City Council Meeting
08-09-21
Item 3.B.8.

Council Agenda Report

To: Mayor Grisanti and the Honorable Members of the City Council

Prepared by: Patricia Salazar, Senior Administrative Analyst

Reviewed by: Richard Mollica, Planning Director

Approved by: Steve McClary, Interim City Manager

Date prepared: July 21, 2021 Meeting date: August 9, 2021

Subject: Professional Services Agreement for Administrative Hearing Officer Services

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RECOMMENDED ACTION: Authorize the Mayor to execute a professional services agreement with Robert M. Snider (Consultant) for Administrative Hearing Officer services.

FISCAL IMPACT: Funding for this agreement is included in the Fiscal Year 2021-2022 Budget in Account No. 101-2001-5100.00 (Planning Profession Services). Based on a preliminary estimate provided by the Consultant, an appeal may take 20 hours of work and cost the City $5,550. The costs for these services will be partially recovered by the $750 appeal fee. Based on this estimate, the City would recover less than 13% of the anticipated expenditures.

WORK PLAN: This item was included as item 4i in the Workplan for Fiscal Year 2021-2022

DISCUSSION: In April 2021, the City Council adopted Ordinance No. 484, the Wireless Communication Facility (WCF) Ordinance Update, which among other new procedural provisions, allows for administrative hearings to consider appeals of the Planning Director's actions on WCF applications.

On April 27, 2021, staff issued a Request for Proposals (RFP) seeking qualified individuals to serve as an Administrative Hearing Officer to preside over administrative hearings. Staff received one proposal in response to the RFP from Robert M. Snider.

Based on his response to the RFP and an interview, Mr. Snider has demonstrated that he possesses extensive experience in conducting administrative hearings and producing written determinations. In addition, he is a resident of the Los Angeles County unincorporated area of the Santa Monica Mountains and is familiar with Malibu's unique character and topography. As such, staff recommends authorizing the Mayor to execute a two-year agreement with the Consultant.

ATTACHMENTS:

1. Agreement with Robert M. Snider
2. Consultant's Response to RFP
3. Consultant Samples of Written Determinations

AGREEMENT FOR PROFESSIONAL SERVICES

This Agreement is made and entered into as of August 9, 2021 by and between the City of Malibu (hereinafter referred to as the "City"), and Robert M. Snider. (hereinafter referred to as "Consultant").

The City and the Consultant agree as follows:

R E C I T A L S

A. The City does not have the personnel able and/or available to perform the services required under this Agreement.

B. The City desires to contract out for consulting services pertaining to Administrative Hearing Officer for certain wireless communications facilities applications.

C. The Consultant warrants to the City that it has the qualifications, experience and facilities to perform properly and timely the services under this Agreement.

D. The City desires to contract with the Consultant to perform the services as described in Exhibit A of this Agreement.

NOW, THEREFORE, the City and the Consultant agree as follows:

1.0 SCOPE OF THE CONSULTANT'S SERVICES. The Consultant agrees to provide the services and perform the tasks set forth in the Scope of Work, attached to and made part of this Agreement, except that, to the extent that any provision in Exhibit A conflicts with this Agreement, the provisions of this Agreement govern. The Scope of Work may be amended from time to time by way of a written directive from the City.

2.0 TERM OF AGREEMENT. This Agreement will become effective on August 9, 2021, and will remain in effect for a period of two years from said date unless otherwise expressly extended and agreed to by both parties or terminated by either party as provided herein.

3.0 CITY AGENT. The City Manager, or his or her designee, for the purposes of this Agreement, is the agent for the City; whenever approval or authorization is required, Consultant understands that the City Manager, or his or her designee, has the authority to provide that approval or authorization.

4.0 COMPENSATION FOR SERVICES. The City shall pay the Consultant for its professional services rendered and costs incurred pursuant to this Agreement in accordance with the Scope of Work's and fee and cost schedule. The total cost of services shall not exceed $50,000. No additional compensation shall be paid for any other expenses incurred, unless first approved by the City Manager, or his or her designee.

4.1 The Consultant shall submit to the City, by no later than the 10th day of each month, its bill for services itemizing the fees and costs incurred during the previous month. The City shall pay the Consultant all uncontested amounts set forth in the Consultant's bill within 30 days after it is received.

5.0 CONFLICT OF INTEREST. The Consultant represents that it presently has no interest and shall not acquire any interest, direct or indirect, in any real property located in the City which may be affected by the services to be performed by the Consultant under this Agreement. The Consultant further represents that in performance of this Agreement, no person having any such interest shall be employed by it.

5.1 The Consultant represents that no City employee or official has a material financial interest in the Consultant's business. During the term of this Agreement and/or as a result of being awarded this contract, the Consultant shall not offer, encourage or accept any financial interest in the Consultant's business by any City employee or official.

5.2 If a portion of the Consultant's services called for under this Agreement shall ultimately be paid for by reimbursement from and through an agreement with a developer of any land within the City or with a City franchisee, the Consultant warrants that it has not performed any work for such developer/franchisee within the last 12 months, and shall not negotiate, offer or accept any contract or request to perform services for that identified developer/franchisee during the term of this Agreement.

6.0 GENERAL TERMS AND CONDITIONS.

6.1 Termination. Either the City Manager or the Consultant may terminate this Agreement, without cause, by giving the other party ten (10) days written notice of such termination and the effective date thereof.

6.1.1 In the event of such termination, all finished or unfinished documents, reports, photographs, films, charts, data, studies, surveys, drawings, models, maps, or other documentation prepared by or in the possession of the Consultant under this Agreement shall be returned to the City. If the City terminates this Agreement without cause, the Consultant shall prepare and shall be entitled to receive compensation pursuant to a close-out bill for services rendered and fees incurred pursuant to this Agreement through the notice of termination. If the Consultant terminates this Agreement without cause, the Consultant shall be paid only for those services completed in a manner satisfactory to the City.

6.1.2 If the Consultant or the City fail to fulfill in a timely and proper manner its obligations under this Agreement, or if the Consultant or the City violate any of the covenants, agreements, or stipulations of this Agreement, the Consultant or the City shall have the right to terminate this Agreement by giving written notice to the other party of such termination and specifying the effective date of such termination. The Consultant shall be entitled to receive compensation in accordance with the terms of this Agreement for any work satisfactorily completed hereunder. Notwithstanding the foregoing, the Consultants shall not be relieved of liability for damage sustained by virtue of any breach of this Agreement and any payments due under this Agreement may be withheld to off-set anticipated damages.

