CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

MILENA MAIONCHI, Trustee of the Maionchi Trust under Declaration, Dated August 17, 1999	)	Case No. CPF-16-515160
Plaintiffs,	)	ORDER GRANTING WRIT OF ADMINISTRATIVE MANDAMUS
v.	)	
THE CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO RESIDENTIAL RENT STABILIZATION AND ARBITRATION BOARD	)	
Defendants.	)	

At 9:30 a.m. on December 13, 2018, the Petition for Writ of Mandamus ("Petition") of Melina Maionchi, Trustee of the Maionchi Trust ('Petitioner"), came on for hearing in Department 501 of the San Francisco Superior Court, before the Honorable Ronald E. Quidachay. Petitioner was represented by its counsel, Curtis Dowling. Respondents, the City and County of San Francisco ("the City") and its Residential Rent Stabilization and Arbitration Board (collectively, the "Rent Board"), were represented by their counsel, Deputy City Attorney Wayne Snodgrass.

Having reviewed the record in this matter, the briefs and other documents submitted by counsel, and the arguments of counsel on December 13, 2018, the Court grants the Petition.

Factual Background

The Maionchi family purchased the property located at 2434 California Street in the 1970s. A report from the Department of Building Inspection (DBI) dated September 24, 1963 indicates that the subject property was constructed in 1906 and at that time, had two stories containing two residential units and one commercial unit. By the time a certificate of Final Completion, dated December 3, 1964, was issued the property only contained one story constituting 1 floor of residential occupancy, with two residential units and one commercial unit. One of the two first floor residential units—a 230 square foot rent-controlled studio apartment (Unit 1)—is the unit at issue in this case.

In February, 2003, Petitioner filed an Application for "Building Permit Additions, Alterations or Repairs—Form 3." Permit Application No. 200302117205 (Permit 205) described the work to be performed as follows: "Move (e) apartment to (n) second floor 2 bedrms, bath, dining, living & kitchen by adding second story. Existing commercial to be expanded under separate permit." The Application also indicates that there was one story and two residential units existing at the time, and there would be two stories and two residential units after the proposed alteration. Under box 24: "Does this Alteration constitute a change of occupancy?" the box is checked "No." The Conditions and Stipulations page states that approval was given "For Second Floor Addition only." Permit 205 was approved on September 12, 2003.

Three months after the second floor addition was approved, on December 8, 2003, Petitioner filed a second Application for "Building Permit Additions, Alterations or Repairs—Form 3." Permit Application No. 200312081738 (Permit 738) described the work as "Remodeling (e) front wall, (e) windows Retrofitted, (e) Bathroom and Replaced (e) Water Heater above (e) bathroom. And retrofit 2 (e) skylights and (n) Parapet. Under box 24: "Does

this Alteration constitute a change of occupancy?" the box is checked "No." The Application also indicates that there are two stories and two residential units existing at the time, and there would be two stories and two residential units after the proposed alteration.

On April 20, 2004, the DBI issued a Certificate of Final Completion and Occupancy for Permit 205, which includes the following description of work: Vertical addition. Move apartment to a second floor & extend commercial ground floor space.

After completion, Petitioner rented the 2nd floor unit to David Briggs and Patrick Briggs in 2007. Christopher Garrison (Garrison) subsequently moved in as a subtenant for Patrick Briggs in 2010. On March 23, 2015, Petitioner's Property Manager, Mr. Makras, sent a notice of a rent increase raising the rent from $2,087.50 to $4,500.00, effective June 1, 2015. On March 31, 2015, Garrison filed a tenant petition alleging that the landlords had unlawfully increased the rent over the allowable limits.

Proceeding Before the Rent Board

The tenant, Mr. Garrison, argued the premises were rent-controlled because the permit application for the 2nd floor addition entailed work "described as moving the [studio] apartment to the second floor." The landlord and Petitioner in this case, argued that the subject unit was not the former studio apartment and was exempt from the rent increase limitations of the Rent Ordinance under the Costa-Hawkins Rental Housing Act ("Costa-Hawkins"), as a newly constructed unit for which a certificate of occupancy was issued after February 1, 1995. (Civil Code § 1954.52(a)(1).)

After several hearings, the Administrative Law Judge ("ALJ") issued a decision granting Garrison's petition, finding that the 2nd floor residential unit was not exempt under §

1954.52(a)(1). It further determined that Petitioner waived their right to impose an unlimited rent increase under Civil Code § 1954.53(d)(4) and Rules and Regulations § 6.14(c)(2).

According to the ALJ, Petitioner did not meet its burden of proving that the subject unit is exempt from the rent increase limitations of the Ordinance as a "newly constructed unit" for which a certificate of occupancy was issued after February 1, 1995. The ALJ came to this conclusion by rendering the following factual findings: (1) The property contained two residential units and one commercial unit before and after the permitted work in 2003-2004, and the work did not increase the number of residential units; and (2) Both the permit application approved for the work and the Certificate of Occupancy subsequently issued by DBI state that the permitted work was for a vertical addition to move (e) apartment to the second floor.

