specified in the lease.

"Renegotiated rent period" means any period of a lease following the expiration of the fixed rent period.

"Renegotiation date" means the date on which a renegotiated lease rent is to take effect.

"Residential apartment" means a condominium apartment which is used for residential purposes. The term does not include the following:

- (1) An apartment used for commercial purposes;
- (2) An apartment used as a time share unit or transient vacation unit, as defined under Chapter 21, Article 10;
or
- (3) Any parking, recreational, or other nonresidential condominium apartment.

(Added by Ord. 91-96)

Sec. 39-1.2 Apartment owner-occupant defined.

- (a) For the purpose of this chapter, an "apartment owner-occupant" or "owner-occupant" means an owner of a residential apartment who on the renegotiation date of the lease of the residential apartment occupies the residential apartment as the owner's principal residence.
- (b) An apartment owner shall be deemed to occupy a residential apartment if, on the renegotiation date of the lease, the residential apartment serves as the principle place of residence of the apartment owner and the apartment owner has possessory control of the premises at that time. An apartment owner shall not be deemed to have possessory control of the premises if the residential apartment is rented, leased, or otherwise assigned to another person or entity for any period of time. Proof of residency and possessory control shall be established by rules adopted by the department.

(Added by Ord. 91-96)

Sec. 39-1.3 Applicability--Purpose of provisions.

- (a) This chapter:
 - (1) Applies to all leases that contain provisions for renegotiation of lease rents for the residential apartment of an apartment owner-occupant. This chapter shall apply whether the leases were executed prior to the effective date of this chapter or are executed from the effective date of this chapter. This chapter also shall apply to lease rent renegotiations that are concluded after the effective date of this chapter;
 - (2) Sets a maximum annual renegotiated lease rent for the apartment of an owner-occupant;
 - (3) Allows biennial adjustment of renegotiated lease rent during the renegotiated rent period;
 - (4) Allows the administrative adjustment of renegotiated lease rent for a residential apartment to an amount higher than the applicable maximum. Administrative adjustment is allowed when the lessor pays operating expenses for the apartment; and
 - (5) Establishes a process for certification that a renegotiated lease rent for the residential apartment of an apartment owner-occupant is within the maximum.
- (b) This chapter does not and shall not be construed as setting a maximum lease rent or adjustment or certification process for lease rent payable during a fixed rent period or for a residential apartment that is not owned by an owner-occupant.

(Added by Ord. 91-96)

Sec. 39-1.4 Renegotiation provisions.

- (a) Every lease shall include or be deemed to include the following provisions:
 - (1) Renegotiation of lease rent shall occur no more frequently than every 10 years from and after the rent renegotiation date; provided, that the first renegotiation shall not be scheduled before the 15th year following the initial date of the lease;
 - (2) After any renegotiation, the renegotiated lease rent for the residential apartment of an apartment owner-occupant shall not exceed the maximum under Section 39-1.5;

- (3) During a renegotiated rent period, the renegotiated lease rent for a residential apartment may be further adjusted biennially in accordance with Section 39-1.6; and
 - (4) The renegotiated lease rent for a residential apartment may exceed the applicable maximum if administratively adjusted pursuant to Section 39-1.7.
- (b) In the event the parties to an apartment lease are unable to reach agreement under any reopening provision, the department or its designee shall arbitrate, and the maximum lease rent as determined by arbitration shall be certified by the department as provided for in Section 39-1.9; provided that where HRS Section 516D-12 is applicable, the arbitration shall proceed pursuant to HRS Chapter 516D. Arbitration proceedings under this subsection will be subject to the following requirements:
- (1) An advance deposit, which amount shall be determined by the department, equal to projected expenses and fees of the department or its designees for arbitration proceedings shall be required and shall be paid equally by lessors and lessees. All additional expenses and fees incurred by the department or its designee while acting as the arbitrator shall be borne equally by the lessees and the lessors. These additional expenses and fees shall be subject to monthly billings or other arrangements which may be specified by contract. If more than one lessee is involved in an arbitration proceeding, all lessors shall share equally in one-half of the arbitration costs. The same division of costs shall apply if more than one lessor is involved in a proceeding.
 - (2) Failure on the part of any lessee to comply with the provisions of this subsection, including failure to make advance deposits on payments, shall result in forfeiture of any rights or remedies under this chapter for arbitration, and the lessee's sole rights and remedies shall be as provided in the lease.
 - (3) If any lessor fails to comply with the provisions of this subsection, including failure to make advance deposits or payments, then arbitration proceedings under this chapter will cease and lease rent shall be set at the most recent fixed lease rent. Upon compliance with the provisions set forth in this section, the arbitration may proceed, with the determination of the new lease rent effective from the date of compliance by the lessor.

