

1 Law Construed:
2 Ordinance Sections: 37.2(r); 37.3(d); 37.8(f)(1)
3 Rules and Regulations Sections: 1.21; 6.14; 11.18
4 Index Codes: A49

5 **RESIDENTIAL RENT STABILIZATION AND ARBITRATION BOARD**

6 **CITY AND COUNTY OF SAN FRANCISCO**

7 IN RE: 1950 CLAY STREET #601

CASE NO. L210225

8 VNL CLAY LP,

HEARINGS: MAY 28, 2021 and AUGUST 27,
2021

RECORD CLOSED: OCTOBER 8, 2021

9 LANDLORD PETITIONER,

10 and

DECISION

11 JAMES FITZWATER and LYNN
12 FITZWATER,

13 TENANT RESPONDENTS.

14 **INTRODUCTION**

15 This case involves a landlord petition filed on March 26, 2021 and amended on April 6,
16 2021, requesting a determination that the unit in question is not subject to the rent increase
17 limitations of Ordinance Section 37.3 pursuant to Rent Board Rules and Regulations Section
18 1.21 (Tenant in Occupancy), and/or 6.14 (Subsequent Occupants), and/or Ordinance Section
19 37.3(d) (Costa-Hawkins Rental Housing Act).

20 A hearing was held in the case on May 28, 2021. The following people appeared at the
21 hearing via video or audio conference due to the COVID-19 office closure: Lynn Fitzwater,
22 tenant; Dr. James Fitzwater, tenant; Keith Kandarian, attorney for the tenants; Bob Voss,
23 landlord; Rene Voss, landlord; Curtis Dowling, attorney for the landlord; Tava Miyata, witness
24 for the landlord; Victor Wierzibicker, witness for the landlord; and Shelly Berg, a court reporter
25 hired by the landlord. At the hearing, all present had full opportunity to present relevant
26 evidence, argument and testimony under oath.

27 Because the May 28, 2021 hearing could not be completed within the allotted time, a
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1 second hearing was held on August 27, 2021. The following people appeared at the second
2 hearing via video or audio conference due to the COVID-19 office closure: Lynn Fitzwater,
3 tenant; Dr. James Fitzwater, tenant; Keith Kandarian, attorney for the tenants; Bob Voss,
4 landlord; Rene Voss, landlord; Curtis Dowling, attorney for the landlord; Maureen Watson,
5 witness for the tenants; Dr. Preben Brandenhoff, witness for the tenants; Timothy Jorstad,
6 witness for the tenants; and Stephen Cisarik, witness for the landlord. At the hearing, all present
7 had full opportunity to present relevant evidence, argument and testimony under oath.

8 The record was held open until September 10, 2021 for the tenants to submit
9 additional documentation, until September 17, 2021 for the landlord to submit a closing brief,
10 and until September 24, 2021 for the tenants to submit a closing brief. A timely submission was
11 received from the tenants on September 9, 2021 and an untimely submission was received
12 from the tenants on September 13, 2021. In the interest of justice and a complete record, the
13 tenants' September 13, 2021 submission was accepted into evidence.

14 On September 21, 2021, for good cause shown, the undersigned Administrative Law
15 Judge granted a request from the landlord for an extension of the open record. The landlord
16 was given until October 1, 2021 to submit a closing brief, and the tenants were given until
17 October 8, 2021 to submit a closing brief. Timely submissions were received from both parties
18 and the record closed on October 8, 2021.

19 RELATED RENT BOARD CASE

20 On May 7, 2021, the tenants filed the petition in Case No. T210398 seeking a review of
21 their full rent history and a determination of their current lawful rent. This case has not been set
22 for hearing and is still pending. Administrative notice is taken of the petition in Case No.
23 T210398.
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25 FINDINGS OF FACT

26 1. The subject property is located at 1950 Clay Street in San Francisco and has 26
27 residential units. The building is managed by V&L CLAY, LP (the "landlord"). Bob Voss is a
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1 general partner and Rene Voss is a limited partner. Stephen Cisarik is the on-site property
2 manager at the subject building. Unit #601 ("the subject unit") is a two-bedroom unit on the top
3 floor of a 6-story building.

4 2. Both parties provided testimony and evidence in support of their respective
5 arguments, all of which has been reviewed and considered by the undersigned Administrative
6 Law Judge (ALJ). The submitted evidence and testimony will be addressed in this Decision only
7 to the extent that it is relevant to the determination requested in the landlord's petition.

8 Relevant Background

9 3. The following facts are undisputed by the parties. Dr. and Mrs. Fitzwater (the
10 "tenants") moved into the subject unit on July 28, 1978 pursuant to a written lease. (Tenant Pre-
11 Hearing Submission, received May 26, 2021, pages 21-24) The tenant respondents' current
12 rental agreement includes two parking spots located in the subject building's parking garage.
13 The tenants purchased a home located at 933 Furlong Road ("933 Furlong") in Sebastopol, CA
14 in 1984, and they also purchased the adjacent vacant lot ("925 Furlong"). The tenants purchased
15 an apartment in Paris in 1998 that they visit for vacations approximately three times per year for
16 vacations. There are no other occupants who reside in the subject unit.

17 4. On April 15, 2021, after filing the instant petition, the landlord served the tenants
18 with a Notice of Rent Increase based upon Rules and Regulations Section 1.21 and/or 6.14
19 and/or Ordinance Section 37.3(d) (Costa-Hawkins Rental Housing Act). (Tenant Pre-Hearing
20 Submission, received May 26, 2021, pages 78-81) The notice increased the tenants' rent from
21 \$1,848.00 to \$5,895.00, effective "90 days after service of the notice". Pursuant to Civil Code
22 Section 827. California Civil Code Section 827 requires service of a ninety (90) day notice of rent
23 increase if the increase, either by itself or combined with any other rent increase in the one year
24 period before the effective date, is more than 10%. If the rent increase notice is served by mail,
25 the required notice period must be extended by an additional five days. Accordingly, for the
26 purposes of this Decision, the effective date of the April 15, 2021 rent increase was July 19,
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1 2021 (April 15, 2021 + 90 days + 5 days for service by mail = July 19, 2021).

2 Landlord's Argument

3 5. The landlord argued that the tenants no longer use the subject unit as their
4 principle place of residence, and that the tenants' claim that their physical absence from the
5 subject unit starting in March of 2020 was due to the COVID-19 pandemic, is not supported by
6 the evidence. Prior to presenting his case, the landlord's attorney objected to the constitutional
7 inadequacy of the procedure allowed by the Rent Board in adjudicating Rent Board cases.
8 Specifically, he objected to his inability to use subpoena power, to compel attendance of
9 witnesses, and secure documents from third parties. Notwithstanding this objection, the
10 landlord's attorney presented the following evidence and testimony in support of the landlord's
11 claim.

12 6. The tenants principally reside at 933 Furlong. The landlord's attorney argued that
13 the tenants use 933 Furlong as their principle place of residence and their usual place of return.
14 In their declarations, both tenants state that they enjoy frequent traveling and that they always
15 travel with the intention of returning to the subject unit because it is their permanent home.
16 During the hearing, the tenants testified that they use 933 Furlong as a weekend or vacation
17 home, and that they resided at 933 Furlong more frequently during the COVID-19 pandemic as
18 discussed further in paragraphs 35-36 below.

19 7. The landlord argued that the following testimony from Ms. Fitzwater, which he
20 transcribed in a post-hearing submission, demonstrates that the tenants only use the subject unit
21 as a mail collection point and place to stop after landing at the SFO Airport, before actually
22 returning to 933 Furlong.

23 Q [Curtis Dowling]. Okay. Fair enough. And when you would return from these trips,
24 where would you stay in Northern California the night of your return?

25 A [Lynn Fitzwater]. Well, stay at 1950, or sometimes we would come up to 933 Furlong, if
26 we came in early enough to do that.

27 Q. So in other words, there have been trips where you've come in, landed at SFO, and
28 basically driven straight from SFO to Sebastopol.

A. We would always come to [the subject unit] first –

Q. And what would you do --- I'm sorry. I didn't mean to interrupt.

1 A. Check on everything, get any accumulated mail, which we probably had redelivered.
2 We held, then we asked it to be delivered on the day we were going to return or on the
3 day before. And then we would clean up a little bit, drop the – leave our bags, maybe do
4 some unpacking and then we would go up to [933 Furlong].