The Landlord appealed the ALJ's decision to the Rent Board. On April 12, 2016, the Rent Board answered and voted to deny the Landlord's appeal from the ALJ decision. The Rent Board mailed written notice of its decision on April 28, 2016. Petitioner commenced this action by timely filing a Petition for Writ of Administrative Mandamus on July 15, 2016.

Petitioner Milena Maionchi, trustee for the trust that owns the building, brought this mandamus action under the following grounds: The plain terms of Costa-Hawkins provide Petitioner a fundamental vested right to be exempt from rent control with respect to the newly construction 2nd floor unit built after February 1, 1995.

Discussion

1. *Standard of Review*

The parties agree there are no facts in dispute. Accordingly, the only issue in this case requires the interpretation of section 1954.52(a)(1) of Costa-Hawkins to determine whether the

newly added second story qualifies as "new construction" exempting the unit from rent control. Interpretation of a state statute entails a resolution of a pure question of law, which is examined de novo. (*Apartment Assn. of Los Angeles County, Inc.* (2009) 173 Cal.App.4th 13, 21, citing *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

2. *Costa-Hawkins Generally Prohibits the Application of Rent Control to Newly Constructed Residential Units.*

In 1995, California enacted Costa-Hawkins. (*Apartment Assn. of Los Angeles County, Inc., supra,* 173 Cal.App.4th 13, 24.) Civil Code section 1954.52, subdivision (a), effectively exempts newly constructed residential units from rent control. (*Ibid.)*

In 2003-2004, the Maionchi family renovated the subject property by adding a newly constructed 2nd floor, and converting the studio apartment (Unit 1) on the first floor into an ADA-accessible restroom for the first floor commercial unit. The second floor contained a new residential unit with two-bedrooms, dining room and kitchen. The unit was built in what had formerly been open sky since there had never been a second floor at the property prior to 2004. The new unit did not share any existing electrical or plumbing systems and consisted of an entirely new structure. The second floor unit was built outside the envelope of the existing structure and had new exterior and interior walls, floors, ceiling, roof, stairs, door, and heating. In their brief, the City conceded "the subject unit was new construction, and that the Rent Board might reasonably have determined that the 2003-2004 renovation project resulted in the construction of a genuinely new residential unit for purposes of § 1954.52(a)(1), but a determination to the contrary was also reasonable."

While the Costa-Hawkins Act does not define new construction, "as a general rule, if residential real property has a certificate of occupancy issued after February 1, 1995, it is not

subject to any system of controls on the price at which rental units are offered." (*Apartment Assn. of Los Angeles County, Inc., supra, 173 Cal.App.4th 13, 24*; Civ.Code, § 1954.52, subd. (a)(1).)

The City cites *Burien* for the proposition that the issuance of a certificate of occupancy after February 1, 1995 exempts a unit from rent control *only if* the project culminating in that certificate has increased the supply of residential housing. (*Burien, LLC v. Wiley* (2014) 230 Cal.App.4th 1039) (Italics added.) According to Respondent, the renovation of Petitioner's building did not do so because, just as before, the building contains the same number of residential units: two. Their focus is misplaced. Contrary to the City's assertion, neither *Burien* nor any other case holds that Costa-Hawkins' new construction exemption is dependent on an increase in units; only that "construction add to the housing supply." Even then, at most, this holding is dicta; and at best, it supports Petitioner's position.

In *Burien*, a landlord attempted to increase the rent on a rent-controlled apartment building by claiming that he secured a certificate of occupancy after February 1995. (*Burien, LLC, supra,* 230 Cal.App.4th at 1042.) The landlord sought to exempt the building by converting the building into condominiums, of which the "change of use" conversion caused the issuance of a new certificate of occupancy. (*Ibid.*) The tenant contended the exemption refers to the *first* certificate of occupancy issued for the unit, and did not apply in this case, because his tenancy was established long before the new certificate of occupancy. (*Id.* at 1044.) The court noted that the purpose of section 1954.52 was to "encourage construction" of buildings which add to the residential housing supply. (*Id.* at 1047.) As such, the exemption could only apply to certificates of occupancy that precede residential use of the unit. *(Ibid.)* The court ultimately held the tenant's unit was not exempt under Costa-Hawkins because the tenant occupied the unit prior to

the issuance of the 2009 certificate of occupancy and the 2009 certificate of occupancy did not precede the residential use of the property. (*Id.* at 1049.)

