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October 24, 2024

memorandum

To  
Mountain View Rental Housing Committee

From  
Karen M. Tiedemann, Special Counsel to the Rental Housing Committee  
Estrella Lucero, Special Counsel to the Rental Housing Committee

RE  
Appeal of Hearing Officer's Decision Re: Petition Nos. C23240029 and C23240044

**RECOMMENDATION**

To 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 Hearing Record to support the changes.

**BACKGROUND**

The instant appeal arises out of two tenant petitions for downward adjustment of rent ("Petitions") based on unlawful rent and failure to maintain habitable premises. These Petitions were formally consolidated with two other tenant petitions from a neighbor located in a different unit at the same property.<sup>1</sup> The consolidated hearing on the Petitions was held on March 11, 2024. The Hearing Officer's Decision was issued on September 4, 2024 ("HO Decision") and served on the parties on September 6, 2024.

**Table 1: Relevant Timeline**

| <b><u>Date</u></b> | <b><u>Action</u></b>                                    |
|--------------------|---|
| January 22, 2024   | RHC accepted Petition Nos. C23240029 and C23240044.     |
| February 5, 2024   | Notice of Consolidation of Petitions served to parties. |
| February 23, 2024  | Pre-hearing telephone conference held.                  |

<sup>1</sup> This staff report only concerns the Petitions filed related to Unit #46.

|                    |   |
|--------------------|---|
| February 29, 2024  | Summary of Pre-hearing Conference Call and Order served on parties.       |
| March 11, 2024     | Hearing held and closed.  |
| March 15, 2024     | Post Hearing Order re: Additional Evidence Submissions served on parties. |
| April 1, 2024      | Hearing Record closed.  |
| September 4, 2024  | HO Decision issued.   |
| September 6, 2024  | HO Decision served on the Landlord and Tenant.                            |
| September 23, 2024 | Appeal submitted by Appellant-Landlord.                                   |
| October 14, 2024   | Tentative Appeal Decision issued and served.                              |
| October 24, 2024   | Appeal hearing before the Rental Housing Committee.                       |

The first Petition requested a rent reduction on the basis that Landlord had failed to maintain the property in a habitable condition based on a biting bug infestation, chemical smells, noise, excessive dust and dirt due to construction, and various outlet shortages. The Tenant also alleged a decrease in housing services or maintenance on the basis of blocked roads due to wood scraps, a walkway to the laundromat being blocked, and an inability to use her parking space. The second Petition alleged that the Landlord had unlawfully retained rent in the form of a "lease completion bonus" worth \$3,500 that the Landlord retained because Tenant was supposedly late on utilities payments.

The Hearing Officer determined that Tenant had met her burden of proof that beginning in September 2023, Tenant experienced an ongoing biting bug infestation that, even after receiving notice, Landlord has yet to resolve. The Hearing Officer also ruled on the issue of insufficient heat in Tenant's unit, despite the Tenant not alleging this specific issue in her first Petition. (The Hearing Officer exercised her discretion to amend the pleadings after the fact to include this issue because Tenant discussed the issue during the hearing and Respondent presented opposing testimony and evidence in response.) The Hearing Officer found that Tenant had met her burden of proof to prove a lack of heat in Tenant's bedroom and bathroom, that Tenant had provided notice to the Landlord, and that the Landlord had responded. However, upon investigating the heating issue, the Landlord chose not to implement a solution that would have provided adequate heat to the Tenant's bedroom and bathroom.

The Hearing Officer determined that due to the lack of adequate heat, Tenant should receive a 10% downward adjustment in rent (from \$2,150 to \$1,935) starting in May

2023, and that due to the ongoing biting bug infestation and lack of adequate heat starting in September, Tenant should receive a total of 35% downward adjustment in rent—the continuing 10% adjustment for heating issues and a 25% reduction for the biting bug infestation—(from \$2,150 to \$1,397.50) until both conditions are fully corrected by the Landlord.

On the other habitability issues, the Hearing Officer concluded that Tenant had failed to meet her burden of proof. Regarding noise, smells, and excessive dirt due to Landlord's construction, the Hearing Officer found Tenant had not provided sufficient evidence to show these conditions resulted from Landlord's failure to maintain the Unit. Regarding the malfunctioning electrical outlets, the Hearing Officer found after weighing the evidence that the electrical outlets in the Unit are functional and that the intermittent failures were caused by Petitioner's actions, not Landlord's failure to maintain the Unit.

The Hearing Officer found that Petitioner did not meet her burden of proof on any of the issues related to a decrease in services. Tenant did not provide sufficient evidence that the blocked roads and walkways resulted from Landlord's failure to maintain the Unit (and that some of these temporary conditions arose from Landlord's efforts to maintain and update the apartment complex). The Hearing Officer found that Petitioner had met her burden to show she had a decrease in services during the time where Petitioner could not easily park her car in her assigned space, but that Respondent had responded timely and adequately to the parking issue.

