



MEMORANDUM

CSFRA, Community Development Department

DATE: August 27, 2018

TO: 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, Associate Planner

SUBJECT: Appeal of Decision Regarding Petition 17180002

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 upward 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>
November 8, 2016	City voters pass Measure V (the “CSFRA”)
May 8, 2017	First RHC meeting
July 24, 2017	RHC adopts petition and hearing process regulations defining a fair return based on the maintenance of net operating income (MNOI)
August 28, 2017	RHC adopts a “Vega” adjustment regulation
December 22, 2017	Appellant-Landlord submits petition for upward adjustment (Petition)

<u>Date</u>	<u>Action</u>
January 4, 2018	RHC staff accept Petition
February 14, 2018	Prehearing settlement conference held
February 28, 2018	Assigned hearing officer requests additional information from Appellant-Landlord, delaying initially scheduled hearing (March 7, 2018)
April 4, 2018	Appellant-Landlord submits additional information, revising Petition
May 22, 2018	Hearing held; at conclusion, Hearing Officer requested additional information from all parties, leaving the record open
June 13, 2018	The hearing record was closed; additional information was received from all parties on or prior to this date
July 16, 2018	Decision and amendment to decision distributed to all parties
July 20, 2018	Appeal submitted by Appellant-Landlord
July 24, 2018	Appeal submitted by Respondent-Tenants
August 17, 2018	Tentative appeal decision distributed to all parties and RHC
August 27, 2018	Appeal hearing before RHC

Appellant-Landlord submitted a petition for upward adjustment of rent with two requests: (1) that 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's decision denied Appellant-Landlord's request for a Vega adjustment and then granted a rent increase applicable to the 56 units based on the MNOI formula.

Appellant-Landlord appealed four elements of the decision. Respondent-Tenants also appealed four elements of the decision. Some of the elements appealed by each party overlap.

ANALYSIS

A. Role of the RHC

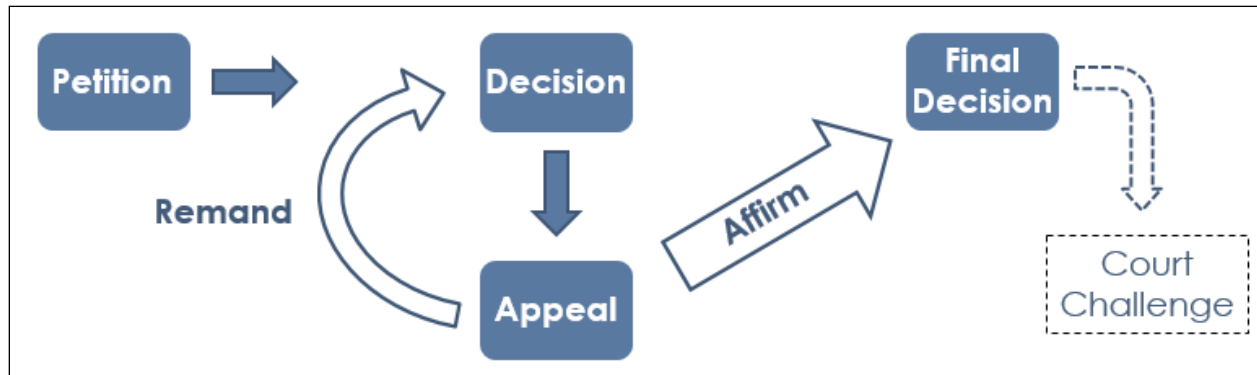
The role of the RHC is not to reweigh evidence submitted in support of or in opposition to the Petition. The hearing officer reviewed all evidence and presided over the evidentiary hearing in order to draft the decision. Rather, the RHC's role in the appeal process is to determine whether the appealed 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 trial court has a reasonable basis for the decision.

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; "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. It should be noted that if this decision is challenged in court, this is the same standard that a court will apply – did the RHC, in making its decision on appeal, have a reasonable basis for that decision based on the substantial evidence test?

B. Review: Affirming and/or Remanding the Appealed Elements of the Decision

Petitions define the scope of issues that hearing officers review. Appeals define the scope of issues that the RHC reviews. In this case, the petition requested rent increases for only 56 units, so although information about the other units is relevant to determining net operating income, the RHC cannot authorize a rent increase for any units that are not part of the petition. Similarly, the parties only appealed certain elements of the decision, and those are the only elements that the RHC is reviewing in its appeal. Elements of the decision that were not appealed are not the proper subject of the appeal hearing.

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. If substantial evidence is not identified in the decision, or if substantial evidence is not readily apparent by reviewing the Petition and other evidence, 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 some appealed elements while remanding others to the hearing officer. As shown above, if the RHC remands any appealed element to the hearing officer, the hearing officer will 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. Although the result of remand may be an additional appeal, the tentative decision is drafted with the goal of giving the hearing officer sufficient direction regarding the issues on remand to eliminate subsequent remands.

