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June 27, 2024

memorandum

To
Mountain View Rental Housing Committee

From
Karen M. Tiedemann, Special Counsel to the Rental Housing Committee
Nazanin Salehi, Special Counsel to the Rental Housing Committee

RE
Appeal of Hearing Officer's Decision Re: Petition Nos. C22230019 and C22230025

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 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 a habitable premises/decrease in Housing Services. The first hearing on the Petitions was held on May 4, 2023. The Petitions were then reassigned to a new Hearing Officer, and a second hearing on the Petitions was held on December 6, 2023. The Hearing Officer’s Decision was issued on March 20, 2024 (“HO Decision”) and served on the parties on March 21, 2024.

Table 1: Relevant Timeline

<u>Date</u>	<u>Action</u>
February 5, 2023	RHC accepted Petition Nos. C22230019 and C22230025
April 11, 2023	First pre-hearing teleconference held
April 12, 2023	First Written Summary of Pre-hearing Conference and the Hearing Officer's Request for Documents served on parties

May 4, 2023	First Hearing held and closed
May 4, 2023	Hearing Record closed
November 9, 2023	Notice of Reopening Record, New Assignment, and Setting New Prehearing Meeting and Hearing Dates served on parties
November 20, 2023	Second pre-hearing teleconference held
November 30, 2023	Second Written Summary of Pre-hearing Conference and the Hearing Officer's Request for Documents served on parties
December 6, 2023	Hearing Officer Inspection of Common Areas of Premises
December 7, 2023	Additional Pre-Hearing Order served on the parties
December 20, 2023	Second Hearing held
December 21, 2023	Notice of Post-Hearing Order and Hearing Officer's Post-Hearing Order issued and served on the parties
January 9, 2024	Additional Notice of Post-Hearing Order and Hearing Officer's Post-Hearing Order issued and served on the parties
January 31, 2024	Hearing Record closed
March 20, 2024	Hearing Officer Decision issued
March 21, 2024	Hearing Officer Decision served on the parties
April 3, 2024	Appeal filed by Respondent-Landlord
June 17, 2024	Tentative Appeal Decision issued and served on parties
June 27, 2024	Appeal Hearing before the Rental Housing Committee

The first Petition requested a rent rollback and rent refund on the basis that the Landlord (or "Respondent") (1) had incorrectly calculated Petitioner's Base Rent at the time that the Community Stabilization and Fair Rent Act ("CSFRA") went into effect and (2) imposed unlawful rent increases above the lawful Annual General Adjustment ("AGA") permitted under the CSFRA in 2017, 2018, 2020, 2021, and 2023.

The Hearing Officer determined Petitioner met her burden of proof that Respondent had unlawfully demanded and retained rent in excess of the amount permitted by the CSFRA because Landlord did not properly roll back the rent for the Affected Unit to its level on October 19, 2015, as required by CSFRA Sections 1702(b)(1) and 1706(a) and did not properly refund Petitioner the amount of the unlawful rent collected due to the improper rent rollback. The weight of the evidence demonstrated that the premises rent for the Property on October 19, 2015 was \$1,465.00 per month and Petitioner paid \$65.00 for utilities for the period from September 20, 2015 through October 20, 2015, therefore the correct Base Rent for the Property was \$1,530.00 per month.

In addition, the Hearing Officer concluded that Respondent was responsible for unlawful retention of rent in excess of the amount permitted by the CSFRA on the basis that the rent increase imposed by Respondent effective September 1, 2018 was unlawful pursuant to CSFRA Sections 1706(a) and (b) and 1707(a) because it did not use the correct Base Rent. Consequently, that rent increase and all subsequent rent increases were unlawful. Respondent was required to refund Petitioner \$8,357.18 in unlawfully collected rent for December 23, 2016 through December 31, 2023.