As it relates to the second Petition, the Hearing Officer determined that resolving the lease completion bonus issue is a contractual issue that is outside the scope of the CSFRA rent adjustment procedures, and the tendering by the Landlord of the completion bonus to the Tenant rendered this issue moot.

The Appellant-Landlord raised the following eight issues on appeal:

- A. The decision regarding the biting bug infestation should be reversed due to lack of evidentiary support.
- B. The Hearing Officer erred in applying Health and Safety Code § 17920.3 related to the biting bug infestation.
- C. The Hearing Officer erred in applying the *Peviani* case related to the biting bug infestation.
- D. The Hearing Officer abused her discretion in ordering a 25% reduction in rent due to the biting bug infestation.
- E. The decision regarding the heating issue should be reversed because there was no breach of habitability.

- F. The Hearing Officer did not adequately take into consideration Landlord's response to the heating issue.
- G. The Hearing Officer did not adequately take into consideration Petitioner's misuse of the electrical outlets regarding the heating issue.
- H. The Hearing Officer's 10% reduction in rent due to heating issue is excessive.

All elements of the appeal are discussed in the Tentative Appeal Decision, as noted in Section C of this report below. All parties to the Appeal are entitled to respond to the Tentative Appeal Decision. Responses to the Tentative Appeal Decision were due on October 21, 2024. To the extent 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 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 because there is sufficient evidence in the Hearing Record on which the Committee may base its decision.

For questions of law (including statutory interpretation), the RHC must exercise its independent judgment without assuming that the Hearing Officer's ruling is correct or affording deference to the Hearing Officer's interpretation. Even though the RHC exercises its independent judgment, its review is still based on the evidence in the Hearing Record for the Petition hearing.

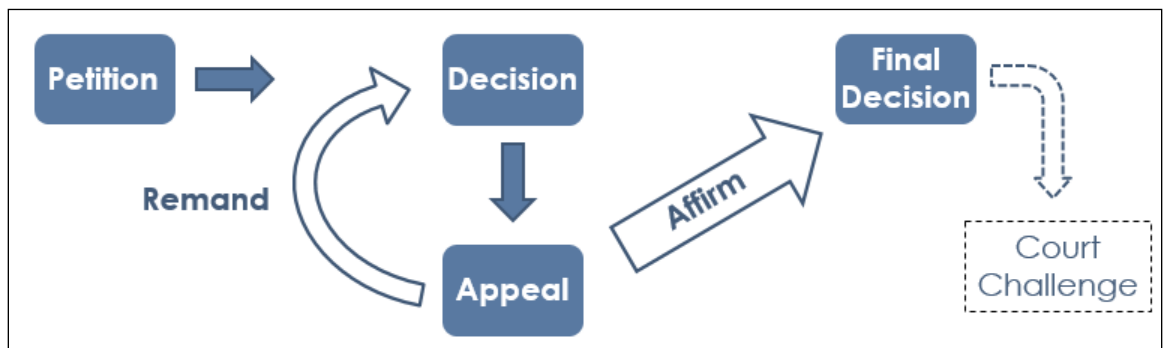
For questions of fact, the RHC's role will be to determine whether the appealed elements of the Hearing Decision are supported by substantial evidence. This process mimics a trial court and an appeal court: the trial court drafts a decision after weighing all the evidence, and the appeal court reviews 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 the 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 Elements of the Decision After Remand**

Petitions define the scope of the Hearing Officer's review. Appeals define the scope of RHC's 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 the 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 Hearing Decision in its totality. In summary:

- A. Appellant-Landlord alleges that the Hearing Officer's decision about the biting bug infestation is not supported by the evidence, and that the Hearing Officer should have weighted the Landlord's evidence from pest control companies more heavily. However, Landlord's own witnesses were not able to provide conclusive evidence that Tenant is not experiencing an infestation, just that they were unable to definitively determine what kind of bug is present and biting the Tenant. The Hearing Officer weighed the Tenant's testimony, Tenant's witness testimony, doctor reports, and photographic evidence of an ongoing biting bug infestation against the Landlord's witness testimony. The Hearing Officer determined Tenant had met her burden of proof by a preponderance of the evidence of an ongoing biting bug infestation that Landlord has failed to remedy.
- B. Appellant-Landlord argues that the Hearing Officer misapplied Health and Safety Code § 17920.3(a)(12) when determining that Tenant was experiencing a biting bug infestation. HSC § 17920.3(a)(12) requires that an infestation must be determined by a health or code enforcement officer. Because no pest control professional determined the source of the infestation, Landlord argues, the Hearing Officer misapplied this statute. However, for the Landlord's argument to

prevail, the Hearing Officer would have had to rely *exclusively* on HSC § 17920.3(a)(12). In forming her conclusion regarding the existence of a biting bug infestation, the Hearing Officer relied on violations of the implied warranty of habitability, Civil Code §1941.1, and the entirety of HSC § 17920. Had the Hearing Officer struck the citation of HSC § 17920.3(a)(12) from her Decision, the Hearing Officer would have still reached the justifiable conclusion that Tenant was experiencing an ongoing biting bug infestation.

