Housing Justice Center

August 29, 2022

Mai Vang
City of St. Paul
310 City Hall
15 West Kellogg Blvd
Saint Paul, MN 5512

By email only to: mai.vang@ci.stpaul.mn.us

RE: Appeal of Angela Wilhight, 261 5th St. East
Reply to Appeal Response filed by Malcolm P. Terry on August 18, 2022

To Hearing Officer and City Staff:

Mr. Terry's response to Angela Wilhight's appeal asserts that the Landlord's shifting of responsibility for four utility payments from the Landlord to Ms. Wilhight in her new lease, beginning September 1, does not amount to a violation of the City's rent stabilization law because the payments by tenants for utilities previously paid for by the owner are not increases in rent. This response is in error for multiple reasons.

Under Ms. Willhight's current lease, which runs from June 2021 through August 31, 2022, she pays $1,575 for occupancy of her apartment. Appeal Ex. 1, sec. 4. The Lease expressly provides that "we'll pay for" water, gas, wastewater, and trash. The current cost to her of living in the apartment is therefore $1,575. Her new lease, effective September 1, 2022 provides for rent of $1,622 (an increase of $47 or 3%) plus payment of the cost of the four utilities paid for by the landlord under her current lease. The cost of these utilities was estimated by her manager to be $130-$150. See Attachment 1 to this memorandum. Thus as a result of the new lease, imposed by the landlord, it will cost her $177 - $197 (11.2% to 12.5%) more to live in her apartment than it has since June 1, 2021.

Under the new lease, the owner remains responsible to the utility companies for payment of the utility bills. The Utility and Services Addendum to the new lease (Exhibit 5 to the Appeal) says, for each utility, that "bills will be billed by the service provider to us." See paragraphs 1,a-d. The bills are then "allocated" to each tenant based on an allocation formula. According to Mr. Terry's August 18, 2022, Appeal Response, a Company called Conserve is used to split the billing. It is "a company that splits out and tracks the utilities by apartment for single metered buildings **for property management companies** and sends a statement to the residents" with the payment of the statement then going to the utility companies. (emphasis added). Conserve is thus, like the management company, an agent of the Landlord. The Landlord is responsible for the utilities and is billed for them by the utility providers and the Landlord's agent, Conserve, then allocates the utility costs among residents, bills the residents, and pays the utilities. Conserve then, is simply the owner's agent, doing the work of allocating the utility bills and paying the utility company on behalf of the Landlord, which has been billed by the utility companies.

Jack Cann, Attorney
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Under § 193A.03.e., The term "Landlord" includes the Landlord's agents. Conserve's actions then are the Landlord's actions. Under § 193A.03.g., "Rent" is all money "charged" by a landlord concerning use of a Rental Unit. Thus the payment by the tenant of the Landlord's utility bills, which are allocated by the Landlord to the tenant (through its agent), charged by the Landlord to the tenant (through its agent) and paid by the Landlord to the utility (through its agent) is "rent" for purposes of the ordinance.[1] And the additional estimated payments by Ms. Wilhight of $130-$150 month are part of a 11.2%-12.5% rent increase imposed by the Landlord as of September 1, in violation of the rent stabilization ordinance and rules.

That this is the case is confirmed by Minn. Stat. § 54B.215 Subd. 2, which permits an owner to apportion utility serviced payments and then either include the apportioned cost in rent or bill the tenant for the utility charges. The owner has chosen the second option, to apportion utility payments and to bill the tenants. The language of the statute makes it clear that it is the landlord who is both the "bill payer responsible" and who bills for utility charges separate from rent in the case the Landlord has chosen the apportionment option.[2] Whichever way the Landlord characterizes the apportioned utility charge, the statute is clear that it is a charge by the owner and therefore "rent" under the ordinance.

Also confirming this position is that the owner applied for and received a self-certified exception to the 3% rent limit, while raising the rents only 3%. There could be no purpose for this application if the allocation of utility costs were not "rent." And indeed, Mr. Terry's July 28 letter, Exhibit 4 to the Appeal, argues that "this property has been approved for an exception to the 3% cap in the ordinance." Of course, the "3% cap" referred to is a cap on rent increases. By defending the Landlord's shift of utility costs to the tenants as a permitted exception, he is conceding that it constitutes a rent increase. What he doesn't address is the fact that it constitutes a rent increase of greater than 8% and that self-certification is therefore not permitted under the ordinance.

