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RENTAL HOUSING COMMITTEE

CITY OF MOUNTAIN VIEW

Central Park Apartment Tenants Petitioners/ Respondent-Tenants v. GREYSTAR CALIFORNIA, INC., and SI, VI, LLC Respondents/ Appellant-Landlord	SUPPLEMENTAL WRITTEN BRIEF Rental Housing Committee Case Nos.: 20210002 (Unit 411) 20210003 (Unit 412 and 2326) 20210005 (Unit 414) 20210006 (Unit 416) 20210008 (Unit 2011) 20210009 (Unit 2013) Date: TBD Time: TBD

This Supplemental Written Brief is submitted on behalf of Greystar California, Inc. ("Management"), as Managing Agent for owner SI VI, LLC (collectively, "Appellant-Landlord") in response to the Rental Housing Committee's ("RHC") Tentative Appeal Decision (the "Tentative Decision") in reference to the following cases: 20210002 (Unit 411), 20210003 (Unit 412 and 2326), 20210005 (Unit 414), 20210006 (Unit 416), 20210008 (Unit 2011), 20210009 (Unit 2013) (collectively, the "Petitions" and Respondent-Tenants are collectively referred to as "Residents"). The Tentative Decision affects the real property located at 100 N. Whisman Road in Mountain View, California (the "Property").

MATTERS ON APPEAL

The RHC grants in part and denies in part, Appellant-Landlord's appeal of the Hearing

Decision by the Hearing Officer ("Original Decision"). Appellant-Landlord does not contest the following issues addressed in the Tentative Decision: rent reduction for Unit 313 for the allegedly deficient valet trash service (remanded), rent reduction for lack of management response to maintenance requests (reversed), and rent reduction awarded to Unit 2013 for loss of use of the grassy recreation area (reversed).

Appellant-Landlord contests the following three issues and provides this supplemental written brief in support of the reconsideration thereof: rent reduction related to the loss of the fitness center and hot tub (remanded), rent reduction related to lack of access to the pool (affirmed), and rent reduction for lack of access to lawn and surrounding areas (affirmed).

LEGAL ARGUMENT

The RHC raises the issue of Senate Bill 91 ("SB 91"), the recent State legislation that precludes an award of a rent reduction on the basis that a landlord has reduced or made unavailable a service or amenity as a result of compliance with public health orders. In relevant part, SB 91 states the following:

> Notwithstanding any other law, a landlord who temporarily reduces or makes unavailable a service or amenity as the result of compliance with federal, state, or local public health orders or guidelines shall not be considered to have violated the rental or lease agreement, nor to have provided different terms or conditions of tenancy or reduced services for purposes of any law, ordinance, rule, regulation, or initiative measure adopted by a local governmental entity that establishes a maximum amount that a landlord may charge a tenant for rent. *California Civil Code Section 1942.9*

As stated in the Tentative Decision, SB 91 became effective on January 29, 2021.

The Tentative Decision states that Cal. Civ. Code Section 1942.9 is not applicable to this appeal because it is not to be applied retroactively. In reaching this conclusion, the Tentative Decision states that the statute contains no language expressing an intent to be applied retroactively and that generally, statutes operate prospectively only. The Tentative Decision cites to *Myers v. Phillip Morris Companies, Inc.* 28 Cal. 4th 828 (2002) for the proposition that a statute may be applied retroactively, only if it contains express language of retroactivity or if other sources provide a clear and unavailable implication that the Legislature intended retroactive application. On that basis, the RHC determines that the application of SB 91 would impair the

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rights of the tenants under the CSFRA, which gave them the right to petition for a rent reduction if housing services are reduced or withdrawn. The Tentative Decision further states that Cal. Civ. Code Section 1942.9 will prospectively prohibit additional rent reductions for housing services that are withdrawn in compliance with public health orders after the effective date of the Legislation, but the Legislation cannot be applied retroactively to these petitions there were already filed and decided.