- C. Appellant-Landlord contends that Hearing Officer misconstrued the case *Peviani v. Arbors at California Oaks Property Owner, LLC* (2021) 62 Cal.App.5th 874. Landlord argues that the Hearing Officer, through her quote to *Peviani*, implies that the "mere presence of insects can be a violation of the Civil Code." (Appeal Request 4:24-25). However, the Hearing Officer acknowledges that the mere presence of insects (be they, for example, biting bugs or spiders) does not constitute a violation of the warranty of habitability, unless the presence reaches a significant degree that interferes with an occupant's health, safety, or enjoyment of their Unit. The Hearing Officer cites to *Peviani* once throughout the 35-page Decision, and the Hearing Officer did not misconstrue the case.
- D. Appellant-Landlord argues the Hearing Officer abused her discretion in ordering a 25% reduction in rent. The Hearing Officer details her reasoning for choosing the 25% reduction. The Hearing Officer acknowledges that the 25% is far less than the 85% requested reduction by the Tenant, and the Hearing Officer specifically acknowledges and credits the Landlord for their response in hiring pest control professionals to attempt to solve the issue. Pursuant to the CSFRA and the regulations implementing the CSFRA, a Hearing Officer has the discretion to order a rent reduction that she believes to be fair given the evidence. Here the Hearing Officer felt that a 25-50% reduction could be fair, and she chose the lower end of this range largely due to Landlord's efforts to address the issue. However, the Landlord has not been able to resolve the issue of the biting bugs at the time of the Hearing. The Hearing Officer did not abuse her discretion.
- E. Appellant-Landlord argues that there is insufficient evidence to prove a breach of habitability regarding insufficient heat in Tenant's Unit. Landlord argues that the heating facilities, including the heater and thermostat, are in working order and that no statute related to habitability requires "perfect heat distribution" throughout the Unit. (Appeal Request 6:11). However, Landlord failed to provide sufficient evidence how a heating facility that did not heat the Tenant's bedroom or bathroom meets the statutory requirement that the heating facilities be "adequate". (HSC § 17920.3(a)(6)). Further, California regulations do require heat distribution for every *habitable* room. (Cal. Code Regs. Tit. 25 § 34(a)).
- F. Appellant-Landlord argues that the Hearing Officer did not adequately take into consideration Landlord's timely response to the heating issues. To the contrary, the Hearing Officer specifically notes that the Landlord did respond in a "timely"

manner (HO Decision 28:19). Despite the prompt response to send a technician to determine the extent of the heating issue in response to Tenant's notice, Landlord ultimately chose not to implement a solution that would have resulted in heat to the Tenant's bedroom. The heating technician suggested moving the thermostat farther away from the heating facilities—perhaps into the Tenant's bedroom—so that the heat wouldn't shut off until the bedroom was properly heated. The Landlord testified that this solution would not be "efficient" and conducted no additional follow up on the heating issue. The Hearing Officer did take into account the Landlord's timely, but ultimately inadequate, response.

- G. Appellant-Landlord argues the Hearing Officer did not adequately take into consideration Tenant's misuse of the electrical outlets regarding the heating issue. Landlord had provided Tenant at least one space heater in response to the lack of adequate heat but cautioned Tenant against using more than one space heater at a time. Regardless of how Tenant attempted to implement Landlord's solution to the heating issues, Landlord has not provided an adequate legal or factual response to their failure to maintain adequate heating facilities in the first place.
- H. Appellant-Landlord argues that the Hearing Officer's 10% reduction in rent due to heating issue is excessive. The Hearing Officer used her discretion, pursuant to the CSFRA and its implementing regulations, to determine an appropriate reduction in rent given the long-lasting nature of the heating issue. The Hearing Officer factored in the Landlord's response (timely, but inadequate) when determining the 10% reduction in rent.

#### **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 allowed to present new evidence. Likewise, the public may provide comment to the RHC before it hears any appeals. (Cal. Gov. 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.

| <b>Schedule of Appeal(s) of Hearing Decisions(s)</b>  |                   |
|---|-------------------|
| <ul style="list-style-type: none"><li>• Public Comment Period applicable for all Appeals on the agenda</li><li>• Appeal Hearing (CSFRA Petition Nos. C23240029 and C23240044)</li></ul> |                   |
| 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-Tenant  |                  |
| 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 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**

See agenda posting for October 24, 2024, RHC meeting.

### **ATTACHMENTS**

1. Tentative Appeal Decision for Petition Nos. C23240029 and C23240044
2. Decision of Hearing Officer (September 6, 2024)
3. Appellant-Landlord Appeal of Decision (September 23, 2024)