Finally, note that paragraph 5 of the Utility and Services Addendum to the new lease (Appeal Exhibit 5) provides that on move out, a final utility bill will be provided and if not paid will be deducted from the tenant's security deposit. But pursuant to Minn. Stat. 504B.178,Subd. 3, security deposits must be held by the landlord and any retention by the Landlord must be limited to "remedy tenant defaults in the payment of rent or other funds due to the landlord pursuant to agreement." Thus, the provision that security deposits may be used to cover a tenant's failure to make utility payments demonstrates that these payments are necessarily "funds due to the Landlord."

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[1] Note that it doesn't matter how "rent" may be defined in any other statute. The definitions in 193A.03 are solely for the purposes defining the limitations of increases in the cost of occupancy by tenants for purposes of the rent stabilization ordinance.

[2] Mr. Terry has misread the statute, as if the apportionment were a wholly separate option from billing the tenants. But the statute doesn't, as Mr. Terry apparently thinks, provide that the owner may apportion OR include utilities in rent OR charge separately for utilities. Rather the statute permits the owner to apportion utilities AND EITHER include the apportioned cost in rent OR charge for it separately. Whichever option the owner chooses after apportionment, the plain language of the statute provides that it is the owner who is the "bill payer responsible" and who, in the case of apportionment, charges the tenants for the cost of the utilities, either as rent or separately.

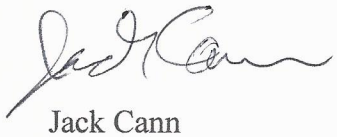
Two other other assertions in Mr. Terry's Appeal Response, not addressed above, are similarly mistaken:

He asserts that the Appeal, labeled on the cover sheet as a challenge to the landlord's violation of the rent stabilization ordinance, is not appealable. But the cover sheet provides that attachments are acceptable and the entry on line 8 says "see attached." The first sentence of the attached memorandum characterizes the appeal as of the ordinance violation *and* the City's approval of the violation. Appeal of the City's approval is clearly authorized, and would be meaningless unless a violation is also asserted.

He also asserts that "passthrough and sub-metered utilities are specifically **excluded** from calculating Gross Rent Income when determining an exception to the 3% rental increase limit." Citing the Regulations at A5aii, Emphasis in the original. That is a highly misleading mis-quote of the regulation. What the cited regulation actually excludes is charges sub-metered utilities. There is no exclusion for "passthrough" charges. This is not a sub-metered building where the actual usage by each tenant is metered. It is a single metered building, where the owner is responsible for all utility payments, and where, as demonstrated above, tenant charges for utility costs passed through to the tenants by the Landlord are "rent" for purposes of the ordinance.

Finally, Mr. Terry has wholly failed to respond to the problems with the owners MNOI Workbook which were set out in my Supplement to Wilhight Appeal submitted on August 10, after I finally obtained a copy of the owner's submission.

Yours truly,



Jack Cann
Attorney for Angela Wilhight

ATTACHMENT 1

From: Rayette Lofts-Mgr <rayetteloftsmgr@cushwake.com>
Sent: Tuesday, July 5, 2022 7:56 AM
To: Angela Wilhight <Angela.Wilhight@mpls.k12.mn.us>
Subject: Re: [EXTERNAL] Lease Renewal Proposals are Ready! #604

Good morning Angela,

I have received your notice and entered it.

Personally, I can tell you I have never seen a lease decrease in price.

Average utilities for a one bedroom we are seeing is $130-$150 depending on usage.

In case of a lease termination we would need the following:

- Lease termination fee - $3,244 (on new lease)
- 60 days' notice
- Any concessions paid back

Thank you

Chelsea Dorval

Property Manager

Rayette Lofts

Direct: +1 651-224-0314

rayetteloftsmgr@cushwake.com

Make an appointment with me HERE