



MEMORANDUM

Rent Stabilization Division
Housing Department

DATE: August 21, 2023

TO: Members of the Rental Housing Committee

FROM: Karen M. Tiedemann, Special Counsel to the Rental Housing Committee
Nazanin Salehi, Special Counsel to the Rental Housing Committee
Anky van Deursen, Program Manager

SUBJECT: Supplemental Memo Re: Appeal of Hearing Officer's Decision Regarding Petition M2223001

BACKGROUND

On Friday, August 11, 2023, the Rental Housing Committee issued a Tentative Appeal Decision recommending affirming the Hearing Decision in Petition M2223001 in its totality. All parties to the Appeal are entitled to respond to the Tentative Appeal Decision. Responses to the Tentative Appeal Decision were due on August 16, 2023. On August 16, 2023, Respondent-Landlord submitted a Memorandum of Points and Authorities in Support of Hearing Officer's Decision and in Support of Tentative Decision ("Respondent's Response"). This staff report supplements Staff's prior report and addresses the relevant arguments in Respondent's Response.

ANALYSIS

Respondent's Response raises nine arguments. We outline each in turn below and address those arguments which are relevant to the appeal at hand.

- A. Petitioner-Tenants' petition is flawed because it ignores the definition of "Rent" in the Mobilehome Rent Stabilization Ordinance ("MHRSO").** The definition of Rent in the MHRSO includes both monetary and nonmonetary consideration. The total amount of monetary and nonmonetary consideration for Petitioners' Mobilehome totaled \$3,595.00.
- **ANALYSIS:** Respondent correctly states that the definition of "Rent" in the MHRSO includes both monetary and nonmonetary consideration. However, for the reasons explained in Section B below, Petitioners did not agree to an

exchange of nonmonetary consideration for the use and occupancy of the mobilehome.

B. Forbearance of a right is valuable consideration under California law. In entering into the Concessions Addenda, Respondent agreed to accept nonmonetary consideration in exchange for Petitioners' promise to honor the remaining term of their rental agreement (i.e., forego their right to terminate their Lease Agreement prior to the expiration of the Lease Agreement).

- **ANALYSIS:** Respondent argues that the Concessions Addendum between Respondent and Petitioners was an agreement by Petitioners to forebear exercising their rights under the COVID-19 laws to only pay 25% of their rent in exchange for a monthly concession of \$980.45 for 11 months. However, the Concessions Addendum does not reference the Petitioners' right to make use of the various COVID-19 tenant protections; rather, the Concessions Addendum merely states that Petitioners would have to pay the \$980.45 per month if they defaulted under their Lease Agreement. In essence, the Concessions Addendum operates as a liquidated damages provision, not as an exchange of nonmonetary consideration (i.e., forbearance of a right) for the use and occupancy of the mobilehome.

Perhaps more importantly, the Rental Housing Committee need not consider this argument if it intends to adopt the Tentative Decision as there is sufficient legal and factual grounds outlined in the Tentative Appeal Decision to uphold the Hearing Officer's Decision in its entirety.

C. The Committee's regulations regarding rental concessions do not apply to tenancies commenced on or prior to March 16, 2021. Under the rules of statutory construction, the language regarding rental concessions in MHRSO Regulations chapter 2, section (c)(2) is intended to apply only to tenancies commencing after March 16, 2021; it cannot be implied to apply to tenancies commencing on or before March 16, 2021.

- **ANALYSIS:** None. The Tentative Decision reaches the same conclusion.

D. Petitioners' interpretation of the MHRSO and the Regulations are contrary to California stated policy regarding rental concessions. The policy of the state of California is to exclude "concessions" when calculating the base rent under the Tenant Protection Act of 2019. (Civil Code Section 1947.12.) Since the concessions for Petitioners' mobilehome were negotiated before the MHRSO was adopted and went into effect, the provisions of the Tenant Protection Act govern.

- **ANALYSIS:** The Tenant Protection Act of 2019 is not applicable to tenancies that are governed by local rent control. (Civ. Code § 1947.12(d)(2).) In addition, at the

time that the rental concessions for Petitioners' mobilehome were negotiated, the provisions of the Tenant Protection Act were not applicable to mobilehomes.

E. The Committee cannot set the Petitioners' Rent based on the amount paid because it is preempted by law. Even if MHRSO Regulations, chapter 2, section (c)(2) applied to tenancies commencing on or before March 16, 2021, it would be unconstitutional to apply it to Petitioners' tenancy because California law allows landlords to either evict tenants who do not pay their rent, or to sue them for breach of contract. (Civ. Code § 798.56(e); Code of Civ. Proc. §§ 337; 1161.) Setting Petitioners' Base Rent based on the rent paid, instead of the Rent in the Lease Agreement, would constitute a taking under the Fifth and Fourteenth Amendments of the United States Constitution.

- **ANALYSIS:** None. The Rental Housing Committee does not have jurisdiction to determine whether the MHRSO is unconstitutional. This argument is outside of the scope of the current appeal.

F. Converting a temporary rent concession to a permanent rent reduction would be unconstitutional. The rental concessions provided to Petitioners were intended to be temporary and converting them to a permanent rent reduction would constitute a violation of the Contracts Clause of the U.S. Constitution.

- **ANALYSIS:** None. The Rental Housing Committee does not have jurisdiction to determine whether the MHRSO is unconstitutional. This argument is outside of the scope of the current appeal.

G. The Hearing Officer and Rental Housing Committee have the authority to determine whether the MHRSO has been applied in a manner that is unconstitutional. Hearing Officers and the Rental Housing Committee have jurisdiction to determine whether Landlords are receiving a constitutionally guaranteed fair rate of return, therefore they also have the authority to determine whether the MHRSO is being applied in an unconstitutional manner to Respondent.

- **ANALYSIS:** The MHRSO specifically authorizes the Rental Housing Committee to determine whether a Landlord receives a fair rate of return; this authorization does not authorize the Rental Housing Committee, or a Hearing Officer appointed by the Committee, to adjudicate the constitutionality of the Ordinance, either on its face or as applied to a specific Landlord or Tenant.

H. Respondent reserves all of their rights, including their right to enforce the concession addendum where tenants have defaulted on their lease. Neither the Hearing Officer nor the Rental Housing Committee have jurisdiction to adjudicate a landlord's common law counterclaims against a tenant. Therefore, Respondent reserves the right to enforce the Concession Addendum against Petitioners.

- **ANALYSIS:** None. This argument is outside of the scope of the current appeal.
- I. **Respondent was legally entitled to increase the rent by five percent (5%) effective November 17, 2022.** The Consumer Price Index change between February 2021 and February 2022 was 5.2%. Pursuant to MHRSO Sections 46.5 and 46.6, Respondent was entitled to a 5% increase and properly increased Petitioners' Rent to \$3,774.75.
- **ANALYSIS:** None. The Tentative Decision reaches the same conclusion.