(Added by Ord. 91-96)

Sec. 39-1.5 Maximum annual renegotiated lease rent.

- (a) Except as otherwise specified under this subsection, the annual renegotiated lease rent payable from any renegotiation date by an owner-occupant for a residential apartment shall not exceed the maximum annual renegotiated lease rent established in accordance with this section. Only when administratively adjusted pursuant to Section 39-1.7 may the annual renegotiated lease rent exceed the maximum.
- (b) The maximum annual renegotiated lease rent for a residential apartment shall be the initial lease rent multiplied by a rent factor. The rent factor shall be determined by dividing:
 - (1) The average consumer price index for the six-month period in which the rent renegotiation occurs; by
 - (2) The average consumer price index for the six-month period in effect at the time of the effective date of the initial lease rent.
- (c) For purposes of determining the maximum annual renegotiated lease rent, the applicable consumer price index shall be the index in effect on the renegotiation date. The council is aware that the consumer price index is an average figure that is published every six months and may not accurately reflect the change in consumer prices as it applies to Honolulu on the renegotiation date. Accordingly, the maximum renegotiated lease rent may be adjusted within a six-month period to reflect the actual change, if any, and the adjusted amount shall be the maximum renegotiated lease rent for that period.

(Added by Ord. 91-96)

Sec. 39-1.6 Biennial adjustment or renegotiated lease rent.

- (a) During a renegotiated rent period, the renegotiated lease rent for the residential apartment of an owner-occupant may be adjusted biennially by the lessor in accordance with this section. A lessor may, but is not required to biennially adjust the lease rent for the residential apartment. If biennially adjusting the lease rent, the lessor may do so only with the approval of the department.
A renegotiated lease rent for a residential apartment, as adjusted in accordance with this section, shall be deemed within the applicable maximum.
- (b) For the purpose of this section:
 - "Biennially adjusted lease rent" means the annual renegotiated lease rent, as biennially adjusted.
 - "Current lease rent" means the annual renegotiated lease rent in effect prior to a biennial adjustment.
 - "Effective date of biennially adjusted lease rent" means the date on which a biennially adjusted lease rent takes effect. As provided under subsection (c) of this section, that date is two years after the effective date of the current

lease rent.

- (c) During a renegotiated rent period, the renegotiated lease rent for the residential apartment of an owner-occupant may be adjusted biennially. The biennially adjusted lease rent shall be determined by multiplying the current lease rent by a rent factor. The rent factor shall be determined by dividing:
- (1) The average consumer price index for the six-month period encompassing the effective date of the biennially adjusted lease rent; by
 - (2) The average consumer price index for the six-month period encompassing the effective date of the current lease rent.
- The biennially adjusted lease rent shall be effective from the date which is two years after the effective date of the current lease rent.
- (d) When there is less than two years between the effective date of the current lease rent and the commencement of a new renegotiated rent period, the current lease rent shall not be biennially adjusted under this section.
- (e) The council is aware that the consumer price index is an average figure that is published every six months and may not accurately reflect the change in consumer prices as it applies to Honolulu on the biennial adjustment date. Accordingly, the biennially adjusted lease rent may be revised with a six-month period after the official reporting of the applicable consumer price index. The revision shall reflect the actual, official change, if any, in the consumer price index. The revised amount shall be the biennially adjusted lease rent in effect.

(Added by Ord. 91-96)

Sec. 39-1.7 Administrative adjustment of annual renegotiated lease rent to exceed maximum.

