HOUSING BOARD OF REVIEW

City of Burlington

149 Church Street Room 11
Burlington, Vermont 05401
(802) 865-7122

HOUSING BOARD OF REVIEW
CITY OF BURLINGTON

NOTICE OF DECISION

Enclosed is a copy of the "Findings of Fact, Conclusions of Law and Order" of the Burlington Housing Board of Review.

Please note that a person aggrieved by a decision of the Housing Board of Review is entitled to appeal to the Chittenden Superior Court. (See Housing Code Section 18-59 and Vermont Statutes Annotated, Title 24, Section 5006.) The court rules may require that such an appeal be commenced within thirty (30) days of the Board's Order.

Unless an appeal is taken, the Board's Order should be complied with before expiration of the thirty (30) day period.

DATED 9/8/20

CITY OF BURLINGTON
HOUSING BOARD OF REVIEW

/s/ Josh O'Hara
Josh O'Hara
Board Chair

cc: Nicole Irizarry (for all tenants)
Martha Lang

CITY OF BURLINGTON, VERMONT
HOUSING BOARD OF REVIEW

In re: Request for Hearing of Laurel Hebert, Nicole Irizarry, Rebecca Shames, Meg Trogolo, Kate Burba and Olivia Lopez Regarding Withholding of Security Deposit by Martha Lang for Rental Unit at 140 Colchester Avenue	)	**Security Deposit Appeal**

DECISION AND ORDER

The above-named hearing came before the Housing Board of Review on August 3, 2020; the hearing was held virtually via Zoom. Board Vice Chair Patrick Murphy presided. Board Members Josh O'Hara and Charlie Gliserman were also present. Petitioners Laurel Hebert and Nicole Irizarry were present and testified. Respondent Martha Lang was also present and testified. Appearing and testifying as a witness was Jennifer Rose.

Upon consideration of the evidence and the applicable law, the Board makes the following Findings of Fact, Conclusions of Law, and Order:

Findings of Fact

1. Respondent Martha Lang is the owner of a rental unit, 140 Colchester, in the City of Burlington which is the subject of these proceedings.

2. Petitioners Laurel Hebert, Nicole Irizarry, Kate Burba, Olivia Lopez, Rebecca Shames and Meg Trogolo moved into the rental unit with a written lease which ran from June 1, 2019 to May 24, 2020. Monthly rent was $3200.00.

3. Petitioners paid a security deposit of $3200.00 to respondent. Petitioners were to receive back their security deposit at the end of the lease minus any amounts withheld for damages.

4. Petitioners vacated the apartment on May 24, 2020.

5. On June 3, 2020, respondent sent, by certified mail, each tenant a written statement related to their security deposit. Said statement itemized one deduction of $40.08 for water. Interest in the amount of $1.00 was credited to the deposit. The statement did not include notice of petitioners' right to appeal the withholding to this Board.

6. Respondent returned $3,160.92 of the deposit to Laurel Hebert in one check made payable to: Kate Burba + Nicole Irizarry + Rebecca Shams + Laurel Hebert + Meg Trogolo + Olivia Lopez. Petitioners had requested that one check be sent to, and made payable to, Laurel Hebert and she would distribute it among all the other tenants. Petitioners disputed the way in which the deposit was returned to them, claiming that they were unable to deposit or cash the check because it was made payable to all of them using the connector "+" and they no longer all live in Burlington. In support of their argument, petitioners submitted written statements from 2 banks, People's United Bank and Citizens Bank. People's United wrote, "Check 112 written with "+" would require all parties in the "Pay to Order line" to sign the back of the check and be present to deposit or Cash." The written statement from Citizens Bank indicated that a check showing multiple payees joined by the word "and" or "&" requires the endorsement of all payees. As long as all payees' endorsements are verified, Citizens Bank indicated a check could be cashed or deposited into payees' joint account or deposited into one of the payee's individual account; both payees are not required to be present as long as the check is endorsed by both payees and both endorsements can be verified. If all payees' endorsements cannot be verified or if all payees did not endorse the check, the bank stated a check could only be deposited into an account titled with all payees' names. When petitioners asked respondent to write out a new check made payable to just one of them, she refused; she stated they could cash the check when they were all back in Burlington or they could meet someplace to sign the check and then cash it.

7. Respondent testified that when she met with petitioners on May 24, 2020 she was laughed at, mocked and harassed by petitioners. Respondent also testified that Laurel Hebert waved a paper in her face, demanding that respondent sign it. Petitioners denied respondent's characterization of their meeting. As a result of the May 24 meeting, respondent testified she was afraid petitioners would take some kind of legal action against her and felt she had to protect herself. Consequently, when she returned the deposit, she returned it in one check made payable to all the tenants. Although respondent's normal practice is to divide the deposit return among all the tenants and send them separate checks, she did not do so in petitioners' case because she felt the need to protect herself and she did not like petitioners' attitude towards her. When asked why she was unwilling to write a new check (payable to one tenant) she stated she was not sure she was required to do so even though she was told repeatedly by petitioners that they could not deposit or cash it.