6.2 Non-Assignability. The Consultant shall not assign or transfer any interest in this Agreement without the express prior written consent of the City.

6.3 Non-Discrimination. The Consultant shall not discriminate as to race, creed, gender, color, national origin or sexual orientation in the performance of its services and duties pursuant to this Agreement, and will comply with all applicable laws, ordinances and codes of the Federal, State, County and City governments.

6.4 Insurance. The Consultant shall submit to the City certificates indicating compliance with the following minimum insurance requirements no less than one (1) day prior to beginning of performance under this Agreement:

(a) Workers Compensation Insurance as required by law. The Consultant shall require all subcontractors similarly to provide such compensation insurance for their respective employees.

(b) Comprehensive general and automobile liability insurance protecting the Consultant in amounts not less than $1,000,000 for personal injury to any one person, $1,000,000 for injuries arising out of one occurrence, and $500,000 for property damages or a combined single limit of $1,000,000. Each such policy of insurance shall:

1) Be issued by a financially responsible insurance company or companies admitted and authorized to do business in the State of California or which is approved in writing by City.

2) Name and list as additional insured the City, its officers and employees.

3) Specify its acts as primary insurance.

4) Contain a clause substantially in the following words: "It is hereby understood and agreed that this policy shall not be canceled nor materially changed except upon thirty (30) days prior written notice to the City of such cancellation or material change."

5) Cover the operations of the Consultant pursuant to the terms of this Agreement.

6.5 Indemnification. Consultant shall indemnify, defend with counsel approved by City, and hold harmless City, its officers, officials, employees and volunteers from and against all liability, loss, damage, expense, cost (including without limitation reasonable attorneys fees, expert fees and all other costs and fees of litigation) of every nature arising out of or in connection with Consultant's performance of work hereunder or its failure to comply with any of its obligations contained in this Agreement, regardless of City's passive negligence, but excepting such loss or damage which is caused by the sole active negligence or willful misconduct of the City. Should City in its sole discretion find Consultant's legal counsel unacceptable, then Consultant shall reimburse the City its costs of defense, including without

limitation reasonable attorneys fees, expert fees and all other costs and fees of litigation. The Consultant shall promptly pay any final judgment rendered against the City (and its officers, officials, employees and volunteers) covered by this indemnity obligation. It is expressly understood and agreed that the foregoing provisions are intended to be as broad and inclusive as is permitted by the law of the State of California and will survive termination of this Agreement.

6.6 Compliance with Applicable Law. The Consultant and the City shall comply with all applicable laws, ordinances and codes of the federal, state, county and city governments, including, without limitation, Malibu Municipal Code Chapter 5.36 Minimum Wage.

6.7 Independent Contractor. This Agreement is by and between the City and the Consultant and is not intended, and shall not be construed, to create the relationship of agency, servant, employee, partnership, joint venture or association, as between the City and the Consultant.

6.7.1. The Consultant shall be an independent contractor, and shall have no power to incur any debt or obligation for or on behalf of the City. Neither the City nor any of its officers or employees shall have any control over the conduct of the Consultant, or any of the Consultant's employees, except as herein set forth, and the Consultant expressly warrants not to, at any time or in any manner, represent that it, or any of its agents, servants or employees are in any manner employees of the City, it being distinctly understood that the Consultant is and shall at all times remain to the City a wholly independent contractor and the Consultant's obligations to the City are solely such as are prescribed by this Agreement.

6.8 Copyright. No reports, maps or other documents produced in whole or in part under this Agreement shall be the subject of an application for copyright by or on behalf of the Consultant.

6.9 Legal Construction.

(a) This Agreement is made and entered into in the State of California and shall in all respects be interpreted, enforced and governed under the laws of the State of California.

(b) This Agreement shall be construed without regard to the identity of the persons who drafted its various provisions. Each and every provision of this Agreement shall be construed as though each of the parties participated equally in the drafting of same, and any rule of construction that a document is to be construed against the drafting party shall not be applicable to this Agreement.

(c) The article and section, captions and headings herein have been inserted for convenience only and shall not be considered or referred to in resolving questions of interpretation or construction.

(d) Whenever in this Agreement the context may so require, the masculine gender shall be deemed to refer to and include the feminine and neuter, and the singular shall refer to and include the plural.

6.10 Counterparts. This Agreement may be executed in counterparts and as so executed shall constitute an agreement which shall be binding upon all parties hereto.

6.11 Final Payment Acceptance Constitutes Release. The acceptance by the Consultant of the final payment made under this Agreement shall operate as and be a release of the City from all claims and liabilities for compensation to the Consultant for anything done, furnished or relating to the Consultant's work or services. Acceptance of payment shall be any negotiation of the City's check or the failure to make a written extra compensation claim within ten (10) calendar days of the receipt of that check. However, approval or payment by the City shall not constitute, nor be deemed, a release of the responsibility and liability of the Consultant, its employees, sub-consultants and agents for the accuracy and competency of the information provided and/or work performed; nor shall such approval or payment be deemed to be an assumption of such responsibility or liability by the City for any defect or error in the work prepared by the Consultant, its employees, sub-consultants and agents.

6.12 Corrections. In addition to the above indemnification obligations, the Consultant shall correct, at its expense, all errors in the work which may be disclosed during the City's review of the Consultant's report or plans. Should the Consultant fail to make such correction in a reasonably timely manner, such correction shall be made by the City, and the cost thereof shall be charged to the Consultant.

6.13 Files. All files of the Consultant pertaining to the City shall be and remain the property of the City. The Consultant will control the physical location of such files during the term of this Agreement and shall be entitled to retain copies of such files upon termination of this Agreement.

6.14 Waiver; Remedies Cumulative. Failure by a party to insist upon the performance of any of the provisions of this Agreement by the other party, irrespective of the length of time for which such failure continues, shall not constitute a waiver of such party's right to demand compliance by such other party in the future. No waiver by a party of a default or breach of the other party shall be effective or binding upon such party unless made in writing by such party, and no such waiver shall be implied from any omissions by a party to take any action with respect to such default or breach. No express written waiver of a specified default or breach shall affect any other default or breach, or cover any other period of time, other than any default or breach and/or period of time specified. All of the remedies permitted or available to a party under this Agreement, or at law or in equity, shall be cumulative and alternative, and invocation of any such right or remedy shall not constitute a waiver or election of remedies with respect to any other permitted or available right of remedy.

