

DATE: December 19, 2022

TO: Rental Housing Committee

FROM: Karen M. Tiedemann, Special Counsel to the Rental Housing Committee
Nazanin Salehi, Special Counsel to the Rental Housing Committee
Anky van Deursen, Program Manager

SUBJECT: Appeal of Hearing Officer’s Decision Regarding Petition No. 21220012

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

The instant appeal arises out of a tenant petition for downward adjustment of rent (“Petition”) filed on May 25, 2022, and based on failure to maintain habitable premises and decrease in maintenance or housing services. The hearing on the petition was held on September 20, 2022, and the Hearing Officer’s Decision (“Hearing Decision”) was delivered on October 20, 2022. The Tenant timely appealed the Hearing Decision on October 26, 2022. The Tenant had previously filed two other petitions—Petitions No. 20210021 and 20210022—against the Respondent based on several of the same issues alleged in the instant Petition. The prior petitions were decided by a Hearing Officer Decision dated September 7, 2021 (“2021 Decision”). A relevant timeline is provided below for reference.

Table 1: Relevant Timeline

| <u>Date</u> | <u>Action</u> |
|--------------------|--|
| July 28, 2021 | Hearing on Petition Nos. 20210021 and 20210022 |
| August 11, 2021 | Hearing record closed |
| September 7, 2021 | Hearing Officer Decision (“2021 Decision”) on Petitions issued |
| September 10, 2021 | Notice of 2021 Decision sent to Parties |
| September 29, 2021 | Tenant files appeal of 2021 Decision |
| October 18, 2021 | Rental Housing Committee denies untimely appeal of 2021 Decision |
| May 25, 2022 | Petitioner-Tenant files Petition No. 21220012 |

| | |
|--------------------|---|
| June 14, 2022 | Notice of Hearing issued with original hearing date of July 27, 2022 |
| July 8, 2022 | First Pre-Hearing Conference held |
| July 8, 2022 | Written Summary of Prehearing Conference served on the Parties |
| July 8, 2022 | Petitioner submits request for postponement of scheduled hearing |
| July 11, 2022 | Hearing Officer denies Petitioner's request for postponement |
| July 21, 2022 | Hearing Officer issues Prehearing Decision limiting the scope of the scheduled hearing on the Petition based on <i>res judicata</i> |
| July 25, 2022 | Petitioner submits reasonable accommodation request to the Rental Housing Committee and City of Mountain View |
| July 26, 2022 | Hearing Officer issues Second Prehearing Order postponing hearing to August 10, 2022 |
| August 8, 2022 | Hearing Officer issues Third Prehearing Order postponing hearing to September 20, 2022 |
| August 24, 2022 | Chair of Committee denies Petitioner's request for reasonable accommodation request |
| September 20, 2022 | Hearing held on Petition |
| September 20, 2022 | Hearing Record closed |
| October 20, 2022 | Hearing Officer Decision on Petition issued and Notice of Hearing Officer Decision sent to the Parties |
| October 20, 2022 | 2021 Decision reissued to correct clerical error |
| October 26, 2022 | Petitioner files Appeal |
| November 23, 2022 | Tentative Appeal Decision issued |
| November 25, 2022 | Petitioner files Response to Tentative Appeal Decision |
| December 5, 2022 | Appeal hearing scheduled before Committee; canceled due to lack of quorum of Committee members |
| December 8, 2022 | Petitioner files Amended Response to Tentative Appeal Decision |
| December 19, 2022 | Appeal hearing scheduled before Committee |

The Petition requested a rent reduction on the basis that the balcony at the Property is not up to building code, and there are cracks in the walkways of the apartment complex. Additionally, the Petition requested a rent reduction on the basis of a decrease in maintenance or housing services due to the loss of property value since Respondent took ownership. Finally, at the hearing, Petitioner raised the issue of the floor of the Property being unstable.

