



DATE: March 4, 2019

TO: Members of the Rental Housing Committee

FROM: Karen M. Tiedemann, Special Counsel to the Rental Housing Committee
Justin D. Bigelow, Special Counsel to the Rental Housing Committee
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SUBJECT: Appeal of Decision Petitions 18190025, 18190026, and 18190033

RECOMMENDATION

Consider the Tentative Appeal Decision and either accept the Tentative Appeal Decision or modify the Tentative Appeal Decision with instructions to staff citing appropriate evidence in the record.

BACKGROUND

This is an appeal hearing regarding three tenant petitions for downward adjustment of rent, two relating to unlawful rent and one addressing a failure to maintain habitable premises and reduction in housing services. The hearing on the petition was held on November 30, 2018. The record was kept open until December 24, 2018 and the hearing officer decision was delivered on January 23, 2019. A revised hearing officer decision was delivered on or about February 6, 2019. The Landlord appealed the decision filing a timely appeal received by the RHC on February 8, 2019. A relevant timeline is provided below for reference.

Table 1 Relevant Timeline

<u>Date</u>	<u>Action</u>
Aug 31, 2018	RHC accepted two petitions regarding Unit 8 (18190025, 18190026)
Sep 18, 2018	RHC accepted one petition regarding Unit 5 (18190033)
Sep 28, 2018	RHC consolidated hearing for all three petitions; hearing scheduled for Oct. 12, 2018; notice sent to all parties
Oct 10, 2018	Landlord requests postponement of hearing for "2-3 months"
Oct 12, 2018	Hearing Officer grants landlord request for postponement of hearing

Nov 19, 2018	Notice sent to all parties of new hearing date scheduled for Nov. 30
Nov 29, 2018	Landlord requests second postponement of hearing
Nov 30, 2018	Hearing held, Hearing Officer denies second request for postponement and conducts hearing leaving record open until Dec. 7, 2018 for submission of additional documents instead of postponing hearing
Dec 6, 2018	Landlord requests hearing record remain open until Dec. 14 to allow newly hired counsel to assist landlord; Hearing Officer grants requests and allows submission of new evidence until Dec. 14 and allows submission of briefing until Dec. 24, 2018
Dec 24, 2018	Hearing Record closed after additional information submitted by both Appellant-Landlord and Respondent-Tenants
Jan 23, 2019	Hearing decision delivered
Feb 6, 2019	Amendment to decision regarding Unit 5 delivered
Feb 8, 2019	Appeal submitted by Appellant-Landlord
Mar 4, 2019	Appeal hearing before RHC

Two petitions for unlawful rent relate to Units 8 and 5, respectively. An additional petition alleges a failure to maintain habitable premises and reductions in housing services for Unit 8.

The Decision addresses each petition and specifically discusses the procedural history of the petitions, including consolidation and the landlord's multiple requests for postponement, as outlined in the timeline above. Ultimately, the Decision concludes that unlawful rent was requested and received by the landlord for Units 8 and 5. The Decision further concludes that habitability issues existed and housing services reductions occurred with respect to Unit 8. The Decision awards refunds of unlawful rent and reductions of rent based on the habitability and housing service reduction issues.

Appellant-Landlord appealed six elements of the Decision: five related to Unit 8 and one related to Unit 5. As described in Section C of this report, each of the six appeal elements is discussed in the Tentative Appeal Decision.

Both Respondent-Tenants responded in writing to the Tentative Appeal Decision. Each response challenged the conclusion related to the reduction of housing services for Unit 8 based on the off-street automobile parking space. Each Respondent-Tenant's response to the Tentative Appeal Decision is attached to this report.

Appellant-Landlord also responded in writing to the Tentative Appeal Decision, which response is attached to this report. In its response to the Tentative Appeal Decision, Appellant-Landlord abandons two of the six appeal elements that were raised in its

appeal. Appellant-Landlord continues to challenge three elements of the Decision and Tentative Appeal Decision: painting of Unit 8, living room window in Unit 8, and bathroom window in Unit 8. These issues are further discussed in Section C of this report.