Matter is Not Final

As a primarily matter, it is important to note the Hearing Officer's Original Decision is not final, as a matter of both the CSFRA and case law. Pursuant to CSFR Regulations, a decision only becomes final if no party requests an appeal within ten (10) calendar days after the mailing date of the decision. *Community Stabilization and Fair Rent Act Hearing Procedure Regulations, Chapter 5, Paragraph H(1)(b)* As a matter of law, a decision (or equally, a judgment) is not final until all appeals have been exhausted. Since the matter is pending the present administrative appeal, the decision is not final and solely on that basis, Cal. Civ. Code Section 1942.9 should be applicable.

Misapplication of Myers v. Phillip Morris Cos. and Retroactivity Rules

The RHC's reliance on *Myers v. Philip Morris Cos., Inc.* is entirely misplaced and inapplicable in this situation. In that case, the California Supreme Court addressed whether legislation enacted in 1998 that *repealed a statute creating immunity* for tobacco manufacturers had retroactive effect, thereby creating liability for the tobacco manufacturers during the time in which they were immune for their conduct. The California Supreme Court ruled that, absent clear legislative intent, it did not. Myers v. Philip Morris Cos., Inc., 28 Cal. 4th 828, 843. The rule in *Myers* is completely inapplicable to the present case, as further explained below, as rules regarding retroactivity (in the context of *Myers*) are not triggered in situations where an party's ability to recover under statute is in question.

Rather, the rule in *Governing Board v. Mann*, 18 Cal. 3d 819 (1977) applies directly to this matter. There, the California Supreme Court held that under common law, when a pending action rests solely on a statutory basis (as is the case here) and when no rights have *vested* under the statute, a repeal of such a statute without a saving clause will terminate all pending actions based

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thereon.

In *Governing Board,* the Defendant, a tenured teacher, pled guilty to a charge of possession of marijuana in 1971. Shortly thereafter, the school district filed a proceeding seeking a judicial determination that the Defendant's marijuana conviction constituted sufficient grounds for dismissal under the Education Code. The trial court concluded that it did constitute cause for dismissal under the Education Code because the Legislature enacted an entirely new comprehensive statutory scheme in 1975, which governed the treatment of marijuana offenses and offenders. As part of this scheme, the Legislature enacted a section that precluded public agencies from imposing sanctions on individuals as a result of a marijuana arrest or conviction that occurred prior to January 1976. The school board argued that even if the law was repealed, it should not apply retroactively to the plaintiff's lawsuit based on the "traditional rule that statutory enactments are generally presumed to have prospective effect." The California Supreme Court rejected that argument and explained:

> Although the courts normally construe statutes to operate prospectively, the courts correlatively hold under the common law that when a pending action rests solely on a statutory basis, and when no rights have vested under the statute, "a repeal of such a statute without a saving clause will terminate all pending actions based thereon." (Southern Service Co., Ltd. v. Los Angeles, supra, 15 Cal.2d 1, 11-12.)

Governing Bd. v. Mann, 18 Cal. 3d at 829. The California Supreme Court further explained:

> As explained nearly 50 years ago in Callet v. Alioto (1930) 210 Cal. 65, 67-68 [290 P. 438]: "It is too well settled to require citation of authority, that . . . every statute will be construed to operate prospectively and will not be given a retrospective effect, unless the intention that it should have that effect is clearly expressed […] It is also a general rule, subject to certain limitations not necessary to discuss here, that a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute. [Citations.] The justification for this rule is that all statutory remedies are pursued with full realization that the legislature may abolish the right to recover at any time." (See generally la Sutherland, Statutory Construction (4th ed. 1972) § 23.33 pp. 279-281.)