Prior to the Hearing on the Petition, Respondent challenged the Petition based on the doctrine of *res judicata*. Stated briefly, the doctrine of *res judicata* provides that a cause of action between the same parties may not be "relitigated" once it has already been judged on the merits. Respondent alleged that the Petition was barred because it raised the same issues as Petition Nos. 20210021 and 20210022, which were already decided by the 2021 Decision. The Hearing Officer requested briefing from the parties on the *res judicata* issue and, ultimately, issued a

Prehearing Order limiting the scope of the hearing on the instant Petition to any new facts or evidence arising after July 28, 2021, the date of the hearings on the prior petitions.

The Hearing Decision addresses each of the issues raised in the Petition as well as the legal arguments raised by both the Tenant and Landlord at the hearing and in written submissions. The Hearing Decision concludes that the Tenant did not meet his burden of proof with regard to any of the habitability issues alleged—the condition of the balcony, the walkway, or the floor. Further, the Hearing Decision found that a reduction in the tax-appraised value of the property did not constitute a reduction in maintenance or housing services. Thus, the Hearing Decision held that the Tenant was not entitled to any reduction in rent on the basis of failure to maintain habitable premises and/or a reduction in housing services or maintenance.

Simultaneously with the issuance of the Hearing Decision, the 2021 Decision was reissued to correct a minor clerical error resulting in the misstatement of the Tenant's first name as "William" rather than "Steven" in the caption of the 2021 Decision.

Appellant-Tenant raised seven issues on appeal as well as additional issues in his response to the Tentative Appeal Decision. On appeal, Tenant makes the following arguments:

1. The Order revising the 2021 Decision made the doctrine of *res judicata* inapplicable and reset the timeline for appeal of the 2021 Decision to October 21, 2022.
2. The current rental agreement for the Property is wholly unlawful and void because the value of the Property has decreased since 2018.
3. The Hearing Officer erroneously interpreted and applied Section 1710(c) of the CSFRA, which establishes the basis for a downward reduction of rent based on a decrease in maintenance or housing services. The Hearing Officer should not have required Petitioner to demonstrate a lack of maintenance to establish a reduction in housing services.
4. The Hearing Officer improperly permitted the testimony of a City Building Inspector because governmental immunity prevents City employees from taking an oath to testify under penalty of perjury.
5. The Hearing Officer improperly permitted evidentiary submissions from Respondent-Landlord's contractor because the contractor's self-certification of his work was illegal.
6. The Hearing Officer should not have considered any documentary evidence or testimony from either the Landlord's contractor or the City Building Inspector because they failed to submit documentary evidence to support their opinions.

7. The Hearing Officer failed to follow proper procedure by not ordering an investigation or inspection of the Property and, therefore, the Hearing Decision is unenforceable due to noncompliance with State building codes.

As described in Section C of this report, each of the appeal elements is addressed in detail in the Tentative Appeal Decision. All parties are entitled to respond to the Tentative Appeal Decision. Appellant-Tenant submitted a response to the Tentative Appeal Decision on November 25, 2022 ("Appellant's Response").

Appellant's Response sets forth the following arguments: (1) Appellant is a certified Information Systems Security Professional, and the Hearing Officer should have considered his expert opinion about whether the 2021 Decision was plagiarized; (2) the 2021 Decision was invalid and unenforceable because it was plagiarized by the Hearing Officer; (3) the Appellant's argument regarding the validity of the rental agreement for the Property is an appropriate topic for appeal because the Hearing Officer failed to consider this argument in the Hearing Decision; (4) the letter of the law requires a downward adjustment of the rent where a property's assessed value has decreased; (5) the City Building Inspector should not have been permitted to testify because the RHC could only use City services during the period between the effective date of the CSFRA and the appointment of the initial members of the RHC; (6) the Hearing Officer was bound by the formal rules of evidence because the petition hearing as a quasi-judicial hearing, not an administrative hearing; (7) testimony from the City Building Inspector and Landlord's contractor should not have been considered because it was not supported by documentary evidence; and (8) the RHC has demonstrated bias toward the Appellant.