ANALYSIS

A. Role of the RHC

The role of the RHC is not to re-weigh evidence submitted in support of or opposition to the Petition, unless the RHC chooses to hear the appeal "*de novo*" pursuant to Regulation Chapter 5, Section H.5.a. *De novo* review would require the RHC to open the hearing record and hold a new, formal hearing. Staff does not recommend *de novo* review for this appeal. Thus, the RHC's role will be to determine whether the appealed elements of the hearing officer's Decision are supported by substantial evidence. This process mimics a trial court and appeal court: the trial court drafts a decision after weighing all the evidence and the appeal court reviews the decision to verify whether the decision was adequate.

Legally, reviewing whether substantial evidence exists to support an appealed element of the decision simply means that there is adequate information in the record to support the decision. Stated differently, substantial evidence means that a reasonable person reviewing the evidence could have reached the same decision. Substantial evidence does not mean that RHC members (or RHC staff or special counsel) would have reached the same conclusion if they were present for every aspect of the hearing.

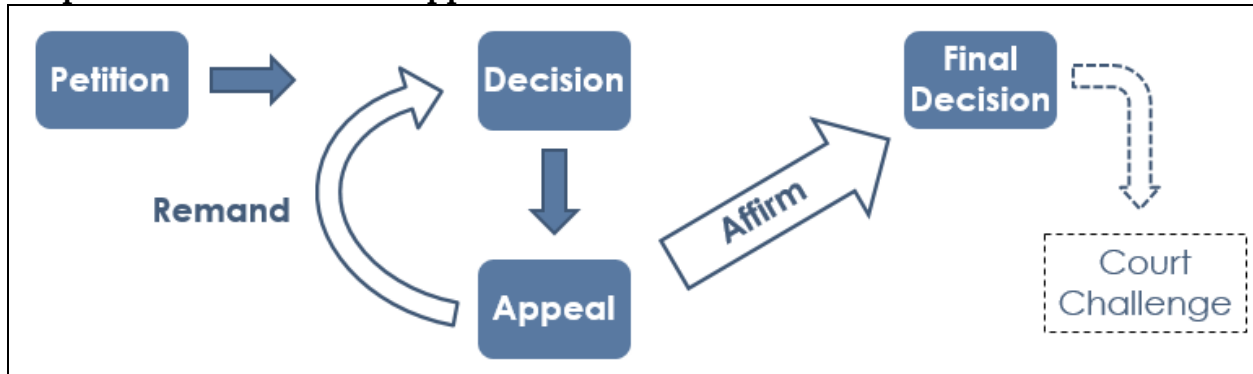
Similarly, an appeal hearing is not an opportunity for the RHC to opine about or determine whether or not code violations exist on a property. City Code and State law provide substantive habitability standards for residential rental property. The City Multi-Family Housing Inspection Program inspects properties, determines whether violations exist, and documents the determinations and identifies actions to resolve violations. Documentation of the Multi-Family Housing Inspection performed on the subject property is attached to this staff report.

B. Review: Affirming and/or Remanding the Appealed Element of the Decision After Remand

Petitions define the scope of information hearing officers review. Appeals define the scope of RHC review of the decision. The portions of the decision that were not appealed by any party are considered final. The Tentative Appeal Decision reviews only those portions of decision that were appealed by the parties.

The process for an appeal can result in multiple appeal hearings before the RHC if a decision is remanded to the hearing officer, which is the case here. A summary graphic visualizing the appeal procedure is provided below.

Graphic 1 Visualization of Appeal Procedure



C. Tentative Appeal Decision - Appeal Elements

The Tentative Appeal Decision recommends modifying the Decision with respect to Unit 8 and affirming the Decision with respect to Unit 5.

The table below summarizes the six elements of the Decision appealed by Appellant-Landlord. The letter/number combination in the left-most column identifies the section in part IV of the Tentative Appeal Decision that discusses that element of the appeal.

In its response to the Tentative Appeal Decision, Appellant-Landlord concedes some appeal elements, and provides further argument and offers new evidence regarding other appeal elements. Specifically, Appellant-Landlord's appeal and response to the Tentative Appeal Decision both include new evidence regarding appeal element A.2 (Unit 8: Painting). The Tentative Appeal Decision recommends maintaining the evidentiary record as created by the Hearing Officer (i.e. not accepting new evidence).