6.15 Mitigation of Damages. In all such situations arising out of this Agreement, the parties shall attempt to avoid and minimize the damages resulting from the conduct of the other party.

6.16 Partial Invalidity. If any provision in this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions will nevertheless continue in full force without being impaired or invalidated in any way.

6.17 Attorneys' Fees. The parties hereto acknowledge and agree that each will bear his/her or its own costs, expenses and attorneys' fees arising out of and/or connected with the negotiation, drafting and execution of the Agreement, and all matters arising out of or connected therewith except that, in the event any action is brought by any party hereto to enforce this Agreement, the prevailing party in such action shall be entitled to reasonable attorneys' fees and costs in addition to all other relief to which that party or those parties may be entitled.

6.18 Entire Agreement. This Agreement constitutes the whole agreement between the City and the Consultant, and neither party has made any representations to the other except as expressly contained herein. Neither party, in executing or performing this Agreement, is relying upon any statement or information not contained in this Agreement. Any changes or modifications to this Agreement must be made in writing appropriately executed by both the City and the Consultant.

6.19 Notices. Any notice required to be given hereunder shall be deemed to have been given by depositing said notice in the United States mail, postage prepaid, and addressed as follows:

CITY:	Steve McClary	**CONSULTANT:**	Robert M. Snider
	Interim City Manager		Hearing Officer
	City of Malibu		33208 Decker School Road
	23825 Stuart Ranch Road		Malibu, CA 90265
	Malibu, CA 90265-4861		TEL (310) 457-4628
	TEL (310) 456-2489 x 224		EMAIL bobsnider58@gmail.com
	FAX (310) 456-2760		

6.20 Warranty of Authorized Signatories and Acceptance of Facsimile or Electronic Signatures. Each of the signatories hereto warrants and represents that he or she is competent and authorized to enter into this Agreement on behalf of the party for whom he or she purports to sign. The Parties agree that this Contract, agreements ancillary to this Contract, and related documents to be entered into in connection with this Contract will be considered signed when the signature of a party is delivered physically or by facsimile transmission or scanned and delivered via electronic mail. Such facsimile or electronic mail copies will be treated in all respects as having the same effect as an original signature.

7.0 GENERAL TERMS AND CONDITIONS. (City and Consultant initials required at EITHER 7.1 or 7.2)

7.1 **Disclosure Required.** By their respective initials next to this paragraph, City and Consultant hereby acknowledge that Consultant is a "consultant" for the purposes of the California Political Reform Act because Consultant's duties would require him or her to make one or more of the governmental decisions set forth in Fair Political Practices Commission Regulation 18700.3(a) or otherwise serves in a staff capacity for which disclosure would otherwise be required were Consultant employed by the City. Consultant hereby acknowledges his or her assuming-office, annual, and leaving-office financial reporting obligations under the California Political Reform Act and the City's Conflict of Interest Code and agrees to comply with those obligations at his or her expense. Prior to consultant commencing services hereunder, the City's Manager shall prepare and deliver to consultant a memorandum detailing the extent of Consultant's disclosure obligations in accordance with the City's Conflict of Interest Code.

City Initials _____
Consultant Initials RMS

7.2 **Disclosure not Required**. By their initials next to this paragraph, City and Consultant hereby acknowledge that Consultant is not a "consultant" for the purpose of the California Political Reform Act because Consultant's duties and responsibilities are not within the scope of the definition of consultant in Fair Political Practice Commission Regulation 18700.3(a) and is otherwise not serving in staff capacity in accordance with the City's Conflict of Interest Code.

City Initials _____
Consultant Initials _____

This Agreement is executed on _____, 2021, at Malibu, California, and effective as of _____ 2021.

CITY OF MALIBU:

_____
PAUL GRISANTI, Mayor

ATTEST:

_____
KELSEY PETTIJOHN, Acting City Clerk
(seal)

CONSULTANT:

_____
By: ROBERT M. SNIDER, Hearing Officer

APPROVED AS TO FORM:

THIS DOCUMENT HAS BEEN REVIEWED
BY THE CITY ATTORNEY'S OFFICE

_____
JOHN COTTI, Interim City Attorney

EXHIBIT A

Scope of Work & Schedule of Fees

PART A –ADMINISTRATIVE HEARING OFFICER SERVICES

The Consultant will provide Administrative Hearing Officer services to preside over appeals of the Planning Director's actions on Wireless Communication Facility applications. The scope of services shall include the following:

- Provide Administrative Hearing Officer services to consider appeals authorized under Malibu Municipal Code Section Chapter 17.46.
- Preside over the appeal administrative hearing and hear testimony and consider evidence from parties.
- Prepare a written determination which sets the basis for the decision. The decision is prepared by the Hearing Officer on a format prescribed by the City. A draft shall be provided to the Planning Director within three business days of the hearing.
- When feasible, staff will provide hearing officer with at least five (5) days' advance notice of hearings.
- Prepare for hearings which could include, but is not limited to, reviewing case documents, reading the agenda and file materials, conduct field observation, knowledge of relevant City ordinances, State and Federal laws. All preparation for hearings may be limited to a total of 5-14 days.
- Collaborate with staff regarding scheduling. The number of hearings will vary.
- Confirm the absence of conflicts before undertaking any new matters for the City. The Administrative Hearing Officer will inform and seek the consent of the City before representing another client in any matter directly adverse to the City (e.g., transactions, negotiations, proceedings, or other representations involving specific parties.)
- Conduct hearings onsite at City Hall or in a format prescribed by the Planning Director.
- In rare cases, attend Planning Commission and City Council meetings as requested by the Planning Director.
- Recommend modifications to the City's guidelines and codes, as appropriate, to maintain best practices.
- Attend court appearances, provide expert witness testimony, and conduct legal research at the request of the City.