- (a) The annual renegotiated lease rent for the residential apartment of an owner-occupant may be adjusted by the department to an amount higher than the maximum applicable to that apartment. An administrative adjustment shall be made in accordance with this section and only for the circumstances of subsection (c) or (d) of this section.
- (b) For the purpose of this section:
- "Administratively adjusted lease rent" means the annual renegotiated lease rent, as administratively adjusted.
- "Base year" means the last year of the fixed rent period.
- "Base year net operating income" means the lessor's net operating income from the apartment during the base year. If the lessor shows that the net operating income from the apartment during the base year was lower than normal because of extraordinary or unusual expenses, the department may adjust the base year net operating income to reflect an appropriate amount.
- "Fair net operating income" means net operating income from the apartment, as adjusted for inflation, which is the same as the base year net operating income. Inflation shall be measured by the change in the consumer price index from the base year to the years for which the administrative adjustment is proposed.
- "Operating expenses" mean:
- (1) Common expenses assumed by the lessor and unpaid by apartment owners or other lessees of the condominium project;
 - (2) Expenses for services provided by the lessor which primarily benefit the apartment owners of the condominium project;
 - (3) Expenses for maintenance by the lessor of apartments or facilities of the condominium project;
 - (4) Real property taxes;
 - (5) Special or improvement district assessments imposed:
 - (A) By the state or city for the funding of public projects; and
 - (B) On the owner of the condominium project or land on which the condominium project is situated;
 - (6) Expenses for telephone, electricity, gas, water, sewer, or cable television services used by apartment owners;
 - (7) Expenses for rehabilitation or repair of apartments or other facilities of the condominium project; and
 - (8) Payments of debt service incurred for the construction of on-site or off-site improvements.
 - (A) "Off-site improvements" mean all physical improvements:
 - (i) Constructed or placed off the land on which the condominium project is situated; and
 - (ii) Which are to be used in common by occupants of all lands adjoining the improvements or by occupants of all lands for whose benefit the improvements have been constructed or placed; and
 - (B) "On-site improvements" mean all physical improvements:
 - (i) Constructed or placed on the land on which the condominium project is situated; and
 - (ii) Which are for the benefit of apartment owners and other lessees in the condominium project.
- "On-site improvements" include, but are not limited to, dwelling units, garages, stairs, walkways, driveways, walls,

trees, shrubs, landscaping, and pools.

"Operating expenses for the apartment" mean operating expenses which:

- (1) Are paid directly for the residential apartment; or
- (2) Represent the proportionate share of the operating expenses attributable to the residential apartment, when the operating expenses are not paid directly for the apartment.

"Operating income for the apartment" means lease rent paid for the residential apartment.

"Net operating income" means operating income from the apartment less operating expenses for the apartment.

- (c) The annual renegotiated lease rent for the residential apartment of an owner-occupant may be administratively adjusted to an amount higher than the maximum applicable to that apartment if:

- (1) The lessor paid operating expenses for the apartment during the base year;
- (2) The lessor paid those operating expenses exclusively from lease rent proceeds and not from separate charges;
- (3) In the years for which the adjustment is proposed, the lessor will continue to pay those operating expenses exclusively from lease rent proceeds; and
- (4) The lessor's net operating income from the apartment in the years for which the adjustment is proposed will be less than the lessor's base year net operating income.

The administratively adjusted lease rent for the residential apartment shall be set to maintain a fair net operating income to the lessor. The administratively adjusted lease rent shall be valid for as long as the lessor continues to pay the operating expenses for the residential apartment. When the lessor discontinues payment of all or a portion of the operating expenses, the administratively adjusted lease rent shall be readjusted by the lessor to reflect the discontinuation.

An administratively adjusted lease rent under this subsection may be biennially adjusted pursuant to Section 39-1.6. The department shall establish a method of calculating the biennial adjustment to maintain the lessor's fair net operating income.

- (d) The annual renegotiated lease rent for the residential apartment of an owner-occupant may be administratively adjusted to an amount higher than the maximum applicable to that apartment if:

- (1) The lessor paid no operating expenses for the apartment during the last year of the fixed rent period;
- (2) In the years for which the adjustment is proposed, the lessor will pay operating expenses for the apartment; and
- (3) The lessor will pay those operating expenses exclusively from lease rent proceeds and not from separate charges.

The administratively adjusted lease rent for the residential apartment shall be set to allow the lessor to pass on the operating expenses to the apartment owner-occupant. The administratively adjusted lease rent shall be valid for as long as the lessor continues to pay the operating expenses for the residential apartment. When the lessor discontinues payment of all or a portion of the operating expenses, the administratively adjusted lease rent shall be readjusted by the lessor to reflect the discontinuation.

An administratively adjusted lease rent under this subsection may be biennially adjusted pursuant to Section 39-1.6. The department shall establish a method of calculating the biennial adjustment to maintain the pass-on of the operating expenses.

- (e) The lessor desiring an administrative adjustment of the annual renegotiated lease rent for a residential apartment shall petition the department. The petition shall specify the proposed adjusted lease rent and be accompanied by supporting data.