5 Q. And all in one day?

6 A. Yes...

7 (Landlord Post-Hearing Submission, received October 1, 2021, page 13)

8 8. Homeowner's Tax exemption. The Sonoma County's Assessor's Office confirmed
9 that the tenants have claimed Homeowner's Tax Exemption for 933 Furlong and "have claimed
10 this as their primary residence since 1989". (Landlord Pre-Hearing Submission, received May 22,
11 2021, pages 2 and 21; Landlord Pre-Hearing Submission (1), received May 27, 2021, page 2;
12 Landlord Pre-Hearing Submission (3), received May 27, 2021, pages 106 and 120) An email
13 from Rene Goncalves from the Sonoma County Clerk-Recorder-Assessor's office confirms that
14 the Homeowner's Tax Exemption is applicable if the property is the claimant's principal
15 residence. Although she could not provide the Fitzwater's completed form, she attached a blank
16 Homeowner's Property Tax Exemption form to show as an example of what has to be filled out in
17 order to claim the exemption. The form has a line that reads "Date you occupied this property as
18 your principal residence (see instructions) ... " The attached instructions state, in relevant part.

19 "The exemption is available to an eligible owner of a dwelling which is occupied as the
20 owner's principal place of residence as of 12:01 a.m., January 1 each year..."

21 "To help you determine your principal residence, consider (1) where you are registered to
22 vote, (2) the home address on your automobile registration, and (3) where you normally
23 return after work. If after, considering these criteria, you are still uncertain, choose the place
24 at which you have spent the major portion of your time this year..."

25 "If the Homeowner's Exemption is granted and the property later becomes ineligible for
26 exemption, you are responsible for notifying the Assessor of that fact immediately..."

27 "A dwelling does not qualify for the exemption if it is, or intended to be, rented, vacant and
28 unoccupied, or the vacation or secondary home of the claimant. If you do not occupy this
parcel as your principal residence, please disregard this form."

(Landlord Pre-Hearing Submission (1), received May 27, 2021, pages 4-5)

The landlord's attorney noted that Article XIII, Section 3(k) of the California Constitution
creates the exemption, and Revenue & Taxation Code Section 218 sets forth the

1 entitlement, which is that "[t]he exemption does not extend to property that is rented, vacant,
2 under construction on the lien date, or that is a vacation or secondary home of the owner or
3 owners..." He argued that the tenants cannot be allowed to both take the homeowner's tax
4 exemption for a principle place of residence and also enjoy the benefits of a San Francisco rent
5 controlled unit, which also requires the unit to be a principle place of residence.

6 9. In response, Dr. Fitzwater testified that he does not recall having applied for the
7 Homeowner's Tax Exemption, nor does he know the details of the exemption form, but he did file
8 for it at some point. The tenants' attorney argued that the Homeowner's Tax Exemption is of no
9 significance under either the Costa-Hawkins Act or Section 1.21 for the following reasons,
10 summarized, in relevant part, as follows.

11 a) Pursuant to the unpublished trial court Order in *Strain v. San Francisco Rent*
12 *Stabilization and Arbitration Board*, San Francisco Superior Court Case No. 508-224 (2009),
13 "[n]either the text [of Section 1.21] nor the Rent Board's prior interpretations of that regulation ...
14 assigns preclusive or binding effect to any particular factor, including the presence of or absence
15 of a homestead exception on other real property, or the fact that a tenant may have stated to tax
16 authorities that he principally resides somewhere other than his rental unit." (Tenant Post-
17 Hearing Submission, received October 8, 2021, pages 5-2 and 52-53)

18 b) Section 1.21 does not apply to conduct or transactions entered into before its
19 enactment. Because section 1.21 was enacted as of June 5, 2001, it did not exist when the
20 tenants bought 933 Furlong in 1984 (or when they last financed it and likely claimed the
21 Homeowner's Tax Exemption), and therefore section 1.21 has no application to the tenants'
22 conduct or transactions executed with respect to 933 Furlong prior to 2001. (Tenant Post-
23 Hearing Submission, received October 8, 2021, pages 52-53)

24 c) The tenants were entitled to claim the Homeowner's Tax Exemption on 933 Furlong
25 as their principal place of residence in 1984 because it was (and still is) the only residential
26 property they own in California and, for tax purposes, the exemption is available to individuals
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1 who own residential property in the state and is triggered by ownership of real property. There is
2 no conflict between the Rent Board rules and property tax rules as each rule has its own policy
3 objectives and directives, and one does not have bearing on determination of the other. (Tenant
4 Post-Hearing Submission, received October 8, 2021, page 54)

5 d) The language in the Homeowner's Tax Exemption notice from the Sonoma County
6 Assessor from 1984, suggests that the exemption remains in effect until terminated without any
7 subsequent filing, and there is no mention of a requirement that the property must be the
8 claimant's principal place or residency. The tenants' attorney argued that the tenant does not
9 recall applying for the exemption but testified that "obviously we had", however the landlord did
10 not provide evidence of an application, the form of oath required, or evidence of periodic
11 renewals. (Tenant Post-Hearing Submission, received October 8, 2021, page 24) The notice
12 from the Sonoma County Assessor states, in relevant part.

13 "The Homeowner's Exemption allows a homeowner to exempt up to \$7,000.00 of property
14 value from taxation each year, if you owned and occupied your property on March 1. Once
15 granted, the exemption remains in effect every year until it is terminated (by owner's request
or sale of property)."

16 (Tenant Pre-Hearing Submission, received May 26, 2021, page 30)

17 10. Owner occupancy clause on the Deed of Trust. The Deed of Trust for 933 Furlong
18 is signed by both James and Lynn Fitzwater in 1994, and contains the following owner
19 occupancy clause. (Landlord Pre-Hearing Submission, received August 23, 2021, page 3)

20 "Borrower shall occupy, establish, and use the Property as Borrower's principal residence
21 within sixty days after the execution of this Security Instrument and shall continue to occupy
22 the Property as Borrower's principal residence for at least one year after the date of
23 occupancy, unless Lender otherwise agrees in writing, which consent shall not be
unreasonably withheld, or unless extenuating circumstances exist which are beyond
Borrower's control."

24 11. PG&E statements for 933 Furlong for 2019 and 2020 were not significantly
25 different. The landlord argued that when you compare the statements for 933 Furlong from 2019
26 and 2020, there is no significant difference in electricity use, which indicates that the tenants
27 were not spending significantly more time at 933 Furlong due to the COVID-19 pandemic. The
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1 landlord submitted the following analysis of the tenants' 933 Furlong PG&E bills, which were
 2 submitted by the tenants. (Tenant Pre-Hearing Submission, received August 16, 2021, pages
 3 10-22; Landlord Pre-Hearing Submission, received August 25, 2021, pages 1-25)

Month	2019/2020 (pre-pandemic time periods)	2020/2021 (pandemic time periods)	Difference between the two
June	\$678.87 on 6/26/19	\$683.64 on 6/23/20	2020 is higher than 2019 by \$4.77
July	\$678.24 on 7/25/19	\$689.79 on 7/24/20	2020 is higher than 2019 by \$11.55
August	\$680.64 on 8/26/19	\$680.56 on 8/21/20	2019 is higher than 2020 by \$2.08
September	\$570.89 on 9/25/19	\$561.27 on 9/22/20	2019 is higher than 2020 by \$9.62
October	\$610.74 on 10/24/19	\$581.89 on 10/23/20	2019 is higher than 2020 by \$28.85
November	\$633.55 on 11/21/19	\$744.91 on 11/20/20	2020 is higher than 2019 by \$111.36
December	\$846.70 on 12/23/19	\$944.38 on 12/24/20	2020 is higher than 2019 by \$79.68
January	\$921.64 on 1/23/20	\$995.78 on 1/22/21	2021 is higher than 2020 by \$74.14
February	\$941.87 on 2/24/20	\$1,003.19 on 2/23/21	2021 is higher than 2020 by \$61.32
March	\$911.29 on 3/24/20	\$860.57 on 3/24/21	2020 is higher than 2021 by \$50.72

