Unit #412 & 2326, Brian Walker & Eric Espinosa
Argument in response to Tentative Appeal Decision
February 17, 2020

I. Tenants adequately raised the closure of the hot tubs in their petitions as part of the "Pool Amenity."

In its Tentative Appeal Decision, the RHC found that Appellant-Landlord was correct in claiming that "none of Petitions raised the loss of the hot tubs so no rent reduction should be awarded for such a loss." In fact, although tenants' petitions refer to the "Loss of Pool Amenity," the supplemental materials submitted with the petition, the discussion in both hearings with the Hearing Officer, and the Hearing Officer's Decision, each makes clear that the loss of the hot tubs (which are located in the swimming pool areas) were part of the Pool Amenity to which the petition referred.

- Exhibit A to tenant's petition contained an email from the landlord announcing the closure of amenities (subject line "Resident Support is at the Forefront of our Focus: COVID-19 Proactive Community Shifts"). It referred to "non-essential amenity spaces, to include fitness centers, pools, business centers and other community spaces such as club rooms, fire pits and grilling areas." Landlord's own communications announcing the closure of the swimming pools and hot tubs referred only to "pools," and tenants should not be prejudiced for using parallel language in their petition.
- Exhibit B to tenant's petition contained a copy of current marketing materials from Landlord's website, clearly both advertising the hot tub and depicting that it is adjacent to the pool and architecturally incorporated into the design and shape of the pool. Tenants' reference to the "Pool Amenity" should therefore not be read as exclusive to the hot tub, but rather as referring to the combined swimming pool and hot tub feature, consistent with Landlord's own communications and with the plain visually apparent integration of the two components of the amenity. The Hearing Officer's semantic word choice in the Decision to refer to the hot tub separately from the swimming pool (even as it recognized the hot tub as an amenity the closure of which tenants' had properly sought relief) should not prejudice tenants' relief, and indeed was demonstrably not intended by the Hearing Officer to have such effect.
- If tenants' petition inadvertently misled Landlord by referring only to the "Pool Amenity," notwithstanding that the Hearing Officer correctly understood from the petitions tenants' intent to include both the swimming pools and hot tubs, tenants' intent to include the hot tubs in the description of the closed amenities was fully clear from the content of the first hearing with the Hearing Officer on November 20, 2020, and Landlord had ample opportunity to respond as the Hearing Officer kept the record open and accepted new arguments and evidentiary submissions in advance of the second hearing on December 1, 2020.
- Landlord did not object to consideration of the hot tubs as a closed amenity on the claimed basis of its omission from tenants' petitions in its materials in advance of the first

hearing, before the second hearing, in oral arguments during either hearing, or at any point prior to its appeal of the Hearing Officer's decision. It is procedurally inappropriate for Landlord to raise this issue for the first time after remaining silent throughout both hearings and both periods of open record. Tenants could have amended their petitions to clarify the coverage of their claims if Landlord had been prompt in raising the issue once the issue became clear no later than the first hearing, and tenants should not be prejudiced by Landlord's strategic delay in raising the issue.

- In fact, Landlord's counsel participated in discussion regarding the closure of both the swimming pools and hot tubs in both the first and second hearing, suggesting that in fact tenants' petitions were understood by Landlord as referring both to the swimming pools and hot tubs.

As such, the Decision of the Hearing Officer should be affirmed with respect to the hot tubs, rather than reversed.

Nevertheless, if despite the context of the wording in tenants' petitions, and despite Landlord's conduct throughout the two hearings as responding to tenants' claims regarding hot tub closure as well as swimming pool closure, the RHC reads the record to indicate a lack of clarity in whether tenants' petitions for the "Loss of Pool Amenity" should be properly read to refer only to the swimming pool or to the combined swimming pool and hot tub, and if despite the clear context during the first hearing and the Landlord's opportunity to supplement its arguments and evidence after the first hearing during the subsequent period of continued open record, the RHC believes this lack of clarity could have prejudiced Landlord in responding to the petitions, the RHC should remand the issue to the Hearing Officer to determine whether, in light of the available evidence (including Landlord's own word choice in its tenant communications, the architectural integration of the swimming pool and hot tub, and the manner in which both were visually advertised by landlord as a collective amenity), the petitions should be read to include reference to the hot tubs as part of their claim for "Loss of Pool Amenity." A remand to consider the issue would allow all of the evidence to be considered by the Hearing Officer.