Upon receipt of a petition, the department:

- (1) Shall review the proposed adjusted lease rent and supporting data;
- (2) Shall give the lessor an opportunity to be heard;
- (3) May conduct its own study of the lessor's operating income and operating expenses or appraisal of the residential apartment or condominium project; and
- (4) May request the lessor to provide additional data.

Within 90 days of the submission of the petition, the department shall approve, disapprove, or modify the proposed adjusted lease rent. Upon approval, disapproval, or modification, the department shall notify the lessor and owner-occupant of the residential apartment. From the effective date of the adjustment, the lessor may charge the administratively adjusted lease rent for the residential apartment.

If the department disapproves a proposed adjusted lease rent for the residential apartment, the lessor shall not charge a lease rent higher than the maximum lease rent applicable to that apartment.

If the department does not take action within the 90-day period, the proposed adjusted lease rent shall be deemed approved and effective on the 91st day following submission. The department shall notify the lessor and owner-occupant of the residential apartment.

- (f) The department shall determine the cost incurred for each proceeding to adjust a lease rent. The lessor shall be charged for the cost incurred by the department for the proceeding; except that the lessor shall not be charged:
 - (1) For the cost of any study or appraisal undertaken by the department without the lessor's permission;
 - (2) If the department took no action on the proposed adjustment within the 90-day period under subsection (e); or
 - (3) If the department waives the charge to prevent undue financial hardship on the lessor.
 The department shall require the lessor to reimburse the department for the chargeable incurred costs, whether the proposed adjusted lease rent is approved, disapproved, or modified. All reimbursements received by the department shall be deposited into the general fund.
- (g) The approval, disapproval, or modification or a proposed adjusted lease rent may be appealed by the lessor or apartment owner-occupant. An appeal shall be made in writing to the department within 30 days of the approval, disapproval, or modification.

An appeal shall not stay the administratively adjusted lease rent, as approved or modified by the department. Upon the receipt of an appeal, the department shall refer the appeal to a hearing officer. The hearing officer shall:

 - (1) Hold an agency hearing in accordance with the contested case procedures of HRS Chapter 91; and
 - (2) Issue a decision and order confirming, modifying, or disapproving the department's action.
 The department may institute a civil action in any court of competent jurisdiction for the enforcement of a decision and order pursuant to this section.

(Added by Ord. 91-96)

Sec. 39-1.8 Interest in lease rent payments.

The lessor, including the master lessor and any sandwich position, shall share in the receipt of lease rentals paid by the owner-occupants and other lessees, as adjusted by this section, in accordance with their respective interests. Notwithstanding any contrary provision in any contract or lease, a developer or other person entitled to share in the lease rent payments shall share in such lease rent payments by the owner-occupants and other lessees to the extent of the developer's or other person's interest as may be determined by agreement of those entitled to share in the payment of lease rentals by owner-occupants and other lessees, or in the absence of such agreement, pursuant to HRS Chapter 658. (Added by Ord. 91-96)

Sec. 39-1.9 Certification of renegotiated lease rents after renegotiation.

- (a) In the lease rent renegotiation process, the renegotiated lease rent for an apartment owner-occupant may be set by arbitration as provided in Section 39-1.4(b) or by voluntary agreement without arbitration.
- (b) Each renegotiated lease rent set by an arbitrator or by voluntary agreement without arbitration shall not exceed the applicable maximum.
- (c) After being set by an arbitrator or voluntary agreement, but prior to taking effect, each renegotiated lease rent shall be submitted to the department. The purpose of the submission to the department is for certification that the renegotiated lease rent is within the applicable maximum. The apartment owner-occupant and lessor shall jointly submit the renegotiated lease rent. Upon submission, the department:
 - (1) May hold an agency hearing on the renegotiated lease rent;
 - (2) May require the apartment owner-occupant and lessor to submit relevant information; and
 - (3) May conduct its own study and investigation.
- (d) The renegotiated lease rent shall be deemed within the maximum if:
 - (1) The department so certifies within 30 days of the submission of the renegotiated lease rent; or
 - (2) The department fails to issue a certification by the 30th day following the submission of the renegotiated lease rent.
 If, within 30 days of submission, the department certifies that the renegotiated lease rent is not within the maximum, the renegotiated lease rent shall be invalid and shall not take effect. The department shall order the apartment owner-occupant and lessor to renegotiate again.
- (e) A party aggrieved by the department's action or inaction under this section may appeal to the department. Upon receipt of an appeal, the department shall:
 - (1) Hold an agency hearing in accordance with the contested case procedures of HRS Chapter 91; and
 - (2) Issue an appropriate decision and order.
- (f) If a court of competent jurisdiction rules or the state attorney general or corporation counsel opines that a renegotiated lease rent set by an arbitrator may be vacated, modified, or corrected only pursuant to HRS Chapter 658, and not by action of the department, an action to vacate, modify, or correct the renegotiated lease rent set by an arbitrator shall be subject to HRS Chapter 658, and no appeal of the renegotiated lease rent set by an arbitrator shall be made to the department.