15 12. PG&E bills for the subject unit were low when compared to 933 Furlong. The
 16 landlord's attorney argued that the PG&E bills for the subject unit show a significantly lower
 17 usage when compared to the bills at 933 Furlong, which indicates that the tenants spent a
 18 majority of their time at 933 Furlong rather than the subject unit during the relevant time periods.
 19 The landlord submitted the following analysis of the PG&E statements for the subject unit, which
 20 were submitted by the tenants. The landlord also noted that the PG&E bill for November 20,
 21 2019 was only \$0.01 different than the PG&E bill for November 18, 2020. (Tenant Pre-Hearing
 22 Submission, received August 16, 2021, pages 10-22; Landlord Pre-Hearing Submission,
 23 received August 25, 2021, pages 1-25)

Statement Date	Bill Amount
The "electric monthly billing history" for the subject unit shows that from 11/2018 to 11/2019, the PG&E bill ranged from \$20.00 to \$50.00	
11/20/19	\$20.39

10/19/20	\$22.18
11/18/20	\$20.40

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3 In response, the tenants testified as follows. The subject unit is a small (two-bedroom)
4 apartment while 933 Furlong is a large property with 2 stories, 4 bedrooms, 3 bathrooms, a
5 dining room, a living room, and that it costs significantly more to heat, which accounts for the
6 much higher bill. Even when they're not at 933 Furlong, the electricity is running to keep
7 appliances on, the pool heated. Also, the cat-sitter uses electricity when she comes, which can
8 be 3-4 times per week. Also, the tenants testified that they spend a lot of time during the holidays
9 at 933 Furlong, which accounts for the higher electrical bill during those months.

10 13. Documentary evidence related to the properties in Sebastopol. The landlord's
11 attorney submitted the following documentary evidence related to both properties in Sebastopol
12 that are mailed to 933 Furlong.

13 a) The Deed of Trust for the property located at 933 Furlong Road in Sebastopol. This
14 document also specifies to "send tax notices to". It also states that the tenant petitioners, "...as
15 co-trustees, whose address is 993 Furlong Road, Sebastopol, CA" (Landlord Pre-Hearing
16 Submission, received May 22, 2021, page 87 and 97-106);

17 b) The Grant Deed for 933 Furlong lists 933 Furlong. (Landlord Pre-Hearing
18 Submission, received May 22, 2021, pages 94);

19 c) The Sonoma County property tax bills and secured property tax bills for 933
20 Furlong from 2013-2021. (Landlord Pre-Hearing Submission, received August 23, 2021, pages
21 8-18; Tenant Pre-Hearing Submission, received August 16, 2021, pages 28-29); and

22 d) Sonoma County Recorder's indexes identified 29 recordings under the tenant
23 petitioners' names between 1984 and 2008 related to the Sebastopol properties. The San
24 Francisco County Recorder indexes have no record of any recordings under James or Lynn
25 Fitzwater. (Landlord Pre-Hearing Submission, received May 22, 2021, pages 3, 23-26, and 70-
26 72)
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1 14. The tenants' vehicles. The tenant petitioners testified that they have two current
2 vehicles registered to 933 Furlong. They have no vehicles registered to the subject unit's
3 address in San Francisco. The tenant petitioners' former vehicle (a 2004 Acura) was also
4 registered to 933 Furlong. (Landlord Pre-Hearing Submission, received May 22, 2021, pages 3,
5 26-28, and 73-75) In response, the tenants testified that they understood it to be a good idea to
6 register their vehicles using 933 Furlong because, in the event of an emergency (such as wildfire
7 or flood), the authorities could determine from DMV records who needed to be contacted before
8 an evacuation and who would be authorized to enter their property during an emergency. Also,
9 although they register their cars to 933 Furlong, the insurance policies are connected to the
10 subject unit.

11 15. Physical presence at the subject premises. The landlord submitted a video log
12 created by Rene Voss, as well as stills taken from security camera footage. (Landlord Pre-
13 Hearing Submission (3), received May 27, 2021, pages 2-95 and 96-104). Based on her review
14 of the security camera footage, Ms. Voss testified that her log indicates that the tenants were
15 only physically present at the subject unit as follows. From December 21, 2020 through May 25,
16 2021, out of 141 total days reviewed, the tenants spent 16 overnights in San Francisco (11.3%)
17 and 125 overnights away from San Francisco (88.7%). Out of the 141 nights, the tenants'
18 presence at the subject unit increased after the Rent Board petition was filed. Out of the 82
19 nights before the petition was filed, the tenants spent 3 nights in San Francisco (3.7%). Out of
20 the 59 nights after the petition was filed, the tenants spent 13 nights in San Francisco (22.0%). In
21 response, the tenants testified that during this time, they were spending more time at 933
22 Furlong due to the COVID-19 pandemic for safety reasons as discussed in paragraphs 35-36
23 below. Ms. Fitzwater testified that they began staying at the subject unit more often in Spring of
24 2021 because they were both vaccinated at the end of February of 2021, and they felt that they
25 needed to spend more time in San Francisco because of the "hearings". When asked if the filing
26 of the instant petition prompted the tenants to spend more time in San Francisco, Ms. Fitzwater
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1 replied that she "can't say".

2 16. Bank account and rent checks are from a bank in Sebastopol. Rene Voss testified
3 that since 2016, the tenants regularly paid rent with a check drawn on a Bank of the West
4 account located in Sebastopol, with the check address reflecting the 933 Furlong address. It is
5 unknown whether the tenant petitioners drew rent from this account prior to 2016 because the
6 landlord does not have records that go back that far. As evidence, the landlord submitted a rent
7 check from the tenants for the February 2021 that reflected the 933 Furlong address, which was
8 drawn from a bank in Sebastopol. (Landlord Pre-Hearing Submission, received May 22, 2021,
9 page 109).

10 17. The tenants' cats live at 933 Furlong. The tenants testified as follows. Their pet cats
11 have and continue to reside at 933 Furlong because they are not allowed to have pets in the
12 subject unit. They have a cat-sitter who takes care of their cats while they are away for extended
13 periods of time. The landlord's attorney argued that the home where the tenants keep their pets
14 is their principal place of residence and the place where they regularly return. After the first
15 hearing, the tenants submitted an email from April Rowley dated June 20, 2021 which states, in
16 relevant part, "It has been my pleasure ...to have looked after your cats in Sebastopol for over
17 30 years. In that time, I have come to the house in Sebastopol at least 3-4 days a week as you
18 live in San Francisco. You wanted to make sure your cats were looked after as you could not be
19 with them the bulk of the time." (Tenant Pre-Hearing Submission, received August 16, 2021 (2),
20 page 17) Dr. Fitzwater testified that Ms. Rowley spends time with the cats, grooms them, feeds
21 them, and changes their litter.

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23 18. The tenants submitted a copy of a register they maintain for tax purposes which
24 reflect payments made to Ms. Rowley from June of 2019 through October of 2019, at which time
25 they paid Ms. Rowley \$25.00 per visit. Dr. Fitzwater declared that the higher number of visits
26 during this time period was due to having an elderly cat at the time who required one visit every
27 two days. (Tenant Post-Hearing Submission, received September 9, 2021, page 34) The register
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1 reflects the following payments in 2019.

- 2 • \$350.00 for January of 2019 (14 visits);
- 3 • \$550.00 for February of 2019 (22 visits);
- 4 • \$0.00 for March of 2019 (0 visits);
- 5 • \$225.00 for April of 2019 (9 visits);
- 6 • \$350.00 for May of 2019 (14 visits);
- 7 • \$300.00 for June of 2019 (12 visits);
- 8 • \$125.00 for July of 2019 (5 visits);
- 9 • \$175.00 for August of 2019 (7 visits);
- 10 • \$225.00 for September of 2019 (9 visits); and
- 11 • \$500.00 for October of 2019 (20 visits).

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13 19. The tenants submitted copies of canceled checks for payments made to Ms.
14 Rowley for pet sitting in 2021. Dr. Fitzwater declared that during this time, Ms. Rowley charged
15 \$35.00 per visit. Dr. Fitzwater declared that on December 26, 2019, the tenants adopted two
16 younger cats so, during this time, the two cats required more visits. (Tenant Post-Hearing
17 Submission, received September 9, 2021, page 4) The checks reflected the following payments:
18 (Tenant Post-Hearing Submission, received October 8, 2021, pages 84-91)

- 19 • \$250.00 per month from January 1, 2021 – May 1, 2021 (7 visits per
20 month);
- 21 • \$840.00 for June 1, 2021 (24 visits);
- 22 • \$630.00 for July 1, 2021 (18 visits); and
- 23 • \$420.00 for August 1, 2021 (12 visits).