Job Performance Standards

- Telephone calls, emails, and public inquires shall be returned within 24 hours
- Record Keeping: Maintain proper record keeping. Files shall be organized, up to date, and ready for public review at all times including digital records (e.g. emails). All records shall be date-stamped and properly identified.
- Shall provide all labor, clerical support, equipment and materials to perform services.
- Responsible for all travel, mileage, and telephone/electronic expenses.
- Maintain detailed accounting.

PART B - SCHEDULE OF FEES

This section describes the rates and general payment terms for the services described in the Scope of Work.

1. FEE

Consultant will perform the services as described in Part A on an hourly basis, in accordance with Schedule 1 below. The Not to Exceed Hourly Fee represents all cost associated with the delivery of services including travel time. An itemized invoice of specific tasks shall be provided on invoices.

Schedule 1 – Hourly Rate

Consultant Rate	$275/Hour
Planning Commission, City Council, or Court Appearance	$350/Hour
Cancellation Fee*	$425.00

Cancellation fee shall apply if hearing is cancelled on less than two business days' notice.

2. NON-BILLABLE ADMINISTRATIVE OVERHEAD

The Consultant will bill only for time spent performing assigned professional work. All other activities associated with carrying out the contract are not billable, and are therefore, considered overhead or administrative functions contained within the hourly rate. Typical examples of non-billable overhead activities are:

- Discussion with staff about the cost of services or to address billing disputes.
- Meetings to discuss work performance, contract or additional services.
- Travel time to and from the City of Malibu.
- Preparation of invoices and other administrative clerical services.
- Contract administration, such as preparing or discussing contract amendments.
- Time spent resolving errors in the event the Consultant is responsible.

Received
May 24, 2021
Planning Dept.

RESPONSE TO REQUEST FOR PROPOSAL

TO PROVIDE HEARING OFFICER SERVICES

FOR THE CITY OF MALIBU

SUBMITTED BY ROBERT M. SNIDER

MAY 24, 2021

ROBERT M. SNIDER, Attorney at Law
33208 Decker School Road **(310) 457-4628**
Malibu, California 90265 **bobsnider58@gmail.com**

May 24, 2021

Ms. Patricia Salazar
City of Malibu Planning Department
23825 Stuart Ranch Road
Malibu, California 90265

Dear Ms. Salazar:

Please find enclosed my proposal for administrative hearing officer services in connection with wireless communication facility applications.

Since 2019, I have served as the principal hearing examiner for the City of West Hollywood, adjudicating cases involving rent stabilization, municipal code violations, and vehicle impoundments. And since 2012, I have served part-time as a hearing officer for the Orange County Employees Retirement System, the San Diego County Employees Retirement Association, and the San Bernardino County Employees Retirement Association, adjudicating disability and benefit allowance cases.

From 1988 until retiring in 2019, I was employed full-time as a California Deputy Attorney General. In that role, I participated in hearings before the Commission on Judicial Performance, the Victim Compensation and Government Claims Board, the Los Angeles County Superior Court, and the United States District Court. I also supervised several investigations of public bodies in Southern California cities.

These matters, and my previous seven years' experience as a Los Angeles Deputy City Attorney, have supplied me with ample knowledge of local government processes. I'm also quite familiar with Malibu, having lived in the City from 1996 until 2005 and since then in Decker Canyon. I don't know much about wireless communication facilities, but I knew little about disability retirement or rent stabilization before being retained in those areas. I've been told that I have a quick learning curve.

No litigation, professional conflicts, or other factors exist that would limit my ability to act fairly and impartially as a hearing officer for the City. It would be an honor to serve in that capacity.

Very truly yours,

Bob Snider

ROBERT M. SNIDER

ROBERT M. SNIDER bobsnider58@gmail.com

For your consideration regarding appointment as a Hearing Officer, City of Malibu.

HEARING OFFICER EXPERIENCE

Principal Hearing Examiner, City of West Hollywood, 2019-present.

I hear landlord-tenant disputes under the City's rent control ordinance, challenges to vehicle impoundments, and appeals from administrative citations for, among other issues, unlawful construction, pollution discharge, and right-of-way encroachment. I have issued more than 230 written decisions.

San Bernardino County Employees Retirement Association, 2015-present;
San Diego County Employees Retirement Association, 2012-present;
Orange County Employees Retirement System, 2011-2018 (seven-year term).

I hear testimony and take evidence from applicants for disability retirement or larger benefit allowances, then research and write findings of fact and conclusions of law in recommendations to the local Board of Retirement.

OTHER PROFESSIONAL EXPERIENCE

Deputy Attorney General, California Department of Justice, 1988-2019.

Trial supervisor for four-county Los Angeles region, in charge of confidential investigations and conflict matters; advocate, Victim Compensation and Government Claims Board; Examiner, Commission on Judicial Performance.

Deputy City Attorney, Los Angeles City Attorney's Office, 1981-1988.

PROFESSIONAL AFFILIATIONS

Member, State Bar of California. Member of the bar, U.S. District Court for the Central District of California; Ninth Circuit Court of Appeals; United States Supreme Court.

EDUCATION

B.A., University of Pennsylvania, with Honors in Urban Studies major; City Planning minor.
J.D., New York University School of Law. Fellow in Public Affairs, Coro Foundation.

PROFESSIONAL DISTINCTIONS

Member, National Association of Hearing Officials, 2020-present.
William James Award, California District Attorneys Association, 2018.
Attorney General's Award for Excellence (Anna Nicole Smith case), 2009.
Attorney General's Award for Sustained Superior Accomplishment, 2003.

33208 Decker School Road Malibu, California 90265 (310) 457-4628

FURTHER QUALIFICATIONS FOR SERVICE AS HEARING OFFICER

A. Credentials and Experience

i. For a summary of my qualifications, credentials, and related past experience, please see the attached cover letter.

ii. My résumé appears on the previous page.

iii. A list of similar clients appears in section E. below, along with information for persons who can be contacted by the City.

B. Professional Services Agreement

I will use and comply with all terms and conditions of the City's standard Professional Services Agreement. In that regard, I have no interests in any real property located in the city (§ 5.0) and no past, present, or future agreement with any land developer (§ 5.2). No City employee or official has or will have a material financial interest in my business (§ 5.1).

C. Compliance

I am self-employed and have no one working for me. Should I acquire employees in the future, I will comply with all federal and state labor laws and standards, including all prevailing wage laws.