(Added by Ord. 91-96)

Sec. 39-1.10 Assignment of renegotiated lease rent to another apartment owner-occupant.

If, during a renegotiated rent period, an apartment owner-occupant conveys or transfers the leasehold interest in a residential apartment to another person intending to be an owner-occupant, the renegotiated lease rent for the residential apartment shall be assigned and applicable to the new owner-occupant. For the renegotiated lease rent to be so assignable, the new owner-occupant shall execute an affidavit stating that the new owner-occupant intends to occupy the apartment so long as owning the residential apartment. (Added by Ord. 91-96)

Sec. 39-1.11 Renegotiated lease rent exceeding maximum for new apartment owner-occupant.

When an apartment owner conveys or transfers the leasehold interest in a residential apartment to another person intending to be an owner-occupant and:

- (a) The apartment is under lease during a renegotiated rent period; and
- (b) The renegotiated lease rent for the apartment is greater than the applicable maximum;

The renegotiated lease rent for the apartment shall be reduced by the lessor to the maximum rent chargeable under this chapter and such reduction shall be effective as of the date of occupancy by the new owner-occupant. For the renegotiated lease rent to be so reduced, the new owner-occupant shall execute an affidavit stating that the new owner-occupant intends to occupy the apartment as long as owning the apartment. (Added by Ord. 91-96)

Sec. 39-1.12 Renegotiated lease rent of apartment owner who is no longer owner-occupant.

A lessor may reopen the renegotiated lease rent for the residential apartment of an apartment owner who:

- (a) Was an owner-occupant of a residential apartment at the time of lease rent renegotiation; but
- (b) No longer qualifies as an apartment owner-occupant.

If reopened, the renegotiated lease rent for the residential apartment shall be set in accordance with the lease agreement for persons who are not owner-occupants and shall be effective as of the date of disqualification as provided by this chapter.

(Added by Ord. 91-96)

Sec. 39-1.13 Renegotiated lease rent of new apartment owner who is not an owner-occupant.

A lessor may reopen the renegotiated lease rent for the residential apartment of an apartment owner when:

- (a) The apartment owner has purchased or otherwise received the leasehold interest in a residential apartment from a former owner-occupant; and
- (b) The apartment owner does not occupy the residential apartment.

If reopened, the renegotiated lease rent for the residential apartment shall be set in accordance with the lease agreement for persons who are not owner-occupants and shall be effective as of the date of conveyance to the new apartment owner. (Added by Ord. 91-96)

Sec. 39-1.14 Enforcement.

- (a) Any person violating any provision of this chapter shall be subject to a civil fine not exceeding \$500.00 for each violation.
- (b) The department shall enforce this chapter. Any person may request that the department investigate any alleged violation of any part of this chapter, or the department on its own initiative may investigate any alleged violation.
- (c) Upon receipt of a written request by a person to investigate an alleged violation of this chapter, or upon its own initiative, the department shall conduct an investigation. If finding that a violation has occurred, the department shall attempt an informal correction of the violation. If the violation cannot be informally corrected or if the person requesting the investigation or the alleged violator requests an agency hearing, the department shall:
 - (1) Hold an agency hearing in accordance with the contested case procedures of HRS Chapter 91; and
 - (2) Issue an appropriate decision and order. If finding that a violation has occurred, the department may order the violator to do any or all of the following:
 - (A) Cease and desist from the violation;
 - (B) Correct the violation;
 - (C) Pay to a lessor or lessee any amount due and owing as specified in this chapter. An "amount due and owing" includes excessive lease rent paid by an apartment owner-occupant or insufficient lease rent paid to a lessor; or
 - (D) Pay the civil fine imposed under subsection (a) of this section.
- (d) The department may institute a civil action in any court of competent jurisdiction for the enforcement of any decision and order issued pursuant to this section. If finding that a violation has not occurred, whether before or after an agency hearing, the department shall so notify the alleged violator and, if any, the person who requested the investigation. The notification shall be in writing.

(Added by Ord. 91-96)