8. Petitioners also requested that the Board award them double damages because respondent willfully withheld the deposit. Petitioners argued that respondent's unwillingness to give them a check that could be deposited or cashed demonstrated her willful withholding of the deposit.

Conclusions of Law

9. The City of Burlington's security deposit ordinance, Minimum Housing Code Sec. 18-120, took effect April 10, 1986 and governs any rental arrangements for dwelling units in the City of Burlington entered into or renewed after that date.

10. The State of Vermont's Landlord and Tenant Act, now codified at 9 V.S.A. Sec. 4451-68, applies to rental agreements for residential property entered into, extended or renewed

on or after July 1, 1986. Its terms are to "be implied in all rental agreements" to which it is applicable. 9 V.S.A. Sec. 4453.

11. Under the city ordinance, as well as state law (the terms of which must be implied in the parties' rental agreement), a landlord must return the security deposit to a tenant within 14 days from the date on which the tenant vacated or abandoned the dwelling unit, with a written statement itemizing any deductions. City ordinance also provides that the written statement must inform the tenant of the opportunity to request a hearing before the Burlington Housing Board of Review within 30 days of receipt of the landlord's written statement. Minimum Housing Code Sec. 18-120(c). The statement and any payment must be hand-delivered or sent by mail. Minimum Housing Code Sec. 18-120(c). If a landlord fails to return the deposit with a statement within 14 days, the landlord forfeits the right to withhold any portion of the security deposit. See, Minimum Housing Code Sec. 18-120(c) and 9 V.S.A. Sec. 4461(e).

12. A landlord who decides to retain all or part of a security deposit must comply with 3 specific requirements of the ordinance: the deposit must be returned within 14 days of the date the tenant vacated or abandoned the rental unit with a written statement itemizing any deductions; the statement must contain notice of the tenant's right to appeal to the Housing Board of Review; and the statement must be hand-delivered or sent by certified mail.[1] See *Lieberman v. Circe*, No. S21-13 Cncv (Crawford, J., March 27, 2013) and Minimum Housing Code Sec. 18-120(c). The Vermont Supreme Court required the literal enforcement of these requirements in *In re Soon Kwon*, 189 Vt 598 (2011). Accordingly, a landlord who fails to meet all of these requirements forfeits the security deposit. In this case, respondent failed to comply with the notice requirements by failing to include petitioner's appeal rights in the statement.

[1]An amendment to Sec. 18-120(c) removing the "certified mail" requirement took effect on January 7, 2015.

Therefore, the Board concludes respondent forfeited the right to withhold any part of the deposit.

13. With respect to the manner in which the deposit was returned (a check made payable to all the tenants), petitioners argue they are unable to cash or deposit the check. While at least one bank indicated the check could be cashed or deposited as long as it was endorsed by all the payees and all payees' endorsements were verified, several factors arising out the COVID-19 pandemic - from travel and business restrictions to significant postal service delays and public health dangers - rendered such a scenario exceedingly difficult. Indeed, petitioners demonstrated multiple unsuccessful attempts to access the funds owed to them. It was as if the check were sent to the petitioners in a steel safe for which they had been given no key or combination. Therefore, the majority of the Board is of the opinion that petitioners were effectively unable to cash or deposit the check because they no longer live in Burlington; they could not travel to one place in order to sign a check; and attempting to do so could have posed serious risks to public and personal health. In addition, since respondent did not provide notice of petitioners' appeal rights, she forfeited the right to withhold money from the deposit for the water charge. Consequently, the Board will order that a new check be issued for the entire amount of the deposit; petitioners will be ordered to return the check made payable to all of them to respondent.

14. Petitioners have also moved for double damages, alleging that respondent's failure to return their security deposit in a manner in which they could cash or deposit was willful. If the failure to return a security deposit with a statement within 14 days is willful, the landlord is liable for double the amount wrongfully withheld. Minimum Housing Code Sec. 18-120(c) and 9 V.S.A. Sec. 4461(e). As the Superior Court has recently held, "willful" for purposes of the ordinances can mean violating the ordinance by design, by intention, or by being obstinate or indifferent to the requirements of the law. Harrington v. McCauley, 1095-12-19 Cncv, slip op. at

1-2 (Vt. Sup. Ct. Feb. 4, 2020). Respondent is aware of the obligation to return a deposit. When petitioners told her they were unable to deposit or cash the check and asked her to reissue a check made payable to one of them, she refused. Instead, she suggested they could all meet someplace to sign the check. Petitioners repeatedly told her they were unable to deposit or cash the check. In her materials submitted to the Board, respondent has included an unsigned form (Appendix J: Return of the Security Deposit Agreement) which seeks a written commitment from the tenants that they "agree to accept a check for [amount left blank] as a fair and just amount on the return of my security deposit at [address left blank]. I and the other tenants will not take legal action against Martha R. Lang. I agree to distribute this money to the other tenants who signed the lease." Not only did the respondent omit notice of the petitioners right to appeal the withholding to the Board in her security deposit transmittal, she went a step further in demanding that they sign away their legal rights to appeal in order to receive the security deposit in the amount offered. This "Return of the Security Deposit Agreement" also suggests that the respondent's routine practice is to return the deposit to one tenant for distribution to the others ("I agree to distribute this money to the other tenants who signed the lease.") In this case, the agreement was not signed, and the respondent then retaliated by creating a significantly burdensome means by which to obtain funds owed, all in the context of a worldwide pandemic with particularly devastating impacts in the states where the tenants now reside. The practice of conditioning receipt of a security deposit upon acceptance of an agreement not to legally challenge the amount or manner in which it is provided by a landlord constitutes a serious undermining of the basic protections afforded to tenants under the City of Burlington ordinance and Vermont state law with respect to security deposits. When coupled with the failure to notify tenants of their right to appeal to this Board, this sort of agreement serves only to further obscure