On December 6, 2022, Appellant filed an Amended Response to the Tentative Appeal Decision ("Amended Response"). The Amended Response includes the following additional arguments: (1) the CSFRA requires landlords to demonstrate substantial compliance with the habitability and maintenance requirements of the Act as substantiated by proactive inspections; (2) failure of a landlord to demonstrate substantial compliance with said standards renders the Certificate of Occupancy for a unit invalid and, thereby, makes the rental agreement for the unit void and unenforceable; (3) the Hearing Officer did not have discretion to permit certain evidence because Respondent did not demonstrate compliance with the registration requirements or required inspections; and (4) CSFRA Regulations Chapter 5, Section (E)(4) was passed while former Committee member Tom Means was on the Committee and because he had a conflict of interest, the regulation is invalid.

The Amended Response also raises issues regarding a letter that Appellant received, dated December 1, 2022, informing him that Respondent had requested a mediation via the Mountain View Mediation Program to address issues related to his tenancy. Neither this report nor staff's presentation address Appellant's arguments regarding the mediation as they do not relate to the instant Appeal.

To the extent additional responses are received, staff may provide a supplement to this report addressing the responses.

ANALYSIS

A. Role of the RHC

The role of the RHC is not to reweigh 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 because the appeal raises questions related to whether the Hearing Officer followed the proper procedures in admitting certain evidence and whether the Hearing Officer correctly interpreted and applied the law. Thus, the RHC's role will be to determine whether the appealed elements of the Hearing 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.

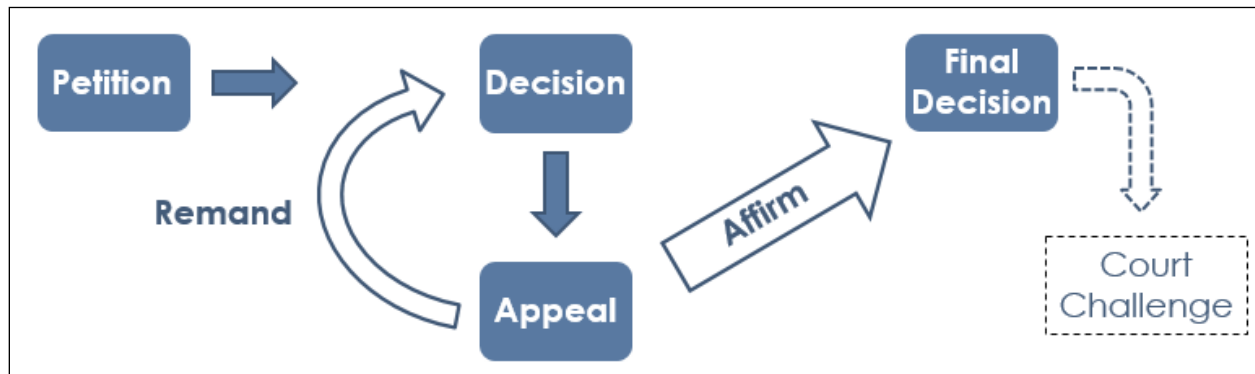
Legally, reviewing whether substantial evidence exists to support an appealed element of the decision simply means that there is adequate information in the record to support the decision. Stated differently, substantial evidence means that a reasonable person reviewing the evidence could have reached 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.

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

Petitions define the scope of the Hearing Officer's review. Appeals define the scope of RHC review of the Hearing Decision. The portions of the Hearing Decision that were not appealed by any party are considered final. The Tentative Appeal Decision reviews only those portions of Hearing Decision that were appealed by the parties.

The process for an appeal can result in multiple appeal hearings before the RHC if a Hearing Decision is remanded to the Hearing Officer. 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 affirming the Prehearing Order and Hearing Decision in its totality.