Id. This general rule has been applied to a multitude of contexts, ranging from the criminal realm to imposition of statutory penalties, when the statutory basis therefor has been repealed prior to

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final judgment on appeal. *Governing Bd. v. Mann*, 18 Cal. 3d at 829. Judge Charles R. Breyer of the Northern District of California best distinguished the repeal at issue in *Myers* from the type of repeal at issue in the present case as follows:

> Myers, however, involved the *repeal of a statutory affirmative defense*. The rule articulated in Mann and Callet **applies to statutory causes of action or remedies**. This distinction, of course, makes sense: **it is one thing to retroactively repeal the right to recover money from someone, it is quite another to retroactively make conduct unlawful that was lawful at the time it occurred.** *(emphasis added)*

Envtl. Prot. Info. Ctr. v. United States Fish & Wildlife Serv., 2005 U.S. Dist. LEXIS 7200 (N.D. Cal., Apr. 22, 2005).

Further, the repeal does not need to be a direct repeal specifically referring to a statute. The legislative action can effect a partial repeal of an existing statute and the substance of the legislation determines whether it constitutes a repeal. *Zipperer v. Cty. of Santa Clara*, 133 Cal. App. 4th 1013, 1023 (2005).

Finally, the concept of retrospective application is not even at issue in this matter. Where the Legislature has conferred a remedy and withdraws it by amendment or repeal of the remedial statute, the new statutory scheme may be applied to pending actions without triggering retrospectivity concerns. *Brenton v. Metabolife Internat., Inc.*, 116 Cal. App. 4th 679, 690 (2004).

The RHC's reliance on *Landgraf v. USI Film Prods.* 511 U.S. 244 (1994) is similarly misplaced and incorrectly summarized. The Tentative Decision states the following:

> If the statute is ambiguous then the next step is to determine whether the new law would have a retroactive effect, meaning would it impair the rights of a party, increase a party's liability for past conduct, or impose new duties with respect to a transaction already completed. If the statute would have such an effect, the presumption is that without express legislative intent, the statute is not retroactive.

This is incorrect. *Landgraf* states the following: when a statute contains no such express command, the court must decide whether the new statute would have retroactive effect, i.e., **it would impair rights a party possessed when he acted**, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would

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operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result. *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 280, 114 S. Ct. 1483, 1505 (1994)

In both *Myers* and *Landgraf*, the changes in law would have caused additional liability and/or legal consequences as a result of events that were completed prior to the enactment of the law and would have invoked the rules regarding retrospectivity. This is completely distinguishable to a situation in which a law simply removes a party's ability to recover money from another party, therefore providing no trigger of retrospectivity, within its legal meaning.

More importantly, SB 91 would not be applied "retroactively" in the sense contemplated by both *Myers* and *Landgraf*. Retroactivity would not be triggered as no impairment of rights possessed by the Respondent-Tenants would be affected; Respondent-Tenants have taken no actions, aside from filing in to attempt to collect under statutory granted rights under the CSFRA. The set of facts at hand place this matter directly under the rule of *Governing Bd v. Mann*, and the hundreds of other California cases that follow the same rule, that a cause of action or remedy dependent on a statute falls with a repeal of the statute, even after the action thereon is pending, in the absence of a saving clause in the repealing statute.

Here, Respondent-Tenants' award of a rent reduction was based on the statutory rights conferred upon them under the CSFRA, therefore, the award of a rent reduction was based on a statutory right to "recover money from someone." The RHC appears to concede this point in the statement that "[t]he tenants have a right under Section 1710 of the CSFRA to petition for a rent reduction if housing services are reduced or withdrawn." The RHC further concedes that Cal. Civ. Code Section 1942.9 would "significantly impair" the rights of the Respondent-Tenants to recoup such an award and similarly states that "Civil Code Section 1942.9 will prospectively prohibit additional rent reductions for housing services that are withdrawn in compliance with public health orders."