24 20. Credit cards. Although the tenants' American Express Platinum card statements
25 and Chase card statements from October of 2019 through December of 2020 reflect the subject
26 unit as the mailing address, the landlord's attorney argued that a review of the purchase history
27 from the credit card statements indicates that a majority of the tenants' in-person purchases
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1 were made in or near Sebastopol, indicating a greater physical presence in that location. The
 2 landlord's attorney submitted a daily usage analysis of the tenants' physical credit card
 3 purchases in 2019. (Landlord Post-Hearing Submission, received October 1, 2020, pages 16-18)
 4 The landlord's analysis determined that (1) on average, the tenants spent most of their time in
 5 Sebastopol for the 2019 months in question as evidenced by the cards being used on 11 days in
 6 San Francisco versus 27 days in the Sebastopol area, (2) the San Francisco usages were
 7 clustered in the middle of the week which he argued is consistent with Lynn Fitzwater's
 8 testimony that she takes guitar and language lessons in San Francisco on Tuesdays and
 9 Wednesdays, (3) there are no in-person charges in San Francisco at all on Thursdays through
 10 Sundays with only three exceptions which also have in-person purchases in Sebastopol, which
 11 indicate that these are travel days.

12 21. The card statements reflect that the tenants used their card as follows. It is noted
 13 that online purchases, recurring automatic payments, and payments made outside of the
 14 Sebastopol or San Francisco area are not included in these calculations. (Tenant Pre-Hearing
 15 Submission, received August 16, 2021, pages 45-89)

16 American Express Card

Date Range	Card usages in the Sebastopol area	Card usages in the San Francisco area
9/13/19 – 12/9/19	36 (56.3%)	28 (43.7%)
9/15/20 – 10/29/20	16 (84.2%)	3 (15.8%)

17 Chase #1

Date Range	Card usages in the Sebastopol area	Card usages in the San Francisco area
9/12/19 – 12/8/19	26 (76.5%)	8 (23.5%)
9/9/20 – 12/8/20	2 (100%)	0

Chase card #2

Date Range	Card usages in the Sebastopol area	Card usages in the San Francisco area
9/14/19 – 12/13/19	11 (84.6%)	2 (15.4%)
9/14/20 – 12/13/20	36 (100%)	0

22. For all three cards, the tenants' aggregate grocery purchases for the relevant time periods in 2019 were \$1,004.31. Of those purchases, \$856.20 (or 85.25%) were made in Sebastopol. The tenants' attorney argued that if you remove the holiday grocery shopping (between November 16, 2019 through December 7, 2019), the Sebastopol grocery purchases would be only \$563.39 (56.1%) of the tenants' total grocery purchase for that time period. The tenants' aggregate grocery purchases for the relevant time periods in 2020 were \$2,524.37. Of those purchases, \$2,445.42 (or 96.87%) were made in Sebastopol.

23. Dr. Fitzwater declared as follows. The tenants regularly buy grocery items by mail order, delivered to the subject unit. They often stop at a family-owned cheese maker in Sonoma and do not count those purchases in their grocery purchases for Sebastopol. They prefer to shop for food for both the subject unit and 933 Furlong at the Pacific market in Sebastopol because it is a family owned business, has a real butcher, is conveniently located, and has parking. A large portion of the grocery bill in Sebastopol during the relevant time period in 2019 is due to being in Sebastopol for Thanksgiving, Christmas, and New Years which yields a higher grocery bill for holiday meals. (Tenant Post-Hearing Submission, received September 9, 2021, page 3)

24. Telephone landline at 933 Furlong. A utilities database identified two landline telephone accounts associated with James Fitzwater at 993 Furlong Road, Sebastopol, CA. (Landlord Pre-Hearing Submission, received April 7, 2021, page 2; Landlord Pre-Hearing Submission, received May 22, 2021, pages 18-20).

25. Letters to the Editor – Sonoma West Times & News. The landlord submitted printouts from the "Letters to the Editor" section from the newspaper "Sonoma West & Times

1 News" from 2017. The section reflects comments written by tenant Lynn Fitzwater. Four of the
2 comments relate to local issues in Sonoma County and one comment relates to the national
3 election and are signed "Lynn Fitzwater, Sebastopol". (Landlord Pre-Hearing Submission,
4 received August 23, 2021, pages 19-38)

5 26. Primary care physician. The tenants testified that their primary care physician is
6 located in Sebastopol. The tenants testified that although their primary care physician is in
7 Sebastopol, they rarely see that doctor. Their specialists (for cancer screening and treatments,
8 etc.) are all located in San Francisco.

9 27. Testimony of on-site property manager Stéphen Cisarik's. Prior to the first hearing,
10 the landlord submitted a declaration from Mr. Cisarik. (Landlord Pre-Hearing Submission,
11 received May 22, 2021, pages 107-108) During the second hearing, Stephen Cisarik appeared
12 to testify. Between his declaration and his testimony, Stephen Cisarik testified, in relevant part,
13 as follows. He has been the resident manager at the subject building since 2018 and is familiar
14 with all of the tenants in the building but does not recall meeting the tenants. He has never been
15 asked to do any repairs or look at any issues in the tenants' apartment. He has a good sense of
16 who is coming and going into the building and he has only seen the tenant petitioners a few
17 times. The amount of times he has seen them in 2020 is the same amount that he has seen
18 them in 2018 or 2019. Mr. Cisarik parks on the same level of the parking garage as the tenant
19 petitioners, and they have two spots. One of their vehicles (Honda) is continuously parked next
20 to his vehicle and he has never seen it leave the garage. Their second vehicle (Toyota) is never
21 there and he has only seen it under 6 times per year. When he has seen it, it is typically gone by
22 6pm and he has not seen it parked overnight. He does not recall seeing it parked overnight on a
23 daily basis; only on a very limited basis. From January 2021 through March 2021, he estimates
24 that he observed the tenants' Toyota one or two times and has never seen it overnight during
25 this period. (Landlord Pre-Hearing Submission, received May 22, 2021, pages 107-108) Since
26 June of 2021, he has seen the tenants' car significantly more often. The first time he saw the
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1 tenants' Camry parked at their second parking spot at the exit of the building, he thought
2 someone was illegally parking there until Rene Voss said it was a legitimate parking spot for the
3 tenants in unit #602. The first time he saw Mrs. Fitzwater, which was within the last couple of
4 months, he thought she was a visitor until he saw her get into the Camry.

5 28. In response, the tenants' attorney argued as follows. Mr. Cizarik's testimony is
6 unclear and confusing because he stated in his declaration that he does not recall meeting the
7 tenants yet testified orally that he occasionally exchanged greetings with one of them. Mr.
8 Cizarik's testimony is also inconsistent with regards to how often and when he saw their cars as
9 he testified that their car is "never there" and later testified that when he has seen it, "it is
10 typically gone by 6:00pm". Regardless, it is irrelevant because there is no requirement in the
11 Ordinance or in the Rules that the tenant be physically present in the unit at all times or
12 continuously, nor is there a fixed amount of time a tenant must spend in their unit in order to
13 permanently reside there.

14 29. Testimony of Rene Voss, partner and co-owner of the subject building. Rene Voss
15 testified as follows. She is a limited partner of VNL Clay, LP. She lived in the building from 1993-
16 2019. From 1993-2005 she worked from home. When she went to the office, she typically left
17 around 7AM and returned around 5PM. During these times, she saw the tenant petitioners less
18 than a dozen times, which is very unusual. She began working as the onsite property manager in
19 2016 until 2018. In her 22 years living at the subject building, she saw other tenants on a regular
20 basis. In 2016 she parked next to the tenant petitioners in the garage. They have a white Honda
21 that is parked in the corner that never seems to move. Their other car is a navy Toyota that Ms.
22 Voss rarely saw. Ms. Voss also testified with regards to a text message conversation between
23 herself and another tenant ("Deborah") in the subject building on May 22, 2021. (Landlord Pre-
24 Hearing Submission (2), received May 27, 2021, page 1) The text messages read as follows:

25
26 **Rene Voss:** "Hey Deb! Hope you're well. Hey I had a question – how many times a year on
27 average do you see the Fitzwaters?"