D. Litigation

No litigation has ever resulted from my rendering professional services. I have never represented nor will I represent any client with a direct or indirect interest adverse to the City.

E. Current and Recent References

Brant C. Will, General Counsel
San Diego County Employees Retirement Assn.
2275 Rio Bonito Way, Suite 100
San Diego, California 92108
(917) 981-0172
or (619) 515-6804

Barbara M. A. Hannah, Chief Counsel
San Bernardino County Employees Retirement Assn.
348 West Hospitality Lane, Suite 100
San Bernardino, California 92408
(909) 915-2039
or (909) 723-7639

Susan Sullivan Pithey, Sr. Asst. Attorney General
California Department of Justice
300 South Spring Street, North Tower
Los Angeles, California 90013
(213) 269-6007
or (626) 827-0259

I anticipate a strong additional reference from my current engagement with the City of West Hollywood. Because my availability there may be affected by consulting for the City of Malibu, however, I would prefer to supply the name of my direct supervisor later in the application process.

F. Fees

Please see professional rate proposal, submitted under separate cover.

G. Timeline

I am willing and able to honor a two-year agreement.

Thank you for your consideration.

Received
May 24, 2021
Planning Dept.

RESPONSE TO REQUEST FOR PROPOSAL

TO PROVIDE HEARING OFFICER SERVICES
FOR THE CITY OF MALIBU

SUBMITTED BY ROBERT M. SNIDER

MAY 24, 2021

(continued)

F. Professional Rate Proposal

My standard rate for professional services is $275.00 per hour. This rate applies to preparing for and presiding over administrative hearings, conducting research, producing decisions, and consulting with City staff.

For preparing for and attending sessions of the Planning Commission, City Council, and court as necessary, the rate is $350.00 per hour.

I would assess a $425.00 fee if a hearing is canceled on less than two business days' notice, or if a hearing does not proceed because of a party's absence.

City of West Hollywood
Legal Services Division
8300 Santa Monica Boulevard
West Hollywood, CA 90069
(323) 848-6481

Citation Number:
Case Number: [redacted]
Date of Hearing: November 16, 2020
Date of Mailing:

ADMINISTRATIVE ORDER

[redacted]

WITNESSES TESTIFYING REMOTELY:

Edward Espinoza, Code Compliance Officer
[redacted] property representative

Also present for remote hearing:
[redacted], property supervisor

EXHIBITS:

1. Report of emergency service cleanups
2. Email from officer to management company
3. Citation for non-storm water discharge
4. Letter accompanying request for hearting

Fine amount:	$1,050.00	Amount refunded:	$0.00
Deposit paid:	$1,050.00	Amount due:	$0.00

DECISION: West Hollywood Municipal Code section 15.56.060 is violated when a discharge results in or contributes to a violation of the City's permit from the National Pollution Discharge Elimination System. The discharge of waste that may adversely affect water quality is prohibited. As the City proved by a preponderance of the evidence that a sewage spill occurred at the time alleged, the property owner is held responsible for the fine imposed.

STATEMENT OF FACTS: [redacted] is a residential property consisting of two buildings with four units each. [redacted]n, operations manager for [redacted], testified that on August 27, 2020, a tenant of the property reported a sewage spill. Responding on an emergency basis, technicians snaked the main sewer line and found baby wipes and other products in it. The blockage was cleared after several hours of work. (Exh. 1.)

One day over the summer, Code Compliance Officer Edward Espinoza noticed raw sewage at the [redacted] address, spilling onto an alley in the public right-of-way. The officer did not recall the date of his observation, which may or may not have been on August 27.

On September 18, according t[redacted] a second sewage spill occurred. Officer Espinoza observed the leak and, at 4:17 p.m., sent [redacted] the following email (Exh. 2):

> Can you please send someone to clean up the raw sewage that his spilled onto the Public Right-of-way (alley). . . . Please be advised that this is the second time I have observed this. The next time this happens the property owner will receive[ ] a fine of $1000.00 for NPDES violation. Can you please consult a plumber and prevent this from happening again in the future.

According to Officer Espinoza, the problem was corrected that day, which was a Friday. Due to the ongoing coronavirus, [redacted] said, her office closed early that afternoon and no one saw the officer's e-mail until Monday, the 21st.

On Sunday, September 20, the sewage spill recurred. Officer Espinoza happened upon it around 10:30 a.m. while on routine patrol. He located a phone number on [redacted] website and, as a courtesy, left a voice message about the spill. He also issued a citation (Exh. 3) for violation of Municipal Code section 15.56.060.d.12, which prohibits the non-storm water discharge of wastes and other materials that have potential adverse impacts on water quality.

Because the phone message was not left on [redacted] emergency plumbing line, it was not received until Monday, September 21. Technicians returned to the property that day and found the driveway covered with sewage, which was caused by tree roots and a lot of paper in the line. Two days later, working all day, a four-person crew fully extracted the roots. (Exh. 1.)

On behalf of the property owner, [redacted] requested an administrative hearing on the citation. She explained in an accompanying letter (Exh. 4) that the sewer line has been completely cleared up and that the officer's email, which was a warning, was not received before the spill recurred. She testified at the hearing that there have been no sewage problems since September 23.

ANALYSIS:

The City of West Hollywood has a permit from the Environmental Protection Agency's National Pollution Discharge Elimination System. The NPDES permit allows the City to regulate point sources that discharge pollution into United States waters. West Hollywood Municipal Code section 15.56.060.e. provides:

> Any discharge that would result in or contribute to a violation of the municipal NPDES permit, either separately or in combination with other discharges, is prohibited. Liability for any such discharge shall be the responsibility of the person(s) causing or responsible for the discharge, and such person(s) shall defend, indemnify and hold harmless the city from all losses, liabilities, claims, or causes of actions in any administrative or judicial action relating to such discharge.

Among the prohibited discharges are those of "any fuel and chemical wastes, animal wastes, garbage, batteries, and other materials that have potential adverse impacts on water quality." (Mun. Code, § 15.56.060.d.12.) The human sewage and other products that emanated from the sewer lines on September 20 qualified as material having a potential adverse impact on water quality. Only water is allowed in the City's storm drains, which terminate in the ocean.