It would be consistent with case law for the RHC to apply Cal. Civ. Code Section 1942.9 in this case and dismiss all Petitions at this point in time. Respondent-Tenants' Petitions and pending awards rest solely on a statutory basis under the CSFRA, they have no rights vested under

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the Hearing Officer's Original Decision, as an appeal is currently under way (and no final decision is made by a judiciary), and Cal. Civ. Code Section 1942.9, which has no "savings clause," revoked any such ability of recovery that Respondent-Tenants may have had under the CSFRA. It would be entirely inconsistent with case law for the RHC to affirm and/or remand any award that was granted to the Respondent-Tenants.

Applying Current Law

Although courts have long embraced a presumption against statutory retroactivity, in many situations, a court should "apply the law in effect at the time it renders its decision." *Bradley v. Richmond Sch.* Bd, 416 U.S. 696 (1974) This applies even though that law was enacted after the events that gave rise to the suit. *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 273 (1994)

Even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect. *Bradley v. Richmond Sch. Bd.* at 696 Accordingly, the Supreme Court has rejected the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature. *Id*. As stated in *Bradley*, a court must apply the law in effect at the time it renders its decision, unless such application would work a manifest injustice, or there is statutory direction or legislative history to the contrary. *Id* at 488

It would be highly unlikely for the RHC, or a court, to find that a "manifest injustice" would occur if SB 91 is applied to these pending Petitions. It is clearly the intent of the Legislature, in passing SB 91, that residents not be allowed to recover financially for amenities that were closed due to the pandemic. If the RHC were to determine that SB 91 should not apply to these Petitions and that said application would constitute a "manifest injustice," the RHC would essentially be determining that SB 91 creates a manifest injustice to all tenants in general and would be going against the Legislature. It is the obligation of the RHC to apply the law in effect at the time it renders its decision; as such, the application of SB 91 should be taken into consideration in this decision.

Application of Golden Gateway

The Tentative Decision states that the "withdrawal of housing services alleged by

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Respondent-Tenants was not done in the service of Appellant-Landlord providing another housing services, but rather in response to public health orders." On this basis, the RHC finds that the facts of the Petitions are distinguishable from the *Golden Gateway Center v. San Francisco Residential Rent Stabilization & Arbitration Board.* 73 Cal. All. 4th 1204 (1999).

This finding is in direct conflict with the Decision after Hearing in the case of Smith et. al v. Prometheus – Park Place, Case Numbers 20210010, et al, dated January 11, 2021. A group of residents at a property managed by Prometheus filed petitions with the City of Mountain View alleging a reduction in rent as a result of the closures and limitations of amenities at the property. The Hearing Officer in the Prometheus matter found that the authority of *Golden Gateway Center* was applicable in the matter and did not award any reduction in rent to the residents. Specifically, the Hearing Officer restates the legal authority set forth by Prometheus as follows: where there is an unavoidable short term inconvenience which interferes with the provision of housing services a reduction of rent should not be granted so long as that inconvenience does not impact the ability to use the rent premises as a residence.

The Hearing Office there recognized that no rent abatement is justified for the period of time in which the amenities were either unavailable or limited in their availability and that such impediment on their use did not impact the residents' ability to use the rented premises as a residence. Such position should be adopted by the RHC with consistently for all cases in which residents allege a reduction in service as a result of COVID-19 amenity closures.

Pool Access Loss.

The Hearing Officer awarded the Residents a reduction in rent ranging between $140 and $175 per month for the period between June 4, 2020 and September 30, 2020. The RHC affirmed this decision on the basis that there was no evidence presented by the Appellant-Landlord justifying the limited access to only one of the pools.

Quite to the contrary, the Appellant-Landlord submitted sufficient evidence that establishes that it was doing all it could to comply with the ever changing health orders. While the tenants and the Hearing Officer have the luxury of playing Monday back quarterback in second guessing the decision the Appellant-Landlord, it is clear that the decision that was made by the Appellant-

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Landlord was made with the intention to protect the health of their tenants. It is simply not good public policy for the Hearing Officer and the RHC to award service reductions under these circumstances where it the landlord was simply trying to comply with the health orders. Upholding the decision by the Hearing Officer places landlords in the unfortunate position of second guessing the health orders by reopening amenities that could ultimately place tenants in danger of being exposed.