28 **Tenant:** "I don't think more than 4, and this past year 2"

1 30. In response, the tenants' attorney argued that Ms. Voss's testimony regarding the
2 tenants' car is vague and it is not reasonable to assume, based on the long-term and short-term
3 parking of an individual, whether they are always there as there are many reasons one would
4 either be not driving much or choosing to leave a car in a secure space, particularly when they
5 own another car that they use more often. He also objected to the text message conversation
6 between Ms. Voss and the tenant "Deborah" due to lack of foundation and reliability.
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8 31. The tenants' attorney pointed out that Ms. Voss' testimony conceded that the
9 tenants "continue to rent the unit", and that the landlord "does not allege that they abandoned the
10 [subject] unit at all". He argued that in her testimony, Rene Voss admitted that she knew about
11 the tenants' 933 Furlong home and that they "always return to Clay Street" after extended stays
12 or vacations "at some point". The landlord's attorney submitted a transcript of Ms. Voss'
13 testimony as verification. (Tenant Post-Hearing Submission, received October 8, 2021, page 17)
14

15 32. Testimony of Victor Wierzbicki, building maintenance. Victor Wierzbicki testified as
16 follows. He provides maintenance and repair services to the subject building and has done so
17 since 2008. He has met the tenants maybe 5-6 times in 13 years. He remembers repairing a
18 minor roof leak in their apartment in 2019, a ceiling collapse in 2009, and other little small repairs
19 such as a damaged floor in the living room 3-4 years ago. He recalled seeing furniture in their
20 apartment such as an antique table set and personal belongings, but "antique. Still antique." The
21 landlord argued that Mr. Wierzbicki's testimony indicates that the tenants rarely occupy the unit
22 as evidenced by the fact that they keep "antique" furniture there, and the fact that they have had
23 very few maintenance items needed since 2008. The tenants' attorney argued that Mr.
24 Wierzbicki's testimony indicates that he saw personal belongings of value that one would expect
25 to keep in a unit occupied by the tenants who live there.

26 33. Private investigator report and testimony. Tava Miyata is a licensed California
27 investigator (#187794) associated with Don MacRitchie whom the landlord retained to determine
28 whether the subject unit is the tenants principal place of residence. Ms. Miyata testified as

1 follows. The investigators ran reports on the Transunion, Equifax, and Experian credit bureaus,
2 conducted internet searches related to the tenants' address history, reviewed the landlord's
3 security camera footage, motor vehicle registration information, reviewed public utility databases,
4 and examined all publicly available documents and filings. Based on their investigation, the
5 private investigators came to the conclusion that "Although a majority of indicia evidence
6 continues to indicate a presence for James Fitzwater (and Lynn Fitzwater) at the subject
7 property, 1950 Clay Street, Apt 601, San Francisco, CA, the preponderance of the evidence
8 supports a conclusion that Dr. Fitzwater (and Lynn Fitzwater) principally resides at 993 Furlong
9 Road, Sebastopol, CA." (Landlord Pre-Hearing Submission, received May 27, 2021, pages 106
10 and 129) The landlord submitted a copy of the investigator's updated report and attachments in
11 its entirety. (Landlord Pre-Hearing Submission, received May 27, 2021, pages 106-168)

12 Tenants' Opposition

13 34. The tenants' attorney argued the landlord has the burden of proof under Ordinance
14 Section 37.8(b)(1) and that it has not met its burden of proving that the tenants no longer
15 "permanently resided" at the unit (as required under the Costa-Hawkins Rental Housing Act), or
16 no longer remained "occupants in lawful possession" of the subject unit (as required by Rules
17 and Regulations Section 1.21 and 6.14) during the relevant time period. In addition to the
18 aforementioned arguments in response to the landlord's evidence (above), the tenants made the
19 following arguments in their closing brief. (Tenant Post-Hearing Submission, received October 8,
20 2021, pages 46-74) The additional arguments are, in relevant part, as follows.

21 a) The evidence shows that the subject unit is the tenants' usual place of return and
22 their permanent residence. Where the tenants travel, shop, and spend time, and how much time
23 they spend away from the subject unit is irrelevant. What matters is that the tenants maintain
24 their key personal, business, and government connections and documents to the subject unit and
25 consider it their permanent, principle, and primary residence. The property located at 933
26 Furlong is a vacation home, and they only spent a significant time at 933 Furlong in recent years
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1 due to the COVID-19 pandemic.

2 b) The Rent Ordinance "clearly focuses on occupancy as the factor which triggers rent
3 control protection." *Parkmerced C. v. San Francisco Rent Stabilization & Arbitration Bd.* (1989)
4 215 Cal.App.3d 490, 493. As defined in the Ordinance and Rules, "occupancy" does not require
5 that an individual be physically present in their unit at all times or continuously, and there is
6 nothing in the Ordinance or Rules that states a fixed amount of time a tenant must spend at their
7 unit in order to continue as "occupants in lawful possession" or to reside there as their principal
8 residence.

9 c) Nowhere in the Costa-Hawkins Rental Housing Act or Rent Board Rules and
10 Regulations 1.21 or 6.14 is a tenant precluded from claiming a Homeowner's Tax Exemption,
11 having a second residence, or using that residence as a mailing address for certain accounts or
12 documents.

13 d) Where tenants spend most of their time is irrelevant so long as they continue to
14 remain in possession, or permanently reside at, the unit. Unless the unit has been abandoned by
15 the tenants, a market rate increase is not available to the landlord.

16 e) The landlord is engaging in intimidation and extortion by asking the tenants if they
17 want to pay market rent in order to keep their apartment.

18 f) The rent increase notice is not valid because there was no notice advising the
19 tenants to seek advice from the Rent Board or from their own counsel ("advice clause").

20 Tenants' Evidence

21 35. Temporary absence due to COVID-19. The tenants testified as follows. Lynn
22 Fitzwater is 76 years old and James Fitzwater is 78 years old. Mrs. Fitzwater is a breast cancer
23 survivor and requires treatment for skin cancer and hypertension. Dr. Fitzwater is clinically obese
24 and is in treatment for hypertension. Both of their health is compromised by comorbidities. The
25 conditions in San Francisco at the beginning of the COVID-19 pandemic were uncertain and
26 confusing, there was no known cure, no effective treatment, and no vaccine for the virus. People
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1 could be infected but asymptomatic and unknowingly infect others. The subject unit is on the top
2 floor of a 26 unit, 92 year-old, six story building with one elevator and no ventilation in the
3 common area, garage, mailbox area, laundry area, and hallways. There were a lot of tenants,
4 guests, and contractors coming and going and most were not wearing masks in elevators or
5 common areas. 933 Furlong is a 2400 square foot, two story home with 4 bedroom and 3
6 bathrooms, a living room, and a dining room. Because the tenants found the conditions of the
7 building to be unsafe, they opted to spend most of their time living in 933 Furlong as a means to
8 seek refuge from the more dangerous conditions in San Francisco given their heightened risk for
9 serious illness or death if they were to contract the Coronavirus. The tenants' attorney argued
10 that the Rent Board should consider "other reasonable temporary periods of absence" as in this
11 case, the tenants had a reasonable reason for being temporarily absent from the subject
12 premises during the COVID-19 pandemic.

13 36. The tenants further testified as follows. Prior to the COVID-19 pandemic, the
14 tenants spent the majority of their time in San Francisco. Ms. Fitzwater regularly attends
15 Tuesday classes at the Guitar Center, on Wednesday she has French lessons at the subject
16 unit, and on Thursdays, she has Italian lessons at a location with the teacher. They always
17 intended to return to the subject unit as soon as experts deemed it reasonably safe to do so. In
18 support of this claim, the tenants submitted the following evidence.