The Prehearing Order determined that the doctrine of *res judicata* applied to limit the scope of the issues in the Petition to those facts and circumstances arising after July 28, 2021. The Petition alleged the same issues against the same owner for the same Rental Unit as Petition Nos. 20210021 and 20210022, which were decided by the 2021 Decision. Appellant alleges that the 2021 Decision was plagiarized by the Hearing Officer in the first petition and that the reissuance of the 2021 Decision to correct a clerical error barred application of *res judicata*. Appellant lacks legal authority for his argument regarding reissuance of the 2021 Decision. Outside of pointing out that the document was created on a computer registered to a different user, he also has not presented any credible evidence that the 2021 Decision was plagiarized. The Hearing Officer correctly applied *res judicata* to narrow the scope of the Petition.

The Hearing Decision concluded that the Appellant-Tenant had failed to meet his burden of proving that the Landlord has not maintained the balcony, walkway, and Petitioner's floor in a habitable condition since July 28, 2021. In reaching this conclusion, the Hearing Decision found testimony from Respondent and the City Building Inspector and documentary evidence from Respondent's contractor to be persuasive in showing that there were no habitability issues and there had not been any reduction in maintenance at the property. Appellant alleges the Hearing Officer either erred or abused her discretion in admitting testimony and documentary evidence, relying on theories about legal immunity

of governmental employees, evidentiary standards in administrative hearings, and procedural requirements of State building codes.

Ultimately, each of Appellant-Tenant's theories fails for lack of relevance and applicability and for its conclusory nature. For instance, Appellant's Response asserts that formal rules of evidence are applicable to the Petition hearing because it is a quasi-judicial, not an administrative hearing. However, quasi-judicial and administrative in the context in which they are being used here are synonymous terms for the same process. Appellant's own cited authorities clearly state: "most cities do not use formal rules of evidence in quasi-judicial hearings." Nonetheless, Appellant asserts the Petition process "is NOT an administrative CITATION hearing, thus the general rule used DOES NOT APPLY." Appellant's argument cites no authority for why a petition hearing should be treated differently from an administrative citation hearing. Appellant also fails to acknowledge that the CSFRA Regulations explicitly provide that the formal rules of evidence do not apply to the petition hearings.

Similarly, Appellant argues that oral and written testimony from Respondent's witnesses should have been excluded by the Hearing Officer because they were not supported by documentary evidence. Again, Appellant fails to cite any legal authority for the purported rule that all testimony must be supported by documentary evidence. While a party to a hearing may choose to submit documentary evidence to corroborate, validate, or reinforce witness testimony, doing so is not a precondition to having the testimony admitted. The Hearing Officer's decision to admit the testimony, and the weight she afforded the testimony were wholly within her discretion. Reconsideration of the latter is outside of the RHC's purview on appeal.

The Hearing Decision also found that the Petitioner was not entitled to a downward adjustment of rent based on a reduction in housing services or maintenance. The Hearing Decision concluded that a reduction in the assessed value of the property, as evidenced by County tax appraisal documents, neither constituted a per se decrease in housing services nor proved that Respondent had failed to maintain the property. Appellant asserts that the Hearing Officer incorrectly interpreted and applied Section 1710(c) of the CSFRA, which authorizes downward adjustment of rent petitions for decreases in housing services or maintenance. Neither the Appeal nor Appellant's Response cite legal authority demonstrating that Appellant's interpretation of the law is correct or for the Appellant's conclusion that the Hearing Officer's interpretation is incorrect.

Next, Appellant's Response asserts that the Hearing Officer and the Committee have demonstrated bias toward the Appellant throughout the petition process. Appellant's argument is grounded in his belief that other petitioners have prevailed on the same or similar theories while Petitioner has not. Appellant provides no factual evidence for his belief. Nonetheless, the accuracy of this alleged fact is wholly irrelevant because Appellant

has not demonstrated that the facts in his case are identical or even similar to the facts in other petitions.