[redacted] does not dispute that the sewage spill took place, but she appeals that because no warning was received, the $1,050.00 fine and $50.00 administrative fee are excessive. That the violation occurred over a weekend, when the property managers were not available to read the City's warning, is a sympathetic fact. That sympathy is tempered, however, by the fact that the first spill happened only three weeks before, on August 27, and the charged spill followed a second cleanup only a day and a half earlier.

The City having carried its burden of proving the validity of the citation, it is upheld. The fine that has been paid is retained.

Robert Snider

ROBERT M. SNIDER, Hearing Examiner

November 26, 2020

Date

NOTICE TO THE CONTESTANT:

You have the right to appeal this administrative order within 20 days of its mailing date. Appeals must be filed with the Los Angeles County Superior Court in the Central District, Stanley Mosk Courthouse. You must serve a copy of the notice of appeal on the City Clerk of West Hollywood, either in person or by first class mail. Unless a notice of appeal is timely filed, this administrative order will be deemed final.

Legal Services Division
City of West Hollywood
8300 Santa Monica Boulevard
West Hollywood, California 90069
Telephone: (323) 848-6450

CITY OF WEST HOLLYWOOD

RENT STABILIZATION COMMISSION

In the Matter of the Rent Determination for [redacted], regarding property located at [redacted] Street, West Hollywood.	**HEARING EXAMINER'S DECISION AS TO MAXIMUM ALLOWABLE RENT AND OVERPAYMENTS** Application No. [redacted]

On April 15, 2020, [redacted], the tenant at [redacted] Street, applied to the City for a determination of her maximum allowable rent (MAR). An administrative hearing was conducted by videoconference on June 12, 2020, owing to the novel coronavirus. [redacted], represented by attorney [redacted], testified under oath. Landlord representative [redacted] appeared through attorney [redacted].

PROCEDURAL HISTORY

Initial registration forms filed:	March 19, 1990
Initial rent for unit at time of registration:	$1,150.00
Start of current tenancy:	2007; 1986 by husband
Rent at inception of tenancy:	not adduced in record
Current rent:	$1,184.50
Application filed and deemed complete:	April 15, 2020
Date of notice of hearing:	June 1, 2020
Hearing conducted and record closed:	June 12, 2020

Record reopened for additional information: July 14, 2020
Record closed and matter submitted: July 31, 2020

ISSUES PRESENTED

What is the maximum allowable rent for [redacted] Street? Does the death of [redacted]'s husband, the sole original tenant, entitle the landlord to increase the rent as she wishes while [redacted] remains in tenancy?

STATEMENT OF FACTS

[redacted] Street is a property in West Hollywood's Norma Triangle area. [redacted] lived next door at [redacted] beginning in 1982. (Exh. 7, p. 1.) [redacted] owned both houses, the former one since 1973. (Exh. 1, p. 1.) [redacted] husband, [redacted], moved into [redacted] around 1986. In 1990, the property was registered with the City at a base rent of $1,150.00. (Exh. 1, p. 2.) In January 2007, two months after they wed, [redacted] and [redacted] began living together at the house.

[redacted] passed away in January 2009. [redacted] continued to live at [redacted], with [redacted]'s acquiescence. Her current rent is $1,184.50. (Exh. 2 [Notice of Change of Terms of Tenancy], p. 1.) Last year, [redacted] observed that [redacted] was suffering from cognitive decline. His niece, [redacted], took over the property's management in December 2019.

On February 11, 2020, [redacted], acting as trustee of the [redacted] served notice on [redacted] through [redacted] that on June 1, 2020, her rent would be increased to $3,300.00. (Exh. 2, p. 2.) On April 15, [redacted] applied for a hearing to determine the maximum allowable rent. [redacted] testified that because of concern about the COVID-19 virus, a friend of hers was living in the "back unit" on the property and taking care of her.

Before the hearing, [redacted] submitted partial checking account statements bearing both her name and [redacted]'s at the [redacted] Street address for the 30-day

periods ending May 7, 2008 (Exh. 3) and July 8, 2008 (Exh. 4). She also offered proof of an April 2, 2008 check paid on the couple's joint account to Networld Servicing Center in the amount of $1,184.50. (Exh. 5.)[1]

On behalf of the landlord, [redacted] submitted argument supporting a rent increase, along with data illustrating average and median rents for two-bedroom, one-bathroom houses within 1.5 miles of [redacted] Street. The data, from Rentometer, Inc., showed that for the year ending June 3, 2020, the average rent in the area was $3,948.00 and the median rent was $3,995.00. (Exh. 6.)[2] The rent proposed by the landlord is slightly more than 80 percent of the average.

On July 14, 2020, the Hearing Examiner directed the parties to provide details about the back unit. [redacted] explained in a declaration that the unit has its own entrance and consists of a bedroom/living area, open closet, and full bathroom. The bathroom is reached via five stairs leading to a landing, two walls of which connect to the main house. [redacted] stated that [redacted] told her he personally built the back unit with his own hands and did not expect it to stand as long as 20 years. (Exh. 8, p. 1.)

[redacted] averred that after [redacted] became the tenant in 1986, he rented out the back unit continuously. She wrote that [redacted] "was personally acquainted with some of the tenants of the back unit, and the back unit was rented out with [his] full knowledge and consent." (Exh. 8, p. 2.) She introduced seven photographs showing the property's courtyard and the unit's bedroom/living area, bathroom, and kitchenette. (Exh. 9 [submitted electronically to the City's acting Legal Services Administrator].)

[redacted], representing the landlord as a trustee, declared that she had no personal knowledge of the back unit until last month. (Exh. 10, p. 1.) She stated that from February 1989 through January 2020, [redacted] offered only a single-family dwelling for rent, and that in seven writings to her in December 2019 and January 2020, [redacted] never mentioned another tenant, past or present. (Exh. 10, p. 2.)

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[1] Exhibits 3, 4, and 5 were submitted electronically to the City's acting Legal Services Administrator.

[2] Although Exhibit 6 lists the unit as having two bedrooms and one bathroom, Exhibit 1 indicates that it had three bedrooms in 1990.

The landlord supplied 10 photographs of the property, as well as information from a management company that the two-bedroom, one-bathroom main house was constructed in 1924. A photo shows that a newer wood frame addition measuring 264 square feet connects the stucco house and the formerly detached garage. [redacted] and the property management company suggested that the unit was legally deficient in various ways. (Exh. 11 [submitted electronically].)