19 a) A copy to the second supplement to Mayoral Proclamation Declaring the Existence
20 of a Local Emergency [COVID-19] Dated February 25, 2020 (Tenant Pre-Hearing Submission,
21 received May 26, 2021, pages 47-52);

22 b) A summary of facts taken from an order denying a motion for an injunction pending
23 appeal in *Ritesh Tandon, et. Al. v. Gavin Newsom, et. al.*, U.S. District Court Case No. 20-CV-
24 07108-LHK, dated February 19, 2021. (Tenant Pre-Hearing Submission, received May 27, 2021,
25 pages 4-9) The summary details the history of the emergence and spread of COVID-19, how it
26 spreads, the effects of the virus, and California's response and recommendations (i.e., stay at
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1 home order, social distancing, and face coverings);

2 c) An email between Lynn Fitzwater and Rene Voss dated March 16, 2020, reflecting
3 the tenants' notice that the tenants plan to go to Sebastopol and stay as long as necessary due
4 to the pandemic (Tenant Pre-Hearing Submission, received May 26, 2021, page 70);

5 d) Two email exchanges between Lynn Fitzwater and friends and neighbors reflecting
6 the tenants' intention to go to Sebastopol for the "foreseeable future" due to the pandemic, and
7 their intention return to Clay Street once the pandemic has passed and it was safe to do so
8 (Tenant Pre-Hearing Submission, received May 26, 2021, pages 71-72). Dr. Fitzwater testified
9 that they received their second dose of the Pfizer COVID-19 vaccine on February 26, 2021; and

10 e) Testimony from Rene Voss. When asked if she knew the tenants were leaving the
11 unit on a temporary basis due to COVID-19, Ms. Voss replied, "Absolutely", which the tenants'
12 attorney argued is conclusive evidence that not only was the landlord aware that the tenants
13 lived at the subject unit, but that their physical absence during 2020 was temporary.

14 37. The tenants' important medical, financial, and government documents and
15 associations are connected to the subject unit. The tenants submitted evidence that the following
16 documents or accounts that list the subject unit as the tenants' mailing address.

17 a) The tenants' drivers licenses (Tenant Pre-Hearing Submission, received May 26,
18 2021, pages 9 and 53);

19 b) The tenants' voter registration and vote-by-mail documentation (Tenant Pre-
20 Hearing Submission, received May 26, 2021, pages 10 and 54);

21 c) The tenants' jury summons documents. (Tenant Pre-Hearing Submission, received
22 May 26, 2021, pages 63-69) It is noted that when questioned, Ms. Fitzwater testified that the jury
23 summons goes to "where you vote" and Dr. Fitzwater corrected her by saying "where you live"
24 and Ms. Fitzwater corrected her testimony to "where you live";

25 d) A Grant Deed dated September 28, 1984 for 933 Furlong and the Grant Deed for
26 925 Furlong, both of which list the subject unit as the mailing address (Tenant Pre-Hearing
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1 Submission, received May 26, 2021, pages 27 and 32);

2 e) A property tax bill for 925 Furlong for 2019-2021, which lists the subject unit as the
3 mailing address (Tenant Pre-Hearing Submission, received August 16, 2021, pages 30-31);

4 f) The tenants' Social Security Form SSA-1099 for tax year 2020 (Tenant Pre-Hearing
5 Submission, received May 26, 2021, page 11);

6 g) The tenants' Medicare benefits (Tenant Pre-Hearing Submission, received May 26,
7 2021, pages 13 and 58);

8 h) Dr. Fitzwater's VA Explanation of Benefits form (Tenant Pre-Hearing Submission,
9 received May 26, 2021, page 14);

10 i) The tenants' Wells Fargo account statement and checks (Tenant Pre-Hearing
11 Submission, received August 16, 2021 (2), pages 5-15; Tenant Pre-Hearing Submission,
12 received May 26, 2021, pages 59-60);

13 j) The tenants' Charles Schwab account statement dated December of 2019 (Tenant
14 Pre-Hearing Submission, received August 16, 2021, page 90);

15 k) A document relating to Dr. Fitzwater's association with the Medical Board of
16 California (Tenant Pre-Hearing Submission, received May 26, 2021, page 17);

17 l) Dr. Fitzwater's prescription pad (Tenant Pre-Hearing Submission, received May 26,
18 2021, page 18);

19 m) Dr. Fitzwater's army pension documents (Tenant Pre-Hearing Submission,
20 received May 26, 2021, page 12);

21 n) Dr. Fitzwater's American Medical Association documents (Tenant Pre-Hearing
22 Submission, received May 26, 2021, page 19);

23 o) The tenants' FasTrak account summary from December 8, 2020 through May 15,
24 2021. (Tenant Pre-Hearing Submission, received August 16, 2021, pages 7-9) The tenants'
25 attorney argued that the weekly transaction dates are consistent with the tenants' testimony with
26 respect to their travel pattern during that time period, and that the patterns show that the tenants
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1 began traveling more frequently to San Francisco prior to the petition filing date;

2 p) The tenants' 2019 and 2020 tax return. (Tenant Pre-Hearing Submission (2),
3 received August 16, 2021, pages 22-34; Tenant Pre-Hearing Submission, received August 16,
4 2021, pages 32-44);

5 q) The tenants' American Express Platinum card statements from October of 2019
6 through December of 2020, and Chase credit card statements from various dates between
7 November 5, 2019 and January 5, 2021. (Tenant Pre-Hearing Submission, received August 16,
8 2021, pages 45-89);

9 r) A BNP Paribas bank account notice dated April 2, 2020, and a mailing address
10 confirmation from 2021 (Tenant Pre-Hearing Submission, received August 16, 2021, page 99-
11 102) It is noted that the tenants' BNP Paribas bank account statements were also submitted and
12 reflect a mailing address for their apartment in Paris (Tenant Pre-Hearing Submission, received
13 August 16, 2021, pages 91-98);

14 s) The tenants' T-Mobile cellular phone bill dated December 23, 2019 and June 23,
15 2021 (Tenant Pre-Hearing Submission, received August 16, 2021, pages 23-27; and Tenant
16 Post-Hearing Submission, received October 8, 2021, pages 94-101);

17 t) The tenants' Bank of the West account statement from November of 2019,
18 November of 2020, and December of 2020 (Tenant Pre-Hearing Submission, received August
19 16, 2021, pages 103-114);

20 u) The tenants' USAA Homeowner's Insurance policy, with a coverage date of
21 September 2, 2020 through September 2, 2021 (Tenant Pre-Hearing Submission, received
22 August 16, 2021, page 115);

23 v) The tenants' USAA Renter's insurance policy (for the subject unit), with a coverage
24 date of June 2020 through May 2021 (Tenant Pre-Hearing Submission, received May 26, 2021,
25 page 15);

26 w) The tenants' USAA Automobile Insurance policy, with a coverage dated October
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1 10, 2020 (Tenant Pre-Hearing Submission, received August 16, 2021, page 116, Tenant Pre-
2 Hearing Submission, received May 26, 2021, pages 26-26);

3 x) The tenants' Global Entry membership application, dated August 29, 2012 (Tenant
4 Pre-Hearing Submission, received May 26, 2021, pages 61-62); and

5 y) There is a PG&E account and a landline telephone account associated with the
6 subject unit.

7 38. Medical specialists. The tenants testified that although their primary care physician
8 is located in Sebastopol, Mrs. Fitzwater receives medical exams, treatment, mammograms,
9 MRIs, and has received a colonoscopy in San Francisco.

10 39. Dr. Fitzwater's employment history. Dr. Fitzwater testified that he has worked as a
11 practicing physician since the 1970s and worked in San Francisco for a majority of his career.
12 From 1983 to 2003 he worked as the Medical Director for Northern California for different
13 commercial laboratories. For a small period of time he was a partner in a medical group in Dublin
14 and during this time, he commuted to and from the subject unit every day. From 2003-2010 he
15 oversaw Bay Area labs for Quest Diagnostics who were based in Sacramento. During this time,
16 he commuted back and forth to the subject unit. Fitzwater began to retire from 2010 through
17 2015 and resigned his last responsibility in 2015. (Tenant Pre-Hearing Submission, received
18 May 26, 2021, page 6)

19 40. New York Times and a letter to the editor. The tenants submitted a letter to the
20 editor of the New York Times dated October 2, 2013 written by Ms. Fitzwater with a dateline of
21 "San Francisco, October 1, 2013." (Tenant Post-Hearing Submission, received October 8, 2021,
22 pages 92-93) Ms. Fitzwater testified that they get the weekend edition of the New York times at
23 the subject unit because they are often not there to pick it up. In response, the landlord's
24 attorney asked Ms. Fitzwater how many newspapers they receive at 933 Furlong and she
25 testified that they receive two newspapers at 933 Furlong. They receive the newspapers 7 days
26 a week starting in 2020 but previously only received them Friday, Saturday, and Sunday.
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1 41. Renovation expenses for the subject unit. The tenants submitted Lynn Fitzwater's
2 notes of renovation expenses in 2006 reflecting a cost of \$12,407.47 for a kitchen remodel at the
3 subject unit address (Tenant Pre-Hearing Submission, received May 26, 2021, page 73); The
4 tenants' attorney argued that this is not the type of investment tenants would make for a property
5 that is not their principal residence. In response, the landlord's attorney questioned the tenants
6 about money they spent remodeling 933 Furlong. In response to the landlord attorney's
7 questioning, the tenants testified that they have spent tens of thousands of dollars over the years
8 remodeling 933 Furlong.