Appellant-Landlord argues that the RHC should accept new evidence based on the "disability and confusion" of Appellant-Landlord, which lead to Appellant-Landlord's "inability to prepare properly" for the petition and hearing process.

In light of the initial postponement of the hearing and the extended opportunity to submit evidence and argument after the in-person Hearing, during which time Appellant-Landlord was represented by counsel, staff continues to recommend the evidentiary record remain closed.

<u>Issue/Appeal Element</u>	<u>Tentative Decision</u>	<u>Responses to Tentative</u>
A.1 Services rendered as partial rent payment for Unit 8	Granting request in part and modifying decision to account for partial payment of rent for September 2017	<i>No longer contested</i>
A.2 Unit 8: Painting	Denying request to accept new evidence submitted with the Appeal; affirming Decision and providing partial refund for reduction of housing services.	<i>Contested by Appellant-Landlord</i>
A.3 Unit 8: Automobile Parking	Granting request in part; affirming valuation of housing service but modifying Decision to clarify that physical occupation of parking space by Appellant-Landlord constitutes a housing service reduction	<i>Contested by Appellant-Landlord and Respondent-Tenants</i>
A.4 Unit 8: Bathroom Window	Denying request and affirming decision valuing broken window and reducing rent accordingly	<i>Contested by Appellant-Landlord</i>
A.5 Unit 8: Living Room Window	Denying request and affirming decision valuing inability to lock window and reducing rent accordingly	<i>Contested by Appellant-Landlord</i>
A.6 Unit 5: Unlawful Rent	Denying request and affirming decision that Appellant-Landlord must refund unlawful rent received from Respondent-Tenant	<i>No longer contested</i>

Staff does not recommend altering the Tentative Appeal Decision.

D. Appeal Hearing Procedure

Each party to the appeal will have an opportunity to present their arguments to the RHC and respond to the other party's presentation. As noted above, the parties are not to present new evidence. Likewise, the public may provide comment to the RHC before it hears any appeals (Gov. § 54954.3(a)). Finally, RHC members may have questions for staff and/or the parties. The following schedule for the appeal hearing is proposed to facilitate the orderly participation of all parties.

Agenda Item 7.1 Appeal(s) of Hearing Officer Decision(s)

Public Comment Period applicable for all Appeals on the agenda

Appeal Hearing (CSFRA Petition No. 18190025, 18190026, 18190033)	
Staff Report & Presentation	
Appellant-Landlord Presentation of Argument	10 minute maximum
Respondent –Tenant Presentation of Argument	10 minute maximum
Appellant-Landlord Presentation of Rebuttal	5 minute maximum
Respondent- Tenant Presentation of Rebuttal	5 minute maximum
RHC Question and Answer with Staff	
RHC Question and Answer with Appellant-Landlord	
RHC Question and Answer with Respondent-Tenants	
RHC Deliberations and Decision	

Conclude Agenda Item

FISCAL IMPACT

Adoption of the Tentative Appeal Decision, as drafted, could potentially lead to litigation, which would have fiscal impacts. Notably, one purpose of appealing a hearing officer decision to the RHC (as opposed to directly appealing to the courts) is to ensure that decisions are legally defensible, and so the appeal process to the RHC reduces the overall risk of legal liability and litigation expenses. As discussed above, the Tentative Appeal Decision recommends modifying in part and affirming in part the hearing officer's Decision, in which case the Decision would be considered a final ruling and could be challenged in court.

PUBLIC NOTICING – Agenda posting

ATTACHMENTS

1. Tentative Appeal Decision (Petitions 18190025, 18190026, 18190037)
2. Multi-Family Housing Inspection - 855 857 Park Drive (8/7/18)
3. Decision of Hearing Officer, as amended
4. Appellant-Landlord Appeal of Decision
5. Respondent-Tenant Wilson Response to Tentative Appeal Decision
6. Respondent-Tenant Halprin Response to Tentative Appeal Decision
7. Appellant-Landlord Response to Tentative Appeal Decision