The second Petition requested a downward adjustment of rent on the basis that Respondent had failed to maintain the property in a habitable condition based on the following ten (10) conditions: (a) allowing smoking on the Property; (b) failing to eliminate a rat infestation; (c) having inadequate lights in the parking lot; (d) failing to repair Petitioner's door lock within a reasonable time; (e) failing to update wall outlets to 3-prongs; (f) allowing water leakage from an area near the laundry room; (g) failing to repair holes in the ceiling of the Affected Unit; (h) not addressing a leak from the bathroom to parking lot; (i) not repairing a broken toilet in the Affected Unit; and (j) allowing trash to accumulate on the Property. The second Petition also sought a downward adjustment on the basis that the Landlord had improperly decreased Housing Services without a corresponding decrease in Rent based on the closure of the pool, the lack of an on-site property manager, because Petitioner had to change her parking space due to security issues, because Respondent failed to evict other tenants for nuisance behaviors, threatening safety, or committing crimes, and based on the closure of the laundry rooms.

As it relates to the second Petition, the Hearing Officer determined that Petitioner had met her burden of proof, and Landlord was liable for a reduction in the habitability of the Property, because: (1) Respondent had allowed smoking to persist on the premises for nearly four years; (2) Respondent had permitted a rat infestation to continue on the premises for over two years; (3) Respondent failed to remediate in adequate lighting in

the parking lot for over 17 months; (4) Respondent did not promptly replace a new door lock and deadbolt on Petitioner's door after an attempted break-in; and (5) Respondent regularly permitted an inordinate amount of bulky trash to accumulate on the Property over a period of four years. Petitioner was entitled to a total rent refund of \$11,722.03 (\$8,039.90 + \$155.37 + \$1,052.25 + \$295.00 + \$2,179.51, respectively) for all of the habitability violations.

The Hearing Officer concluded that Petitioner did not meet her burden of proof that Respondent failed to maintain a habitable premises as it relates to (1) installation of a three-prong wall outlet in the Property, (2) water leaking for an area near one of the laundry rooms, (3) knots in the wooden ceiling of the unit falling out and causing cosmetic holes, (4) water leaking from the bathroom in the unit into the parking lot, and (5) a leaking toilet in the unit.

With regard to the decreases in Housing Services alleged in the second Petition, the Hearing Officer decided that Petitioner had met her burden of proof, and Landlord was liable for improper decreases in Housing Services, based on (1) the closure of the swimming pool for several months each spring/summer for five years, (2) the closure of the laundry facilities for four months, (3) the failure to provide an on-site property manager for two years despite the provision of one at the commencement of Petitioner's tenancy and for many years thereafter, and (4) the failure to evict other tenants for nuisance behaviors threatening safety, or committing crimes. The Hearing Officer also determined that there had been a reduction in Housing Services based on the previously discussed trash issue but did not award an additional rent reduction since a reduction was already awarded under the habitability section. Petitioner was entitled to a total rent refund of \$14,852.02 (,872.00 + \$441.92 + \$11,016.0 + \$1,522.10, respectively) for the decrease in Housing Services.

Appellant-Landlord raised the following fifteen (15) issues on appeal:

- A. Based on the holding in *Golden Gateway Center v. San Francisco Residential Rent Stabilization and Arbitration Board* (1999) 73 Cal.App.4th 1204, the Hearing Officer erred in determining that maintenance and repairs undertaken by Respondent improperly interfered with Petitioner's use and occupancy of the Property.
- B. The Hearing Officer erred in applying a strict liability standard to the Respondent when the applicable laws require only "substantial compliance" with their requirements.
- C. The Hearing Officer erred in determining the reasonable value of the various habitability and Housing Services issues at the Property because the Rent for the unit is already below market due to rent control.

