



DATE: February 11, 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
Anky van Deursen, Program Manager

SUBJECT: Appeal of Decision on Remand Re: Petition 17180002

RECOMMENDATION

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

BACKGROUND

This is the second appeal hearing on a petition for upward adjustment of rent. The Rental Housing Committee (“RHC”) heard the first appeal on the petition on August 27, 2018 and remanded the decision to the hearing officer with direction to the hearing officer on thirteen appeal elements. The hearing officer issued a Decision After Remand on December 10, 2018 and both parties to the petition filed timely appeals of the Decision After Remand. A relevant timeline is included below for your reference.

Table 1 Relevant Timeline

<u>Date</u>	<u>Action</u>
Dec 22, 2017	Appellant-Landlord submitted petition for upward adjustment
Jan 4, 2018	Petition accepted
Feb 12, 2018	Respondent-Tenants submit response in opposition to Petition
Feb 14, 2018	Pre-hearing settlement conference held
Feb 28, 2018	Hearing officer requests additional information from Appellant-Landlord, delaying initially scheduled hearing
Mar 7, 2018	Hearing Officer conducts pre-hearing telephonic conference
Mar 7, 2018	Hearing Officer requests additional information from Respondent-

<u>Date</u>	<u>Action</u>
	Tenants
Apr. 4, 2018	Appellant-Landlord submits additional information, revising Petition
May 22, 2018	Hearing held, at conclusion Hearing Officer requests additional information from all parties, leaving record open
June 13, 2018	Hearing Record closed after additional information submitted by both Appellant-Landlord and Respondent-Tenants
July 16, 2018	Hearing decision delivered
July 20, 2018	Appeal submitted by Appellant-Landlord
July 24, 2018	Appeal submitted by Respondent-Tenants
Aug 27, 2018	Appeal hearing before RHC
Sept. 6, 2018	Direction to Hearing Officer on Remand delivered
Dec 10, 2018	Decision on Remand issued
Dec 21, 2018	Appeals submitted by both Appellant-Landlord and Respondent-Tenants
Feb. 11, 2018	Second Appeal Hearing before RHC

Appellant-Landlord submitted a petition for upward adjustment of rent that was originally applicable to 68 units at the property. As part of the hearing process and as the result of the Hearing Officer requesting additional information from Appellant-Landlord, the Appellant-Landlord submitted revised petition worksheets on April 4, 2018 at which time the number of units subject to the petition was reduced to 56 units (“Subject Units”).

The petition seeks an upward adjustment of rent with two requests: (1) that the Appellant-Landlord be granted a Vega adjustment pursuant to Regulation Chapter 6, Section G(3) and (2) that Appellant-Landlord be granted an increase in rent for 56 units in order to maintain Appellant-Landlord’s net operating income as earned in 2015.

The hearing officer issued a decision on July 16, 2018 (“First Decision”) which decision was appealed by both the Appellant-Landlord and the Respondent-Tenants. In the First Decision, the hearing officer denied the Appellant-Landlord’s request for a Vega adjustment and then granted a rent increase applicable to the 56 units based on the Maintenance of Net Operating Income formula.

The RHC heard the appeals on the petition on August 27, 2018 and remanded the decision to the Hearing Officer with direction on 13 elements of the decision (See Attachment 2).

The hearing officer issued a Decision After Remand on December 10, 2018, which denied the Vega adjustment and granted the Appellant-Landlord an increase for 56 units in order to maintain Appellant-Landlord's net operating income. The Decision After Remand corrected certain mathematical errors in the First Decision and clarified the hearing officer's reasoning with respect to aspects of the First Decision upon which the RHC directed the Hearing Officer to provide further clarification.

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 After Remand 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.