9 42. Prescription medication. The tenants testified that their prescription medication is
10 delivered to the subject unit address.

11 43. Passport. Ms. Fitzwater testified that the subject unit address is hand-written in on
12 the tenants' passports.

13 44. Charitable donations. The tenants aforementioned credit card statements reflect
14 donations made to the San Francisco Museum of Modern Art, the Fine Arts Museum, the San
15 Francisco Symphony, the San Francisco Opera, the San Francisco Ballet, the Marines Memorial
16 Association, the Asian Art Museum, and KQED. The tenants submitted receipts for these
17 donations reflecting the subject unit address. (Tenant Post-Hearing Submission, received
18 October 8, 2021, pages 94-101).

19 45. Personal belongings. The tenants testified that they keep their nicer belongings in
20 San Francisco and not Sebastopol because they consider 933 Furlong a weekend country house
21 that is furnished more simply. The tenants keep their sentimental items and valuable items in the
22 subject unit while 933 Furlong is furnished for temporary stays. No pictures of the interior of 933
23 Furlong or the subject unit taken during the relevant time period were submitted by the tenants.
24

25 46. Testimony from Maureen Watson, tenant in unit #602. Ms. Watson testified as
26 follows. She has lived in the building since March of 2012 and she has known the tenants since
27 then and considers them friends. Prior to March of 2020 she saw them regularly at the building –
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1 just as often as she saw other tenants but more often because they live across the hall. She
2 would run into them when she was taking out the garbage or when one of them were coming or
3 going. Ms. Fitzwater would occasionally leave Ms. Watson messages under the door informing
4 her that the tenants would be out of town and asking her to pick up packages for them. She is
5 aware of Ms. Fitzwater's weekly guitar, French, and Italian lessons, as well as her hair
6 appointments. She knew that the tenants were there even when she did not see them because
7 she could see that someone picked up their New York Times newspaper. She did not know how
8 often they left or when, but from March of 2020 through the end of the year she saw them maybe
9 once per month. In 2021, she began to see them more often, maybe a few times per week. With
10 regards to the conditions in the building during the beginning of the COVID-19 emergency in
11 2020, Ms. Watson agreed with the tenants' description – that many tenants, visitors, and
12 contractors did not wear masks or remain distant, and that the conditions in the building were
13 uncertain and confusing. However, masks did become mandatory in the building in July of 2020.
14 In response, the landlord's attorney argued that Ms. Watson's testimony is not credible because
15 she was not paying close attention to the tenants' comings and goings, and her testimony
16 contained ambiguous responses rather than actual knowledge.

17
18 47. Testimony from Dr. Preben Brandenhodff, tenant in unit #401. Dr. Brandenhoff
19 testified as follows. He has lived in the subject building with his wife since 2005. He has known
20 the tenants since he first moved into the building and considers the tenants his friends. He has
21 not called Mr. Cisarik regarding issues inside his apartment – his wife has, but she has had no
22 luck. Prior to March of 2020, Dr. Brandenhoff saw the tenants regularly in the building – just as
23 often as other tenants, which is maybe 1-2 times per week. He is not sure if he saw them daily
24 but fairly often because he would run into them in the lobby, going in and out of garages, or he
25 would pick up packages for them. He "absolutely" knows they are living in the subject unit. He
26 and his wife have held an annual holiday party since 2008 and the tenants attended the 2020
27 party and some other parties. Dr. Brandenhoff's profession requires him to keep up to date on
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1 infectious diseases and he agrees with the tenants' and Ms. Watson's description of the
2 conditions of the building during the beginning of the COVID-19 public health emergency in 2020
3 and did not believe the building was COVID-safe given the number of tenants, lack of ventilation,
4 and the fact that there was only one elevator. He is aware of the tenants' age and medical
5 conditions and if he was their doctor, he would have advised them to go stay in Sebastopol
6 rather than the building. He is a transplant surgeon and does from 50-80 cases per year and can
7 be away from the subject building for up to 160-180 days per year during pre-COVID times.

8 48. In response, the landlord's attorney argued as follows. Dr. Brandenhoff's testimony
9 is unreliable due to his limited knowledge of the tenants' actual comings and goings, and that he
10 offered no meaningful testimony with respect to the ultimate determination in this case. The fact
11 that Dr. Brandenhoff is, as he testified, often away from the building many days per year,
12 indicates that his testimony should carry little weight. The landlord's attorney also argued that Dr.
13 Brandenhoff's testimony that the building is more safe to live in in 2021 than 2020, undermines
14 the tenants' claim that they were only staying at 933 Furlong more often due to COVID-19 as the
15 evidence indicates that they continued staying there in 2021 and did not begin staying more
16 frequently at the subject unit until after the instant petition was filed as indicated by the camera
17 log analysis discussed in paragraph 33 above.

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19 49. Testimony and declaration from Timothy J. Jorstad, CPA. (Tenant Pre-Hearing
20 Submission, received August 16, 2021 (2), pages 18-19) Mr. Jorstad's declaration states, in
21 relevant part.

22 "My firm has prepared Federal and State tax returns for Jim and Lynn for approximately 40
23 years, up to and including returns for the 2020 tax year. We have always used Jim and Lynn's
24 Clay Street address on their tax return filings. For 2020 only, Jim did have me send their draft tax
25 return package to their Sebastopol address for review prior to filing. However, the official tax
26 return forms as filed reflect their Clay Street address as their primary, personal residence, as
27 they have since I have been working with Jim and Lynn since approximately 1982."

28 During the hearing, in response to questioning by the landlord's attorney, Mr. Jorstad
testified as follows. His firm almost always use people's principle residence on income tax filings
because that is the address the IRS will serve official notices. He has never discussed whether

1 the tenants have claimed 933 Furlong as their principle residence because it has no bearing on
2 their income taxes. He is not aware of any legal requirement that the address used on a tax
3 return be someone's principle residence. He does not socialize with the tenants and meets with
4 them once per year. The landlord's attorney argued that Mr. Jorstad's testimony only serves to
5 confirm that the tenants used the subject unit as an address for tax returns, that there is no legal
6 requirement that individual's use any particular address on a tax filing; and that he has no actual
7 knowledge of where the tenants actually principally reside.

8 CONCLUSIONS OF LAW

9 1. At all times relevant to this petition, the subject rental unit is within the jurisdiction of
10 the Rent Board. [Ordinance Section 37.2(r)]

11 2. The landlord has the burden of showing that an increase in rent in excess of the
12 allowable annual rent increase is justified. [Rules and Regulations Section 11.18]

13 Rules and Regulations Section 1.21

14 3. Ordinance Section 37.3(a) limits rent increases for a "tenant in occupancy." When
15 there is no tenant in occupancy in the unit, the rent increase limitations in the Ordinance do not
16 apply, and the rent may be increased without limitation. The issue in this case is whether the
17 tenant respondents or any other person was a "tenant in occupancy" at the time the petition was
18 filed on March 26, 2021.

19 4. Ordinance Section 37.2(t) defines a "tenant" as "a person entitled by written or oral
20 agreement, sub-tenancy approved by the landlord, or by sufferance, to occupy a residential
21 dwelling unit to the exclusion of others."