ANALYSIS

Although [redacted] styled her hearing application as a request to determine the maximum allowable rent, no evidence was presented by either party about [redacted]'s original rent in 1986, the rent when [redacted] moved in 2007, the rent when [redacted] passed away in 2009, or the changes in her rent between 1990 and the present. These omissions eventuated despite the City's advice to [redacted] in an April 15, 2020 letter:

> If you contend that the Maximum Allowable Rent for your unit is different from what you are actually paying, or from what your landlord asks you to pay, it is your responsibility to bring to the Hearing the original AND a copy of any evidence that supports your claim (e.g., cancelled rent checks [both sides], lease documents, bank receipts/statements, etc. covering the duration of your tenancy. [¶] PLEASE NOTE that it is your responsibility to present any evidence in support of your position at the Hearing.

(Exh. 7.) [redacted] tendered a statement identifying her present rent, $1,184.50, and evidence that the same amount was paid in April 2008, but no other records showing the course of her rent payments. As a result, the current maximum allowable rent (MAR) cannot be determined.

The starting point for calculating the MAR is the base rent, defined in two ways under the Rent Stabilization Ordinance (RSO). For housing units rented for the first time after April 30, 1984, the rent first charged for the unit comprises the base rent. (RSO § 17.08.010.2.c.) Any rent adjustments allowed through August 31, 1996 and actually implemented after that date, when added to the base rent, establish the maximum allowable rent. (RSO § 17.32.010.2.) For persons whose tenancy commenced on or after January 1, 1999, the base rent is the rent charged upon commencement. (RSO § 17.08.2.h.)

In the latter instance, the base rent plus any permissible adjustments constitute the MAR (RSO §§ 17.32.010.3 & 17.40.020. 2(b).)

[redacted] became the tenant a[redacted] in 1986, according t[redacted]. According to the Rent Stabilization Department's registration form filed by [redacted] in 1990 (Exh. 1), the unit was first rented in 1983.[3] While both the form and [redacted] agree that $1,150.00 was the base rent, [redacted]'s initial rent is not in evidence. Furthermore, when [redacted] moved in in January 2007, the rent charged at that time is also unstated. Thus, whether it is designated as of 1983, 1986, 1989, or 2007, the base rent applicable to either [redacted] or [redacted] is undisclosed in the record. Absent that information, it is not possible to determine the maximum allowable rent for [redacted]'s unit.

Yet that is not what the parties fundamentally want to know. Rather, the issue is whether the landlord has the right to raise the rent to what she perceives to be the property's fair market value, or whether she is constrained by the Rent Stabilization Ordinance to limit rent increases to those permitted in annual general adjustments (AGAs) or on other grounds. The answer demands examination of both the ordinance and state law.

In 1995, the Legislature enacted the Costa-Hawkins Rental Housing Act, codified in Civil Code section 1954.50 et seq. and effective January 1, 1996. The act imposed limits on municipal rent control ordinances, including vacancy control provisions, and set forth circumstances under which a landlord can establish the initial and all subsequent rental rates. Civil Code section 1954.52, subd. (a)(3)(A) specifically states that for dwellings "alienable separate from the title to any other dwelling unit" – such as single-family residences – an owner of residential real property may establish the initial and all subsequent rental rates.

Moreover, even where initial or subsequent rental rates were controlled by local ordinance as of January 1, 1995, such as in West Hollywood, a landlord can set those rates in a separately alienable dwelling – provided that there exists a "previous tenancy" or a "new tenancy" in effect as of January 1, 1999, and that tenancy was created between

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[3] [redacted]'s statement (Exh. 10) suggests that [redacted] rented the property to [redacted] in 1989.

January 1, 1996, and December 31, 1998. (Civil Code, § 1954.52, subd. (a)(3)(C)(i).)[4] Until January 1, 1999, a landlord could "establish the initial rental rate for a dwelling or unit only where the tenant has voluntarily vacated, abandoned, or been evicted." (Civil Code, § 1954.52, subd. (a)(3)(C)(iii).)

The Costa-Hawkins Act allowed until January 1, 1999, either a rent increase of up to 15 percent or an increase reflecting 70 percent of the prevailing market rent for comparable units, where the previous tenant had voluntarily vacated the unit, had abandoned it, or had been evicted. (Civil Code, § 1954.53, subd. (3)(c).) Subdivision (d) of section 1954.53 authorizes a landlord to establish rental rates for subleases, but that subdivision "does not apply to partial changes in occupancy of a dwelling or unit where one or more of the occupants of the premises, pursuant to an agreement with the owner provided for above, remains an occupant in lawful possession of the dwelling or unit." (Civil Code, § 1954.53, subd. (d)(3).)

These provisions appear to expose a contradiction in the Act. On the one hand, single-family residences are excluded from rent control as of January 1, 1999. On the other hand, rental rates in subleases are subject to local control when the owner consents to a partial change in occupancy; and subdivision (b) of section 1954.53 protects the initial rent of "the same tenant, lessee, authorized subtenant, or authorized sublessee for the entire period of his or her occupancy." Complicating matters further, the Act does not specifically address tenant changes arising from cohabitation rather than subleasing.

The apparent statutory conflict is harmonized in chapter 17.24 of the Rent Stabilization Ordinance. It lists several types of properties that are exempt from the local ordinance's reach, including, after 1998, single-family residences that are separately alienable. But the local exemption applies only "if the existing or prior tenancy was created after January 1, 1996." (RSO § 17.24.010.a.11.) Two observations follow from this section of the ordinance.

First, [redacted] Street is not a single-family residence that is separately alienable

[4] Under state law, "tenancy" means the lawful occupation of property, including a lease or sublease. (Civil Code, § 1954.51, subd. (f).) West Hollywood defines "tenancy" as the right or entitlement of a tenant to use or occupy a rental unit. (RSO § 17.08.010.24.)

within the meaning of the Costa-Hawkins Act. Besides the main house, the property has a back unit with a bedroom/living area, open closet, kitchenette, and bathroom. That unit has been intermittently rented for decades with the owner's knowledge and consent, and it was occupied at the time of the hearing. Because the main house where [redacted] lives cannot be transferred separately from that unit, it is not separately alienable.