Burien dealt with multiple certificates of occupancy when there is no new construction. The key concept in *Burien* is not whether unit count increases, but instead, when a unit is first occupied by a tenant for residential purposes. The *Burien* court noted the importance of the date when a unit is first residentially occupied because it is that day which determines which certificate of occupancy matters. The facts in this case are significantly different because they do not involve a mere "change in use." Instead, they involve the brand new construction of a unit for which a certificate of occupancy was first issued for its use in 2004. While the first floor unit was certified for occupancy in 1964 and rented out over the years on and off, no one occupied the second floor prior to 2004 because it never existed.

"A commonsense interpretation of section 1954.52(a)(1) is that it excludes buildings from rent control that are certified for occupancy after February 1, 1995." (*Burien, supra*, 230 Cal.App.4th at 1047.) In this case, the second floor addition was given its own certificate, noting the subject unit: "dwelling unit: 1." "When a building is "constructed [or] added on to . . . a certificate of occupancy is generated at the conclusion of all inspections to certify that the building meets local building code requirements for occupancy." (*Burien, supra*, 230 Cal.App.4th at 1047.) The 1964 certificate of occupancy is irrelevant because it did not certify the use of the new unit for occupancy. The 1964 certificate established the occupancy of a single story, constituting 1 floor of residential occupancy.

Additionally, the newly constructed second floor—and the unit contained on it— does add to the housing supply. The former unit on the first floor was a studio of approximately 230 square feet. The new unit is 2 bedrooms, and over 600 square feet. When Petitioner was deciding

whether to undergo the renovation in 1999, the unit had not been rented for the prior three to four years and was in a dilapidated state.

The legislature plainly meant that a unit like the subject premises would be exempt from rent controls upon its construction and entry into the rental housing market. The City's fixation on the building's overall unit count, and whether it increased after the construction of a brand-new unit, is misplaced.

Equally misplaced is the City's fixation on language in the permit application that the unit would be "moved" when nothing in fact "moved." The City contends that the DBI approved the building permit application for the 2003-2004 renovation and issued a certificate of occupancy based on the express representation that the project involved "moving" one of the building's two residential units from the ground floor to a newly constructed second floor. The suggestion is that "move" meant "to be rent-controlled." However, nothing in the permit documentation issued by the City references rent-control, including the 'Conditions and Stipulation' page stamped by the DBI. Nor was there any testimony from any city official corroborating the City's alleged intent to maintain the unit as a rent-controlled unit.

More importantly, it is undisputed that Petitioner had the right to convert Unit 1 into an ADA-compliant bathroom, and was not required by any San Francisco ordinance to replace the rent-controlled unit. The relevant section of the Planning Code in effect in 2003, provided that "Residential Conversions" were "P"– permitted on 1st stories. (See San Francisco Planning Code, Article, 7, section 790.84.) Planning Code section 202(a)(1) states, "in defining uses permitted under this Code, a Principally Permitted use is one permitted as of right." In 2008, section 317 replaced the "P." However, unlike section 317, section 790.84, had no provision for one-to-one replacement of rent-controlled units. This evidence was overlooked by the ALJ, who

remarked to the rent board on appeal: "Given the City's longstanding policy of preserving affordable housing, it is also unlikely the City would approve the removal of a rent-controlled unit and its replacement by a non-rent-controlled exempt unit." (Administrative Record at pg. 451.)

In making its comment to the Board, the ALJ conflated the law existing back in 2003 with Planning Code section 317, which is the current law governing the "Loss of Residential and Unauthorized Units through Demolition, Merger, and Conversion." Under this new law, there are strict standards for conversion of residential units, and residential conversions are now subject to one-to one replacement of the converted rent-controlled unit. At the hearing on December 13, the City conceded that in 2003, Petitioner had the right to convert the studio into an ADA-compliant bathroom and there were no regulations in place that required Petitioner to replace the rent-controlled unit.

Costa Hawkins was enacted to relieve landlords from some of the burdens of "strict" and "extreme" rent control, which the proponents of Costa Hawkins contended unduly and unfairly interfered with the free market (*Apartment Assn. of Los Angeles County, Inc.* at 30.) If an owner of the building is adding to the housing supply by new construction, it's only equitable that they be entitled to fall under the purview of state law.

Under these facts, the subject unit falls under the "new construction" provision of Costa-Hawkins, exempting the unit from rent control. By any reasonable meaning of the word "new," the subject unit constructed on the second floor is a new residential unit. Whether Petitioner moved the unit or not, the second floor addition was new construction; the unit "moved" to the second floor functioned together as part of that new construction.

Conclusion

The Court finds the newly constructed second floor—and the unit contained on it—constitute "new construction" for purposes of Civil Code § 1954.52(a)(1). The Planning Code in effect in 2003 permitted Petitioner to convert the studio into commercial space as a matter of right, and as a general matter, did not require the converted studio to be replaced with a new unit. This is new construction.

DATE: December 7, 2018

The Honorable Ronald Quidachay
Judge of the Superior Court of California