- D. The Hearing Officer erred or abused her discretion in concluding that the Respondent demanded and accepted unlawful Rent for the Property because Utility Charges only recently became a part of the calculation of Rent.
- E. The Hearing Officer abused her discretion in determining the valuation of the common areas as twenty percent (20%) of the rental value of the Property.
- F. The Hearing Officer abused her discretion by ignoring extensive evidence of Respondent's efforts to address the second-hand smoke issue.
- G. The Hearing Officer abused her discretion in finding that Respondent failed to maintain the Property in a habitable condition due to the lack of lighting in the parking lot because Petitioner failed to show that the lights were not repaired within a reasonable time and did not assert that she had suffered any harm from the inadequate lighting.
- H. The Hearing Officer abused her discretion by applying a strict liability standard to Respondent's trash collection efforts.
- I. The Hearing Officer abused her discretion in awarding a rent reduction based on the pool closure because the closures were largely due to the presence of migrating ducks, which Respondent was told it could not remove.
- J. The Hearing Officer abused her discretion in awarding damages for the closure of the laundry room because the Respondent was repairing vandalism damage.
- K. The Hearing Officer abused her discretion by holding Petitioner was entitled to a rent reduction for Respondent's failure to correct the nuisance and threatening behaviors of other tenants because she improperly imported the implied covenant of quiet enjoyment into the CSFRA, and arbitrarily and capriciously calculated damages.
- L. The Hearing Officer abused her discretion by awarding a rent reduction based on Respondent's failure to provide an on-site property manager.
- M. The Hearing Officer improperly awarded multiple rent reductions related to the common areas of the Property without justification.
- N. The Hearing Officer's Decision denies Respondent a fair rate of return on its investment, in violation of *Birkenfeld v. City of Berkeley* (197) 17 Cal.3d 129.
- O. The Rental Housing Committee's appeal procedures are unjust as applied to this action because it lacks any accommodations for an extension of time, thereby denying the Respondent a fair and reasonable opportunity to make arguments on appeal to the Committee.

All other 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 June 20, 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 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 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 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, Reversing and/or Remanding the Appealed Element of the Decision After Remand

Petitions define the scope of the Hearing Officer's review. Appeals define the scope of RHC 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 Hearing Decision that were appealed by the parties.

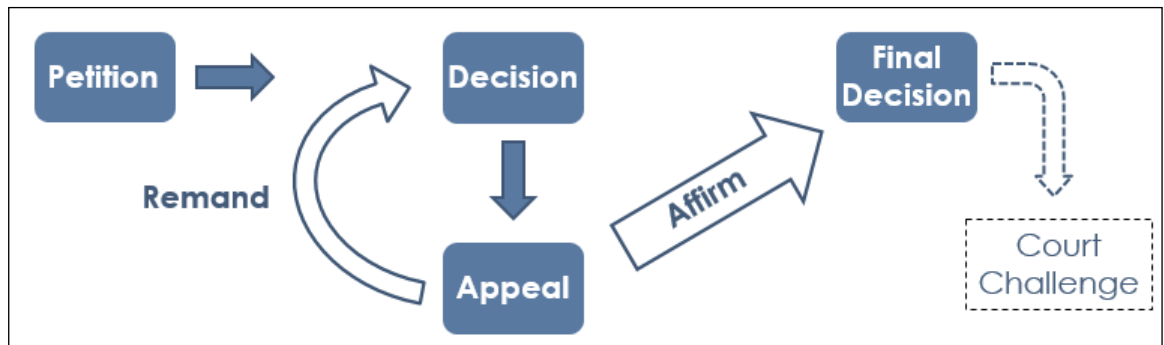
The process for an appeal can result in multiple appeal hearings before the RHC if a Hearing Decision is remanded to the Hearing Officer. A summary graphic visualizing the appeal procedure is provided below.

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 based on the holding in *Golden Gateway Center v. San Francisco Residential Rent Stabilization and Arbitration Board* (1999) 73 Cal.App.4th 1204, the Hearing Officer erred in determining that maintenance and repairs undertaken by Respondent improperly interfered with Petitioner’s use and occupancy of the Property. In that case, the court held “a housing service did not *cease* to be provided; rather, by undertaking to *provide* housing services – repair, maintenance and paint – another service was temporarily interrupted” and as such, the tenant was not entitled to a reduction in rent for decrease in housing services. That case is inapplicable here because the interruption or decrease in Housing Services resulted from Respondent’s lack of diligence in providing maintenance and repairs, or general lack of responsiveness and thoroughness in addressing the issues at the premises.
- B. Appellant-Landlord asserts that the Hearing Officer erred in applying a strict liability standard to the Respondent when the applicable laws require only “substantial compliance” with their requirements. However, the Hearing Officer did not impose a strict liability standard; she merely followed the applicable standards in CSFRA and the Regulations, including those defining “substantial compliance” in the context of the CSFRA.
- C. Appellant-Landlord also argues that the Hearing Officer erred in determining the reasonable value of the various habitability and Housing Services issues at the Property because the Rent for the unit is already below market due to rent control. Appellant cites no authority for its assertion that Rent is below market, or that because the Rent for the Property is below market here because of rent control, no rent reduction could be awarded without evidence of lost value. The authorities cited by Appellant indicate that the Hearing Officer had discretion in calculating the reasonable rental value of the Property, which she determined was the lawful Rent for the unit pursuant to the CSFRA.