22 5. Rules and Regulations Section 1.21 defines "tenant in occupancy" as follows:

23 A tenant in occupancy is an individual who otherwise meets the definition of tenant as
24 set forth in Ordinance Section 37.2(t), and who resides in a rental unit or, with the
25 knowledge and consent of the landlord, reasonably proximate rental units in the same
26 building as his or her principal place of residence. Occupancy does not require that the
27 individual be physically present in the unit or units at all times or continuously, but the unit or
28 units must be the tenant's usual place of return. When considering whether a tenant
occupies one or more rental units in the same building as his or her "principal place of
residence," the Rent Board must consider the totality of the circumstances, including, but not

1 limited to the following elements:

2 (1) the subject premises are listed as the individual's place of residence on any
3 motor vehicle registration, driver's license, voter registration, or with any other
4 public agency, including Federal, State and local taxing authorities;

5 (2) utilities are billed to and paid by the individual at the subject premises;

6 (3) all of the individual's personal possessions have been moved into the
7 subject premises;

8 (4) a homeowner's tax exemption for the individual has not been filed for a
9 different property;

10 (5) the subject premises are the place the individual normally returns to as
11 his/her home, exclusive of military service, hospitalization, vacation, family
12 emergency, travel necessitated by employment or education, or other reasonable
13 temporary periods of absence; and/or

14 (6) Credible testimony from individuals with personal knowledge or other
15 credible evidence that the tenant actually occupies the rental unit or units as his or
16 her principal place of residence.

17 A compilation of these elements lends greater credibility to the finding of "principal
18 place of residence" whereas the presence of only one element may not support
19 such a finding.

20 6. A landlord who seeks a determination that a tenant is not a tenant in occupancy
21 pursuant to Section 1.21 above must petition for an arbitration hearing prior to issuing a notice of
22 rent increase on such grounds. [Rules and Regulations Section 5.10]

23 7. It is clear from the testimony and documentation that the tenants have personal,
24 financial, and government connections to both the subject unit and 933 Furlong. The key
25 question in this case is not whether the tenants have abandoned the subject unit, or whether
26 they happen to own and use another home. Rather, the question to be determined is whether the
27 tenants occupied the subject unit as their "principle place of residence" during the relevant time
28 period. Because the already difficult analysis is further convoluted by the unprecedented COVID-
19 pandemic, each parties' attorney has diligently scrutinized the tenants' lives, behaviors,
patterns, and expenses during the relevant time period in order to paint a picture that supports
their respective arguments.

8. After carefully considering all of the testimony, the documentary evidence, and the

1 parties' arguments, the undersigned ALJ has determined that, based on the totality of the
2 evidence, the tenants did not reside in the subject unit at 1950 Clay Street #601 as their principal
3 place of residence on the March 26, 2021 petition filing date, and it is undisputed that there was
4 no other tenant in occupancy at that time. This determination takes into account the
5 documentary evidence showing that the tenants' use of the subject unit address for important
6 personal and professional mail, including their drivers licenses and income taxes. Pursuant to
7 the Rules and Regulations Section 1.21, such evidence is and has been considered as elements
8 in determining the tenants' principal place of residence. However, other substantial evidence,
9 including video surveillance footage, utility usage comparisons, credit card purchase history, and
10 the residence of the tenants' pets at 933 Furlong supports a finding that the subject unit was not
11 the tenants' principal place of residence at the time the petition was filed. It is further determined
12 that the evidence did not establish that the tenants' absence from the subject unit was a
13 reasonably temporary absence under Rules and Regulations Section 1.21(5). This determination
14 is supported by the evidence that includes, among other things, that the tenants' patterns of
15 physical presence in San Francisco vs. Sebastopol during the relevant time period were not
16 significantly different from their patterns prior to the COVID-19 pandemic.

17
18 9. Accordingly, the rent limitations set forth in Rent Ordinance Section 37.3 are not
19 applicable, the landlord is entitled to increase the tenants' rent pursuant to Rules and
20 Regulations Section 1.21 without limitation under the Rent Ordinance, and the rent increase
21 effective July 19, 2021 to \$5,895.00 is lawful. The tenants' argument that the rent increase notice
22 is not valid because it did not contain an advice clause is without merit as there is no authority in
23 the Rent Ordinance or in the Rules and Regulations to invalidate a rent increase notice on that
24 basis.

25 10. Because it has been determined that the landlord may impose an unlimited rent
26 increase under Rules and Regulations Section 1.21, it is not necessary to make any
27 determination under the Costa-Hawkins Rental Housing act or Rules and Regulations Section
28

1 6.14.

2 ORDER

3 Wherefore, all the evidence having been heard and considered, it is the order of this
4 Administrative Law Judge that:

5 1. Petition No. L210225 is granted.

6 2. It is determined that the tenant respondents Lynn Fitzwater and James Fitzwater
7 were not "tenants in occupancy" of the subject unit at the time the petition was filed on March
8 26, 2021, and there was no other "tenant in occupancy" in the unit within the meaning of Rules
9 and Regulations Section 1.21. Since the rent increase limitations set forth in Rent Ordinance
10 Section 37.3 are not applicable, the rent increase effective July 19, 2021 to \$5,895.00 is lawful.

11 3. If the tenant respondents file a timely appeal of this decision, then the tenants
12 need not pay the rent increase effective July 19, 2021 to \$5,895.00 pursuant to Section 1.21 until
13 after the Rent Board takes final action on the tenants' appeal which results in sums owed.
14 [Ordinance Section 37.8(f)(1)]

15 4. This decision is final unless specifically vacated by the Rent Board following
16 appeal to the Board. Appeals must be filed no later than 15 calendar days from the date of the
17 mailing of this decision, on a form available from the Rent Board. [Ordinance Section 37.8(f)(1),
18 emphasis added] If the fifteenth day falls on a Saturday, Sunday or legal holiday, the appeal may
19 be filed with the Board on the next business day.

20
21
22 Dated: November 3, 2021

23 
24 _____
25 ERIN E. KATAYAMA
26 Administrative Law Judge
27
28



**Residential Rent Stabilization and Arbitration Board
City & County Of San Francisco**

<p>Esta notificación puede afectar a sus derechos como propietario o inquilino. Si necesita ayuda para entender este aviso, por favor llame al 415-252-4600.</p>	<p>本項公告可能會影響您身為房東或房客的權利。 如果您需要協助來了解本項公告，請致電 415-252-4600。</p>	<p>Posibleng maapektuhan ng abisong ito ang inyong mga karapatan bilang nagpapaupa (landlord) o umuupa (tenant). Kung kailangan ninyo ng tulong upang maintindihan ang abisong ito, pakitawagan ang 415-252-4600.</p>
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Proof of Service

Proof of Service page 1

CASE NO. L210225

I am over the age of 18, not a party to this case, and am employed at 25 Van Ness Avenue #320, San Francisco, California, 94102. I served a copy of the attached:

DECISION

regarding the property at **1950 Clay Street, #601** by placing a true copy in a sealed envelope with postage prepaid in the United States mail at San Francisco, California, on the date shown below, and addressed to the parties as shown below.

Name	Property Address	Mailing Address
Landlord Petitioner V&L Clay, L.P.		c/o Dowling & Marquez, LLP 625 Market Street #4th Floor San Francisco, CA 94105
Landlord Attorney Curtis F. Dowling		Dowling & Marquez, LLP 625 Market Street #4th Floor San Francisco, CA 94105
Tenant Respondent James E. Fitzwater	1950 Clay Street #601 San Francisco, CA 94109	1950 Clay Street #601 San Francisco, CA 94109
Lynn S. Fitzwater	1950 Clay Street #601 San Francisco, CA 94109	1950 Clay Street #601 San Francisco, CA 94109
James E. Fitzwater	1950 Clay Street #601 San Francisco, CA 94109	993 Furlong Road Sebastopol, CA 95472
Lynn S. Fitzwater	1950 Clay Street #601 San Francisco, CA 94109	993 Furlong Road Sebastopol, CA 95472
Tenant Attorney Keith Kandarian	1950 Clay Street #601 San Francisco, CA 94109	Attorney at Law 475 Sansome Street #510 San Francisco, CA 94111
Tenant Observer Timothy J. Jorstad	1950 Clay Street #601 San Francisco, CA 94109	Jorstad Incorporated 1000 Fourth Street, Suite 375 San Rafael, CA 94901

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed on the date shown below at San Francisco, California.

Signed: *E. Jorstad*

Dated: 11/3/2021