a tenant's right to disagree with the landlord's decision and the process through which to do it, seemingly by design. The Board concludes respondent's actions with respect to the return of the deposit demonstrate were willful.

Order

Accordingly, it is hereby ORDERED:

15. Petitioners shall return to respondent Martha Lang check #112 make payable to all of them in the amount of $3,160.92

16. Petitioners are entitled to recover from respondent Martha Lang the following amounts:

a) $3,201.00 of the security deposit improperly withheld after June 7, 2020.

b) $3200.00, double the amount of the security deposit willfully withheld; and

c) Additional interest of $0.002 per day from June 8, 2020 until such date as the amount improperly withheld is returned to petitioners.

17. Respondent shall comply with this order in one of two ways: either by issuing a check made payable to Laurel Hebert, the person designated by the tenants to receive the return of the deposit, who will then be responsible for distributing a share to each of the other tenants **OR** by issuing individual checks to each petitioner for an equal share of the amount ordered to be returned.

DATED at Burlington, Vermont this 8th day of September, 2020.

CITY OF BURLINGTON
HOUSING BOARD OF REVIEW

/s/ Patrick Murphy
Patrick Murphy

/s/ Charlie Gliserman
Charlie Gliserman

I respectfully dissent from the Board's conclusion that the Landlord willfully withheld the security deposit within the meaning of Burlington's security deposit ordinance, thereby entitling the Tenants to double damages. I agree with the rest of my colleagues' well-reasoned decision.

To be clear, I find the Landlord's decision not to cooperate with the Tenants' request to be petty, unprofessional, and reckless. Dr. Lang's decision to write the check as she did—requiring all the Tenants to gather together again at a bank to sign the check, so signatures could be verified, after all had ceased living together—was undoubtedly made so it would be hard for the Tenants to get their money back. The Landlord did not provide the Board with a business or legal reason for doing this, and in fact said that her usual business practice is to write separate checks to her tenants. I am left to conclude the Landlord wrote the check this way to spite the Tenants after their May 24 meeting. And the Landlord did this in the context of the ongoing novel coronavirus pandemic, which has made gathering in groups indoors, such as at a bank, dangerous and a violation of the law in some places. The Landlord wrote the check in early June, nearly three months after a state of emergency had been declared by Governor Scott, a time by which the Landlord ought to have known not only the danger of asking the Tenants to gather together, but also that it was unlikely that they could. The Landlord's actions display disregard for the risk to the Tenant's well-being and a clear attempt to make it as difficult as possible for the Tenants to get their money back.

While I think the Landlord's conduct was low, I cannot say that it meets the standard for double damages. We have awarded double damages in cases where landlords have been indifferent or obstinate to their legal obligations, choosing to violate the ordinance even though they know or should know better. See *Bennum & Alexander v. Harrington* (Burl. Housing Bd. of Rev. Mar. 6,

2020)[2] and *Paris, et al v. Kwon* (Burl. Housing Bd. of Rev. Sept. 17, 2019).[3] Although the Landlord made it difficult for the Tenants to cash the check, I cannot say that the Landlord intended to evade or disregard her legal obligations altogether. The banks the Tenants have consulted said that the check is cashable, although doing so is difficult. Because the Landlord returned the deposit, albeit in a form that is hard for the Tenants to cash,[4] I am therefore not convinced that the Landlord failed to return the deposit, and if she did fail, that the failure was willful. I would not award double damages.

/s/ Joshua S. O'Hara
Joshua S. O'Hara
Board Chair

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[2] Available at https://www.burlingtonvt.gov/sites/default/files/Agendas/SupportingDocuments/Bennum%20%26%20Alexander%20v%20Harrington.pdf (last visited Aug. 25, 2020).

[3] Available at https://www.burlingtonvt.gov/sites/default/files/Agendas/SupportingDocuments/Paris%20et%20al%20v.%20Kwon.pdf (last visited Aug. 25, 2020).

[4] In recent months, the Board has seen disputes over the ways parties make rent payments and security-deposit returns. Here, it is how a check was written, and in other cases, the disputes have been about electronic payments versus paper checks, and whether the paying party should have used one form or another. In the absence of a lease term or some other agreement, I am reluctant to have the Board spell out how people should pay each other. The parties should be able to work that out on their own, with a case like this being the exception.