A recent opinion from the California Court of Appeal supports this conclusion. In *Owens v. City of Oakland Housing, Residential Rent and Relocation Board* (2020) 49 Cal.App.5th 739, landlord Owens claimed entitlement to the single-family exemption because he was renting his single-family house to three unrelated tenants. The appellate court rejected the claim, ruling that the house consisted of separate dwelling units which rendered it *not* "alienable separate from the title to any other dwelling unit" and therefore not exempt from Oakland's rent control ordinance. The Court cited Civil Code section 1940, subdivision (c), which for purposes of landlord-tenant law defines "dwelling unit" as "a structure or the part of a structure that is used as a home, residence, or sleeping place."

[redacted]'s position that Costa-Hawkins' single-family exemption does not apply to her tenancy is stronger than the tenant's in *Owens*. Unlike the several dwelling units within a single house that were ascertained in that case, the property [redacted] rents actually has two structures. Her house is not separately alienable from the rear unit and thus does not fall within the single-family exemption.

Second, neither the existing nor the prior tenancy at [redacted] Street was created after January 1, 1996, which defeats the application of Civil Code section 1954.52 and comports with RSO section 17.24.010.a.11. The existing and prior tenancies are in fact the same tenancy, beginning when [redacted] moved in in the 1980s, continuing through [redacted]'s co-tenancy in 2007, and surviving [redacted]'s death in 2009.

For Civil Code section 1954.52 to apply, an existing tenancy had to end and a new tenancy had to begin on or after January 1, 1999. Although [redacted] did not move in with [redacted] until 2007, his death in 2009 neither terminated that tenancy nor created a new one.

Subdivision (d) of Civil Code section 1954.53 authorizes a landlord to establish

rental rates for subleases, yet that subdivision "does not apply to partial changes in occupancy of a dwelling or unit where one or more of the occupants of the premises, pursuant to an agreement with the owner provided for above, remains an occupant in lawful possession of the dwelling or unit." (Civil Code, § 1954.53, subd. (d)(3).) In *DeZerega v. Meggs* (2000) 83 Cal.App.3d 28, the Court of Appeal construed this provision to mean that even if a named tenant has vacated a unit, a roommate who remains in occupancy "pursuant to the rental agreement with the owner" continues the original occupancy. (*Id.* at p. 41.)

Exhibits 3 through 5 demonstrate that the landlord, [redacted], accepted [redacted] as a continuing tenant, and her testimony indicates that she had personal dealings with him. Furthermore, in West Hollywood, a tenancy cannot be terminated when a spouse is added to the occupancy of a rental unit, even if the underlying lease agreement allows only one occupant. (RSO § 17.52.010.2.(c).)

Because the tenancy that [redacted] adopted from [redacted] was created before January 1, 1996, the property is not exempt from application of the Rent Stabilization Ordinance. (RSO § 17.24.010.a.11.) Nevertheless, [redacted]'s argument that her tenancy was community property transmuted to her when her husband died is unavailing. Under Family Code section 760, real or personal property acquired by a married person during the marriage is community property; a tenancy is neither real nor personal property. The owner of [redacted] may possess a community property interest, but its tenants do not.

For the foregoing reasons, then, the following Findings of Fact and Conclusions of Law are submitted:

FINDINGS OF FACT

1. [redacted] Street consists of a two-bedroom, one-bathroom main house and a back unit containing a bedroom, bathroom, open closet and kitchenette facilities.

2. [redacted] purchased [redacted] Street in 1973 and acted as the landlord until last year. He also owned and occupied [redacted] Street.

3. [redacted] became the tenant at [redacted] Street in the 1980s. In 1990, [redacted] registered the property with the City as having three bedrooms and one bathroom.

4. In November 2006, [redacted] married [redacted], who had been living next door at [redacted]. She moved into his house in January 2007.

5. [redacted] on his own, and later [redacted], rented out the back unit intermittently with [redacted]'s knowledge, though without his express permission.

6. After [redacted] died in January 2009, [redacted] continued in tenancy with [redacted]'s acquiescence.

7. [redacted] became incapacitated in 2019. His niece, [redacted], became the landlord's representative, acting on behalf of the [redacted].

8. In February 2020, [redacted] served [redacted] with notice that on June 1, her rent would be increased from $1,184.50 to $3,300.00.

9. [redacted] continues to reside on the property. At the time of the hearing, a friend of hers was living in the back unit and was taking care of her.

CONCLUSIONS OF LAW

1. Under RSO section 17.44.040.1, a tenant can apply for and the Hearing Examiner can adjudicate a determination of the maximum allowable rent.

2. Under RSO section 17.32.010, the maximum allowable rent for a unit consists of the base rent plus any permissible adjustments.

3. The maximum allowable rent for [redacted] Street cannot be determined because the hearing record does not disclose the base rent.

4. Under Civil Code section 1954.52, single-family residences are exempt from

local rent control ordinances only if they are separately alienable from the title to any other dwelling unit.

5. [redacted]'s residence is not separately alienable, because another structure on the property exists and has been rented over the years as a separate dwelling.

6. Civil Code sections 1954.52 and 1954.53 apply to tenancies created on and after January 1, 1996, not to existing tenancies created prior to that date.

7. Under RSO section 17.24.010.a.11, the tenancy that began with [redacted]'s occupancy continued when [redacted] moved in. Her remaining in occupancy after [redacted]'s demise extended the existing tenancy and did not create a new one.

DECISION

The maximum allowable rent for [redacted]'s tenancy at [redacted] Street cannot presently be determined. Her tenancy, however, is subject to the City's Rent Stabilization Ordinance and is exempt from the provisions of the Costa-Hawkins Act. Accordingly, the landlord is prohibited from increasing the rent from $1,184.50 to $3,300.00, or to any amount not authorized by the local ordinance.

The parties may appeal this decision to the Rent Stabilization Commission no later than September 23, 2020. If appealed by that date, the decision will be stayed pending appeal. If no appeal is filed by then, the Hearing Examiner's decision will constitute the final action of the Commission. Unless the decision is modified, reversed, or vacated by the Commission, any failure to comply with it is a violation of RSO § 17.44.010.9.

Dated: August 24, 2020

ROBERT M. SNIDER
Hearing Examiner