- D. Next, Appellant-Landlord asserts that the Hearing Officer erred or abused her discretion in concluding that the Respondent demanded and accepted unlawful Rent for the Property because Utility Charges only recently became a part of the calculation of Rent. Appellant's argument wrongly assumes the intent of the Committee in adopting the Chapter 13 regulations and incorrectly interprets the impact of these regulations. Utility Charges have been a part of the calculation of Rent since the CSFRA went into effect; Landlord's failure to include them in the calculation of the Base Rent was an error. Therefore, Appellant was not in substantial compliance with the requirements of the CSFRA when it imposed rent increases in 2017, 2018, 2019, 2021 and 2023, and those rent increases were invalid. Even if Appellant was in substantial compliance based on its attempt to comply with rollback requirements, the rent increases that were imposed were still unlawful because Appellant relied on the incorrect Base Rent to calculate the increase.
- E. Thereafter, Appellant-Landlord challenges the Hearing Officer's valuation of the common areas as percent (20%) of the rental value of the Property, relying on the fact that the Hearing Officer did not cite any legal authority for the valuation. However, the CSFRA Regulations authorize Hearing Officers to determine the "amount of rent adjustment attributable to each failure to maintain a habitable premises, decrease in housing services or maintenance, or demand for or retention of unlawful rent claimed in" a petition so long as their decisions include findings of fact and conclusions of law which support the decision. Since there was no established methodology that the Hearing Officer was required to use, it was reasonable and within the Hearing Officer's authority to develop a methodology by which to assign value to the common areas.
- F. Appellant-Landlord contends that the Hearing Officer abused her discretion by ignoring extensive evidence of Respondent's efforts to address the second-hand smoke issue. However, the Hearing Officer cited sufficient evidence in the record to support her conclusion that Petitioner demonstrated that it was more likely true than not that (1) her neighbors were smoking on or near the Property in violation of the City's Anti-Smoking Ordinance and (2) the Landlord had notice and a reasonable opportunity to correct the second-hand smoke issue. More importantly, nothing in the CSFRA prohibits a Hearing Officer from awarding a rent reduction where the Landlord has taken steps to correct the condition but has been unsuccessful in doing so. Finally, there is significant evidence in the record about the persistence of the second-hand smoke issue, including testimony from the Petitioner that the smoking happens every day, to support the Hearing Officer's decision to award a rent reduction for the entire period from March 15, 2019 through August 1, 2023.
- G. Appellant-Landlord next argues that the Hearing Officer abused her discretion in finding that Landlord failed to maintain the Property in a habitable condition due to the lack of lighting in the parking lot. Appellant insists that Petitioner failed to

show that the lights were not repaired within a reasonable time and did not assert that she had suffered any harm from the inadequate lighting. Yet, there was testimony from both Petitioner and Appellant's representatives that lighting, especially the breaking and removal thereof by other tenants and non-residents, continues to be an ongoing problem at the Property. It was also reasonable for the Hearing Officer to conclude that the lack of adequate lighting in the common areas constitute a safety concern for Petitioner, given the extensive evidence in the record about unsafe events at the Property.