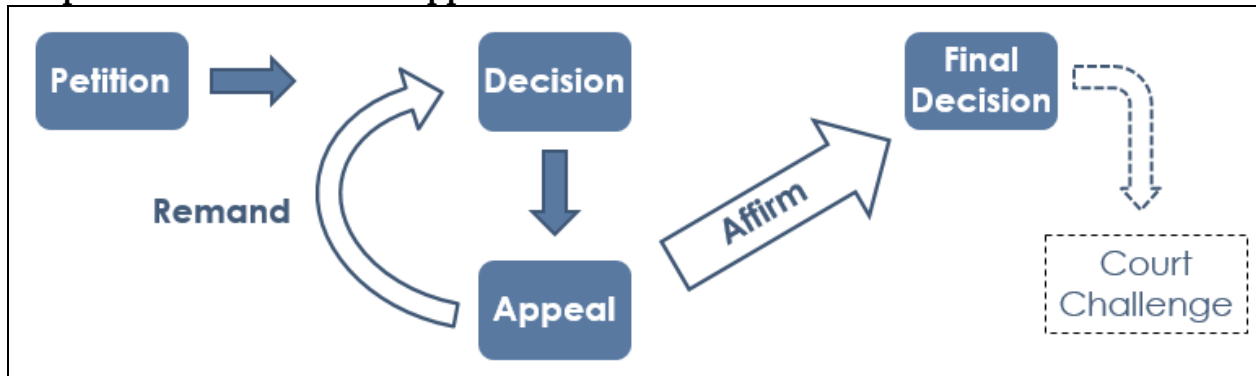
B. Review: Affirming and/or Remanding the Appealed Element of the Decision After Remand

Petitions define the scope of information hearing officers review. Appeals define the scope of information the RHC reviews. In this instance the initial appeals filed by both parties narrowed the issues to be considered by the RHC. The RHC further narrowed the issues to be considered by the hearing officer in the Decision After Remand in its direction on remand. Those portions of the First Decision that were either not appealed by the parties or that were affirmed by the RHC were not subject to the Decision After Remand and are not properly subject to an appeal of the Decision After Remand, as those portions of the First Decision are considered final.

Likewise, the Second Tentative Appeal Decision reviews only those portions of the appeals filed by the parties that address matters that were remanded to the hearing officer. As noted in the Second Tentative Appeal Decision, Appellant-Landlord included within its appeal items that were affirmed by the RHC in its Direction After Remand and not the subject of the Decision After Remand. These issues are not the proper subject matter for an appeal. Thus, the appeals on the Decision After Remand have narrowed the issues to be considered in the appeal.

As was noted when the RHC heard the appeals on the First Decision, 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. Second Tentative Appeal Decision.

The Second Tentative Appeal Decision recommends modifying the Decision After Remand with respect to the Vega adjustment. The Decision After Remand includes additional discussion of the evidence presented by both parties on the Vega adjustment, including the evidence presented by the Respondent-Tenants regarding the condition of the property and whether the condition of the Subject Units justified a Vega adjustment. After reviewing the Decision After Remand as well as the evidence presented by the parties, the Second Tentative Appeal Decision finds that the evidence presented by the Respondent-Tenants did not meet the burden of proof to overturn the presumption that the Appellant-Landlord is entitled to a Vega adjustment on 22 units. The Second Tentative Appeal Decision includes a calculation of the Vega adjustment on the 22 units based on the First Decision which determined that Jr. 1-bedroom apartments were to be valued as efficiencies for purposes of the Vega adjustment, this portion of the First Decision was affirmed by the RHC and thus is final.

Subsequent to the RHC appeal hearing on the First Decision, the RHC amended its regulations to allow hearing officers discretion to average the HUD Fair Market Rents for efficiency and one bedroom-units if the evidence supports a conclusion that an amount greater than the efficiency unit HUD Rent reflects the general market conditions applicable to the unit. (Chapter 6, Section G.3.f (iv)). This regulation was not in effect at the time of the hearing on this petition or when the record on the petition was closed. The Appellant-Landlord requests that the RHC apply the new regulation to the petition, however, to do so would require that the hearing be re-opened to allow both parties to submit evidence in the record in the application of the regulation and further delay a final decision on the petition. Additionally, the RHC in its Direction on Remand affirmed that the junior one-bedroom units were to be valued as efficiencies based on the record and that decision is final. The CSFRA and its regulations do not provide any method for reopening a portion of a decision that was determined to be final.