Additionally, there was no evidence that supports the amounts awarded, given the limited use of the pool under the health orders. The amounts awarded seem to assume that tenants would have had use of the pool the same as if there were no health orders restricting their use. When in fact, the health orders placed severe limitations on how many persons and when the pool area could be used. Even if both pools were opened, there was no guaranty that these tenants would have unfettered use of the pool area, as they would be limited by the reservations and the availability of the pool.

Lawn & Surrounding Areas.

The Hearing Officer awarded the Residents a reduction in rent between $60-$75 per month between June 4, 2020 and September 30, 2020 for the lawn and surrounding areas. The Hearing Officer found that Management could have allowed exercise and other use of the lawn area, with appropriate limitations on the totally number of people exercising and appropriate enforcement of social distancing. The RHC, in its Tentative Decision, affirmed the Hearing Officer's award on the basis that the Appellant-Landlord failed to make efforts to allow use of common areas for fitness classes or work with the Respondent-Tenants to find options for addressing the loss of the fitness center and other facilities. This affirmation is in conflict with the rest of the Tentative Decision.

First, there is no obligation in the CSFRA for the Appellant-Landlord to have made efforts to find options for addressing the legally mandated closure of the fitness center and other facilities. The Hearing Officer determined that there was no award to be given for the time that facilities were ordered to be entirely closed by the public health orders and the RHC does not appear to be in disagreement with the Hearing Officer. By requiring the Appellant-Landlord to have made efforts to find options for addressing these closures and providing an award to the Respondent-

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Tenants for this same issue is completely in conflict with the decision to not provide an award for the time the facilities were ordered closed.

At the least, the RHC should remand this issue to the Hearing Officer as the issue with the fitness centers were remanded to the Hearing Officer. It appears that these two issues go hand in hand, as the RHC is viewing the Respondent-Tenants outdoor exercise classes as an alternative to the fitness center that was closed.

Finally, the RHC has failed to recognize that the evidence given at the Hearing by both parties was that the group exercises were being held in the *parking lot* and not in the grassy areas. There was no evidence presented by the Respondent-Tenants that they attempted to exercise in the grassy areas of the property. Rather, all photographs and testimony provided that these group exercises were held in the parking areas. Under normal circumstances, tenants would not have the right to exercise in the parking lot are, as such a location is not appropriate for pedestrian activity and is further inherently dangerous. .

It should also be noted that use of the parking lot for anything other than parking is contrary to the Lease Agreement. Thus, even if the Landlord denied tenants the right to use the parking lot for exercise classes, that should not be deemed a service reduction because residents never had that right before the pandemic.

In addition, the RHC has failed to recognize that no other evidence or testimony was presented by the Respondent-Tenants that they were attempting to use the grassy areas, with the exception of the two households that were holding picnics on these areas. These households provided no evidence or testimony that they were attempting to use these areas to exercise.

An email was sent to those households to address these disturbances to the other residents and the damage to the grass area and at no point did that email, nor any other evidence, demonstrate that Respondent-Tenants were unable to use the grassy areas for exercise or other permitted activities.

The repeated fundamental flaw with the Hearing Officer's finding and the Tentative Decision is that Appellant-Landlord never prohibited any resident from using the lawn. Rather, Landlord addresses violations of the Health Orders in place at that time and complaints received

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from other residents regarding the noise emanating from certain households gathering.

CONCLUSION

Appellant-Landlord urges the RHC to revisit the legal bases under which the RHC refuses to apply Cal. Civ. Code Section 1942.9 and dismiss the remaining portions of the Respondent-Tenants' Petitions alleging rent reductions due to the closure and limitations of amenities as a result of the public health orders.

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