For example, Appellant-Landlord and Respondent-Tenants appealed a combined 10 elements of the decision (*see* Section IV, Subsections A through J of the tentative appeal decision). As summarized below, the tentative appeal decision proposes to affirm four elements of the decision and remand six elements.* If approved by the RHC, the hearing officer would revise only those six elements of the decision; any party impacted by those six revised elements of the decision could appeal those elements to the RHC. No party could appeal an affirmed element to the RHC, but could challenge the affirmed elements in court after the decision is final (e.g., after all elements are either affirmed, or no further appeals are received).

The RHC can also modify the hearing officer decision. Any modification must be supported by substantial evidence and the final decision of the RHC must provide the analytical link between the evidence and the final decision. Staff is not suggesting modifications to the hearing officer decision since to do so in this instance would require the RHC and staff to reweigh all of the evidence presented in order to make the necessary determinations. The hearing officer has the greater

* The tentative appeal decision proposes to modify one aspect of the decision, which provides clarity regarding the regulations (*see* Page 14 of the tentative appeal decision stating that membership renewal costs for the California Apartment Association are not “business license fees”).

familiarity with the evidence and should be able to address the issues on remand more efficiently than the RHC or the staff.

C. Appeal Elements

The table below summarizes the 10 elements of the decision appealed by parties to the Decision. The letter on the leftmost 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	Vega Adjustment Valuation of Junior One-Bedroom	Affirm Hearing Officer that Junior One-Bedrooms are treated as studios
	Vega Adjustment Application	Affirm Hearing Officer decision that Vega Adjustment is precluded
B	Calculation of Adjusted Gross Income in Base Year	Affirm Hearing Officer Decision to accept Landlord's submission of adjusted gross income
C	Calculation of Adjusted Gross Income in Petition Year	Remand calculation to identify evidence in the record to support conclusion
D	Exclusion of California Apartment Association membership Renewal Costs as a Business License Fee	The categorization of the CAA fee is remanded to the Hearing Officer to review existing evidence to appropriately classify the membership renewal costs
E	Calculation of Base Year Management Expenses	Affirm calculation of base year management expense
F	Calculation of Petition Year Management Expenses	Remand calculation to apply 6 percent presumption based on recalculation of petition year adjusted gross income
G	Ordinary Repair, Replacement, and Maintenance Costs Base Year Calculation	Remand calculation to review salary/labor expenses and determine whether reimbursable costs were improperly included

	<u>Issue/Appeal Element</u>	<u>Tentative Decision</u>
	Ordinary Repair, Replacement, and Maintenance Costs Petition Year Calculation	Remand calculation to review and clarify salary/labor expenses and determine whether reimbursable costs were improperly included
H	Capital Expenses Base Year Calculation	Remand calculation to review and clarify paver expense
	Capital Expenses Petition Year Calculation	Remand calculation to review and clarify parking lot resurfacing expense and incorporate any recalculation of base year capital expenses that carry over
I	Calculation of Base and Petition Year Operating Expenses	Remand calculations to implement changes requested above and to review and clarify whether \$1,100 check was double-counted
J	Allocation of Upward Adjustments	Remand calculation to implement changes requested above

D. Appeal Hearing Procedure

Each party that appealed the decision will have an opportunity to present their appeal and respond to the other party's presentation. Likewise, the public may provide comment to the RHC before it hears any appeals (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.

Agenda Item 5.1 Appeal(s) of Hearing Officer Decision(s)

- Public Comment Period applicable for all Appeals on the agenda

Appeal Hearing (CSFRA Case 17180002)	
Staff Report and Presentation	
Appellant-Landlord 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-Landlord	
RHC Question and Answer with Respondent-Tenant	
RHC Deliberations and Decision	

E. Complex and Sensitive Issues

This first appeal of a decision of a petition for upward adjustment of rent is complex and requires careful scrutiny of otherwise private business and personal documentation. The RHC has endeavored to implement the CSFRA as smoothly and constructively as possible, yet acknowledges that implementation of any new regulatory requirements, especially the complex and at times controversial components of the CSFRA, challenges all involved parties, RHC staff, and the public-at-large to work in good faith and strive toward the reasonable implementation of the policies enacted by popular vote. All parties involved in the petition and appeal deserve thanks and gratitude for their diligent pursuit and execution of the petition for upward adjustment.

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 remands numerous issues, including the overall MNOI calculation that defines the amount of any rent increase. The purpose of the remand is have the hearing officer make the analytical links from the evidence to the conclusions so that the RHC, and should the final decision be appealed to Superior Court, the Court can determine if the conclusions are supported by substantial evidence. Because the decision is remanded in part, the tentative appeal decision reached by the RHC is not considered a final ruling that could be challenged in court.

PUBLIC NOTICING – Agenda posting.

KMT-JDB-AvD/AK/2/RHC
896-08-27-18M-4

- Attachments:
1. Tentative Appeal Decision (17180002)
 2. Appellant-Landlord Response to Tentative Appeal Decision
 3. Respondent-Tenants Response to Tentative Appeal Decision