The Second Tentative Appeal Decision also modifies the hearing officer's Decision After Remand with respect to the exclusion of certain elevator expenses as capital improvements. After reviewing the invoices and records submitted, it appears that the expenses should be properly categorized as capital improvement costs.

The Second Tentative Appeal Decision also modifies in part portions of the decision related to business license fees to exclude expenses that were excluded in the First Decision and to exclude certain cleaning costs that were reimbursable from tenant deposits, based on the appeal filed by the Respondent-Tenants.

The Second Tentative Appeal Decision affirms the remainder of the Decision After Remand.

C. Appeal Elements

The table below summarizes the ten elements of the Decision After Remand appealed by Appellant-Landlord and the three elements of the Decision After Remand appealed by Respondent-Tenants. Appeal elements A.1 through A.10 reflect the appeal requests of Appellant-Landlord. Appeal elements B.1 through B.3 reflect the appeal requests of Respondent-Tenants. The letter/number combination in the left-most column identifies the section in part IV of the Second Tentative Appeal Decision that discusses that element of the appeal.

<u>Issue/Appeal Element</u>	<u>Tentative Decision</u>
A.1 Denial of Vega Adjustment	Granting request in part and modifying decision to grant a Vega adjustment for 22 Subject Units
A.2 Adjusted Gross Income in Base and Petition Year	Denying request and affirming calculation of Adjusted Gross Income except to the extent modified pursuant to appeal element A.1.
A.3 Exclusion of California Apartment Association Fees	Denying request and affirming the calculation of business license fees, except to the extent modified pursuant to appeal element B.2
A.4 Calculation of management expenses in Base and Petition Year	Denying request and affirming decision calculating base year and petition year management expenses
A.5 Categorization of Salary Expenses	Denying request and affirming decision calculating management expenses and ordinary repair, replacement and maintenance costs, except to the extent modified pursuant to appeal element B.3
A.6 Calculation of Base Year and Petition Year Operating Expenses	Denying request and affirming decision methodology for calculation of operating expenses
A.7 Exclusion of Pavers from Amortized Capital Improvements	Denying request and affirming decision to exclude pavers from amortized capital improvements
A.8 Exclusion of Certain Parking Lot Resurfacing and Elevator Costs from Amortized Capital Improvements	Denying request and affirming decision to exclude parking lot resurfacing Granting request and modifying decision to include elevator expenses as amortized capital improvements
A.9 \$1,100 Payment to P.W. Stephens	Granting request to include payment to P.W. Stephens and affirming decision accounting for this expense
A.10 Equal Allocation of Rent Increases Among All Units	Denying request and affirming decision methodology on allocation of upward adjustment to rent equally among units
B.1 Calculation of Petition Year Ordinary Repair, Replacement and Maintenance Costs	Denying request and affirming decision calculating ordinary repair, replacement and maintenance costs, except to the extent modified pursuant to appeal element B.3
B.2 Calculation of Petition Year Business License Fees	Granting request and modifying decision to exclude \$239.80 business license fee excluded in First Decision
B.3 Calculation of Base and Petition Year Costs for Ordinary Repair, Replacement and Maintenance Due to Reimbursable Costs	Granting in part and denying in part and modifying decision to exclude cleaning costs and tenant screening fees that are reimbursable

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. 18190037)	
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 Second 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 affirming 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. Second Tentative Appeal Decision (17180002)
2. Petitioner Response to Second Tentative Appeal Decision
3. Respondents' Response to Second Tentative Appeal Decision
4. Hearing Officer Decision After Remand
5. Rental Housing Committee Direction to Hearing Officer on Remand
6. First Tentative Appeal Decision (17180002)
7. Original Hearing Officer Decision