II. The question of whether Landlord's decision to close the fitness centers was required by applicable health directives has already been fully documented, briefed and considered, and the Decision should be affirmed in this regard rather than being remanded.

The Tentative Decision includes the following:

> Appellant-Landlord contends that the fitness center could not have been reopened during the time that the Decision awards a rent reduction because of public health orders, however, the Appellant-Landlord does not cite to any evidence in the record to support this claim but rather on appeal cites to a newspaper article that is not part of the hearing record. Despite the fact that the record is replete with public health orders as they evolved, the Appellant-Landlord failed to include within the record the relevant information prohibiting the reopening of the fitness center.

Despite Landlord's opportunity in two submission periods prior to two separate hearings to provide evidence of the necessity of closing the fitness center, and despite Landlord understanding the importance of doing so with respect to every other amenity that it purportedly closed in response to public health directives, it failed to do so. In fact, Landlord did provide into evidence two public health orders governing the use of fitness spaces (Respondents' Exhibits 13 and 19, admitted in every case by the Hearing Officer). However, after consideration and augmentation by Landlord and by tenants, the Hearing Officer properly found that those directives did not, in fact, require the complete closure of fitness centers as Landlord claimed. Instead, the Hearing Officer found as follows:

> A Mandatory Directive for Gyms and Fitness Centers was also issued by the County on July 2, effective July 13. [Resp Ex. 13]. It applied to both indoor and outdoor activities. It permitted use of these facilities if social distancing rules were maintained.
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> …
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> Examples of reasonable steps to increase access to the amenities that Respondent failed to take, and failed to even consider, include … Partially re-opening the fitness center with social distancing and other limitations. This level of access could have been allowed when fitness centers were approved in the July 2 Order [effective July 13] for partial re-opening.

The issue of whether the fitness needed to be closed as a result of public health directives has already been fully briefed and argued, and evidence has already been submitted. The relevant public health directives were already entered into the record and the Hearing Officer already considered and determined their applicability to the fitness center amenities at issue. There is nothing further to be gained by remanding for further consideration the question of whether the Landlord could have reopened the fitness center. No failures in the process of submitting or considering evidence by the Hearing Officer, nor clear errors in the legal analysis of the Hearing Officer, have been identified by the Landlord or by RHC. The Decision should be affirmed with regard to the fitness centers rather than being remanded for further duplicative consideration.

III. Passage of California Civil Code Section 1942.9 should not restrict tenants' recovery not just because it cannot be applied retroactively, but also based on the plain text of the statute.

In its Tentative Appeal Decision, the Rental Housing Committee of the City of Mountain View (the "RHC") found that the retroactive application of the new California Civil Code Section 1942.9, effective January 29, 2021 (the "Legislation"), would impair tenants' rights under the Mountain View CSFRA, but based on case law and statutory language, declined to apply the Legislation retroactively.

Tenants agree with the RHC's decision not to apply the Legislation retroactively.

However, even if the Legislation were to apply retroactively, it should not restrict any of the findings or remedies of the Decision of the Hearing Officer. Although tenants argued that the CSFRA entitled tenants to rent reductions and refunds for amenity reductions without regard to whether the reductions of amenities were required by COVID-19 health directives, the Hearing Officer did not award rent reductions or refunds to the extent that the amenity reductions were required by applicable public health directives. Rather, the Hearing Officer provided awards for rent reductions and refunds only for the portion of amenity reductions that were not necessary for compliance with applicable public health directives. As such, the amenity reductions for which tenants received rent reductions or refunds in the Decision were not “the result of compliance with federal, state, or local public health orders or guidelines”; rather, they were the result of Landlord’s overreach in reacting to such public health orders or guidelines, and so the Legislation.

The RHC should clarify that California Civil Code Section 1942.9 does not preclude any of tenants’ remedies on the basis of substantive statutory interpretation as well as for the statute’s lack of retroactive applicability that the RHC recognized in its Tentative Decision.