



DATE: January 28, 2018

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 Re: Petition 18190037

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 the first appeal of a decision regarding a petition for downward adjustment of rent to be heard by the Rental Housing Committee (RHC). A relevant timeline is included below for your reference.

Table 1 Relevant Timeline

<u>Date</u>	<u>Action</u>
Oct 1, 2018	Appellant-Tenant submitted petition for downward adjustment
Oct 2, 2018	Petition accepted
Oct 29, 2018	Respondent-Landlord submitted response in opposition to petition
Nov 8, 2018	Hearing held; hearing record closed at the end of the hearing
Dec 11, 2018	Decision distributed to all parties
Dec 21, 2018	Appeal submitted by Appellant-Tenant
Dec 21, 2018	Appeal submitted by Respondent-Landlord
Jan 28, 2018	Appeal hearing before RHC

Appellant-Tenant submitted a petition for downward adjustment of rent applicable to one unit, alleging that Appellant-Tenant did not receive the rent rollback mandated by the CSFRA. The hearing officer's decision granted a downward adjustment for

Appellant-Tenant based on Appellant-Tenant's continuous occupancy of the unit since 2012.

The hearing officer's decision addresses an ambiguous area of the CSFRA for which instructive regulations may be warranted. Specifically, Appellant-Tenant continuously occupied the subject unit since 2012 but had executed various written agreements with Respondent-Landlord to remove and name additional cohabitants, in which the agreements also increased the rent. Other rent stabilized jurisdictions specifically regulate various aspects of the landlord-tenant-cohabitant relationship. For instance, both state law and local jurisdictions regulate whether and how a cohabitant may obtain status as a tenant versus a legal occupant, which relates to vacancy control and decontrol. Moreover, some local jurisdictions regulate the rent charged by a master tenant to subtenants. If the RHC desires, a study-session can be held regarding potential regulations of the landlord-tenant-cohabitant and master-subtenant relations.

Ultimately, the hearing officer concluded that the purported rent increases included in agreements that replaced cohabitants were void pursuant to CSFRA section 1713, which is reproduced below.

"Non-Waivability. Any provision of a Rental Housing Agreement, whether oral or written, which purports to waive any provision of this Article established for the benefit of the Tenant, shall be deemed to be against public policy and shall be void."

Neither the Appellant-Tenant nor the Respondent-Landlord appealed the conclusion that the purported rent increases were void based on CSFRA section 1713.

The Appellant-Tenant contests three elements of the Decision: (A.1) "Requesting clarification on the amount of rent to be charged for the unit and how this applies to each cotenant;" (A.2) "Requesting that Petitioner not be held liable for the June 2017 rent;" and (A.3) "Clarifying the tenant's rent split agreement with respect to the ruling."

The Respondent-Landlord contests two elements of the Decision: (B.1) requesting authorization of the 2016 annual general adjustment enacted by RHC Resolution Number 18 (2018); and (B.2) regarding management expenses.

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 conclusions in the 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.

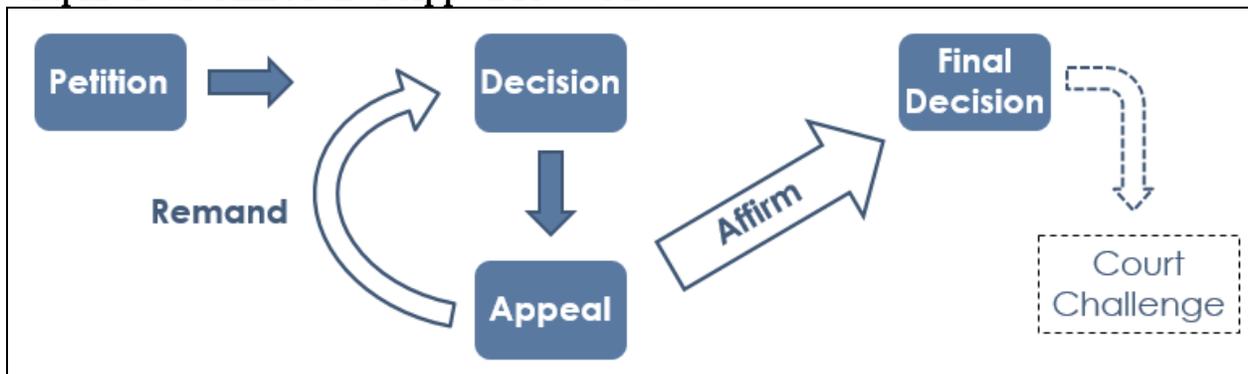
Legally, reviewing whether substantial evidence exists to support an appealed element of the decision simply means that there is adequate information in the record to support the decision. Stated differently, substantial evidence means that a reasonable person reviewing the evidence could have reached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

Petitions define the scope of information hearing officers review. Appeals define the scope of information the RHC reviews.

Likewise, the tentative appeal decision reviews only the appealed elements of the decision, and determines whether or not there is substantial evidence to support (affirm) the hearing officer's decision. Elements of the decision that were not appealed by either party are considered final and not subject to RHC review. If substantial evidence to support the decision is not identified in the decision, or if substantial evidence is not readily apparent by reviewing the record presented to the hearing officer, then that element of the decision is remanded so the hearing officer can "show the work:" describing how and why the conclusion was reached. A summary graphic visualizing the appeal procedure is provided below.

Graphic 1 Visualization of Appeal Procedure



The tentative appeal decision recommends affirming decision, while granting and denying various requests of Appellant-Tenant and Respondent-Landlord. If affirmed, the decision could be subject to a judicial challenge. As shown above, if the RHC remands any appealed element to the hearing officer, the hearing officer would revise the decision and provide it to the parties. Importantly, the hearing officer can only revise parts of the decision subject to remand and parties to the Petition can only appeal revised parts of the decision to the RHC. In this way, there could be multiple appeals to the RHC of the same Petition, but the elements subject of the appeal will likely narrow each time.

C. Appeal Elements

The table below summarizes the five elements of the Decision appealed by Appellant-Tenant and Respondent-Landlord. Appeal elements A.1, A.2. and A.3 reflect the appeal requests of Appellant-Tenant. Appeal elements B.1 and B.2 reflect the appeal requests of Respondent-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.

<u>Issue/Appeal Element</u>	<u>Tentative Decision</u>
A.1 Requesting clarification of rent applicable to unit	Granting request and affirming decision by restating rent applicable to unit
A.2 Requesting reversal of decision finding liability for outstanding rent from June 2017	Denying request and affirming decision by subtracting outstanding rent from unlawful rent that must be returned to Appellant-Tenant
A.3 Requesting apportionment of rent among current and former cohabitants	Denying request and affirming decision, which does not address apportionment among persons who are not parties to the petition, decision, or appeal
B.1 Requesting application of the 2016 AGA	Denying request and affirming decision calculating lawful rent applicable to the unit
B.2 Requesting incorporation of management expenses	Denying request and affirming decision calculating lawful rent applicable to the unit

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 Presentation of Argument	10 minute maximum
Respondent Presentation of Argument	10 minute maximum
Appellant Presentation of Rebuttal	5 minute maximum
Respondent Presentation of Rebuttal	5 minute maximum
RHC Question and Answer with Staff	
RHC Question and Answer with Appellant	
RHC Question and Answer with Respondent	
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 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. Tentative Appeal Decision (18190037)