- H. Again, Appellant-Landlord argues that the Hearing Officer abused her discretion by applying a strict liability standard to Landlord's trash collection efforts. Hearing Officer appropriately determined that the Property substantially lacked common areas that were clean, sanitary and free from accumulations of trash where the record included photographic evidence of at least 38 days where bulky trash was dumped on the property, six reports from the City's Multi-Family Housing Inspection program where trash was reported as an issue, and testimony from Appellant's representatives that illegal dumping, and trash accumulation remain daily issues at the Property.
- I. Appellant-Landlord claims that the Hearing Officer abused her discretion in awarding a rent reduction based on the pool closure because the closures were largely due to the presence of migrating ducks, which Respondent was told it could not remove. The Hearing Officer's conclusion was supported because over the course of the 5-6 years that the ducks remained an issue, Landlord only attempted two methods of deterring the ducks. Appellant also overlooks that the fact that the Hearing Officer's use of the "common area valuation" method applied only to issues arising out of Landlord's failure to maintain the Property in a habitable or tenantable condition while the Hearing Officer used different measures for the Housing Services issues.
- J. Appellant-Landlord argues that the Hearing Officer abused her discretion in awarding damages for the closure of the laundry room because the Appellant was repairing vandalism damage. But, the Hearing Officer's conclusion was actually appropriate because the laundry room closure was not caused by Landlord undertaking to provide another housing service, but rather by the Landlord's failure to properly secure the laundry facilities to prevent break-ins and vandalism and its unexplained four-month delay in getting the laundry facilities back open.
- K. Additionally, Appellant-Landlord asserts that the Hearing Officer abused her discretion by holding Petitioner was entitled to a rent reduction for Appellant's failure to correct the nuisance and threatening behaviors of other tenants because she improperly imported the implied covenant of quiet enjoyment into the CSFRA, and arbitrarily and capriciously calculated damages. But there is no authority for Appellant's argument that this particular contractual obligation

cannot be enforced via the petition process, while several of a landlord's other contractual obligations (such as the implied warranty of habitability) can be.

- L. Furthermore, Appellant-Landlord alleges that the Hearing Officer abused her discretion by awarding a rent reduction based on Appellant's failure to provide an on-site property manager by insisting that there is no legal requirement to provide an on-site property manager for a building with fewer than 16 units. Putting aside whether the property in fact has fewer than 16 units, the Hearing Officer correctly explained the determination of whether Appellant is required by law to provide an on-site property manager is irrelevant because the provision of an onsite property manager at the time that the CSFRA went into effect constitutes a "Housing Service" under Petitioner's rental housing agreement.
- M. Appellant-Landlord argues that the Hearing Officer improperly awarded multiple rent reductions related to the common areas of the Property without justification. Hearing Officer explained the findings of fact and conclusions of law underlying the rent reduction awarded so the valuations of the common area reductions were not arbitrary.
- N. Appellant-Landlord asserts that the Hearing Officer's Decision denies Appellant a fair rate of return on its investment, in violation of *Birkenfeld v. City of Berkeley* (197) 17 Cal.3d 129. The determination about whether a landlord can achieve a fair rate of return under a local rent control scheme is made on a property-wide, not unit-by-unit, basis. To demonstrate that the decision denies it a fair rate of return, Appellant must file a fair rate of return petition demonstrating the impact of this award on their net operating income.
- O. Lastly, Appellant-Landlord challenges the Rental Housing Committee's appeal procedures as unjust because they allegedly lack any accommodations for an extension of time and therefore denied Respondent a fair and reasonable opportunity to make arguments on appeal to the Committee. The Committee's regulations provide that the "Committee may accept the late appeal, in Rental Housing Committee's sole discretion...upon finding that the untimely appeal request is supported by good cause and postponement serves the interest of justice."

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.

Schedule of Appeal(s) of Hearing Decision(s)

- Public Comment Period applicable for all Appeals on the agenda

Appeal Hearing (CSFRA Petition Nos. C22230019 and C22230025)

Staff Report & Presentation

Appellant-Landlord Presentation of Argument	10 minute maximum
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Respondent-Tenant Presentation of Argument	10 minute maximum
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Appellant-Landlord Presentation of Rebuttal	5 minute maximum
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Respondent-Tenant Presentation of Rebuttal	5 minute maximum
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RHC Question and Answer with Staff

RHC Question and Answer with Appellant-Landlord

RHC Question and Answer with Respondent-Tenants

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 — Agenda posting, posting on the City’s website, and email to distribution list.

ATTACHMENTS

1. Tentative Appeal Decision for Petition Nos. C22230019 and C22230025
2. Decision of Hearing Officer (March 20, 2024)
3. Appellant-Landlord Appeal of Decision (April 3, 2024)
4. Respondent Answer to Tentative Appeal Decision (June 24, 2024)