The arguments in Appellant's Amended Response similarly lack merit. For example, Appellant asserts that the CSFRA required Respondent to substantiate compliance with maintenance and habitability requirements through evidence of inspections and that failure to provide documentation of said inspections invalidates both the Certificate of Occupancy and the rental agreement for the property. Nowhere in the CSFRA or the Regulations are inspections mandated. In fact, the Act operates largely on a complaint-based system, especially with respect to issues of habitability and maintenance. A downward adjustment of rent petition is the proper mechanism by which to challenge a landlord's attestation that they are in substantial compliance with maintenance and habitability standards. In the instant case, the Hearing Officer determined that Respondent had substantially complied with the requirements.

Appellant's argument about the validity of the CSFRA Regulations Chapter 5, Section (E)(4) is also futile. CSFRA Regulations Chapter 5, Section (E)(4) provides that formal rules of evidence do not apply to Individual Rent Adjustment petitions. Appellant asserts that this regulation is invalid and inapplicable because it was passed at a time when a member of the RHC was alleged to have a conflict of interest. The Committee member in question, Tom Means, was never formally determined to have a conflict of interest that prevented him from serving on the Committee. Moreover, there is no legal authority for Appellant's assertion that the regulation should now be invalidated due to an alleged conflict of interest held by a single member of the Committee over seven (7) years ago. Finally, there is no evidence that the Committee would not have passed the specific regulation in question but for former member Means' participation. A vast majority of the rent-controlled jurisdictions in the State, including Richmond, Berkeley, San Francisco, and San Jose, do not require petition hearings to be conducted in accordance with formal rules of evidence.

A review of the record supports the following conclusions: (1) the Hearing Officer followed proper procedures and applied proper standards; (2) the Hearing Officer acted within her discretion in allowing certain testimony and evidence; and (3) the Hearing Officer's findings of fact were supported by evidence in the record and her conclusions of law were sufficiently supported by the findings of fact. The Tentative Appeal Decision recommends affirming the Prehearing Order and Hearing Decision in its totality.

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 (Government Code § 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.

| Schedule of Appeal(s) of Hearing Decision(s) | |
|--|-------------------|
| <ul style="list-style-type: none"> Public Comment Period applicable for all Appeals on the agenda | |
| Appeal Hearing (CSFRA Petition No. 21220016) | |
| Staff Report & Presentation | |
| Appellant-Tenant Presentation of Argument | 10-minute maximum |
| Respondent-Landlord Presentation of Argument | 10-minute maximum |
| Appellant-Tenant Presentation of Rebuttal | 5-minute maximum |
| Respondent-Landlord Presentation of Rebuttal | 5-minute maximum |
| RHC Question and Answer with Staff | |
| RHC Question and Answer with Appellant-Tenant | |
| RHC Question and Answer with Respondent-Landlord | |
| RHC Deliberations and Decision | |
| <ul style="list-style-type: none"> 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 Decision to the RHC (as opposed to directly appealing to the courts) is to ensure that Hearing 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 upholding the Hearing Decision in its entirety. If the RHC accepts the Tentative Appeal Decision, the Hearing Decision will be final.

PUBLIC NOTICING—Agenda posting.

KMT-NS-AvD/JS/1/CDD/RHC

895-12-19-22M

- Attachments:
1. Tentative Appeal Decision for Petition No. 21220012
 2. Decision of Hearing Officer (October 20, 2022)
 3. Appellant-Tenant Appeal of Decision (October 26, 2022)
 4. Appellant-Tenant's Response to Tentative Appeal Decision (November 25, 2022)
 5. Appellant-Tenant's Amended Response to Tentative Appeal Decision (December 8, 2022)
 6. Correspondence from Appellant-Tenant and Staff's Responses to Correspondence (November 23, 2022—December 14, 2022)
 7. Notice of Rescheduled Appeal Hearing (December 7, 2022)