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CITY ATTORNEY

REPORT NO. R 20 - 0 1 0 9
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**PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION**

CONFIDENTIAL REPORT RE:

**MOTIONS PROVIDING TENANT PROTECTIONS DURING
COVID-19 EMERGENCY DECLARATION**

The Honorable City Council
of the City of Los Angeles
Room 395, City Hall
200 North Spring Street
Los Angeles, California 90012

Council File No. 20-0404, 20-0407, 20-409, 20-0147-S19

Honorable Members:

On April 7, 2020, the City Council introduced multiple COVID-19 housing-related motions, some of which requested our Office to draft ordinances for Council's consideration. Our Office recognizes the unprecedented challenges and issues faced by the City and its leadership during this emergency and is committed to assisting in every way possible, including interpreting the Council's authority as broadly as legally possible. However, some of the requested ordinances raise significant legal concerns and may expose the City to significant liability. These requests include to:

1. Prohibit any owner or property manager from terminating a tenancy, serving a notice to terminate a tenancy, or using lockouts or utility shutoff to terminate a tenancy, or otherwise evict a residential tenant, except to protect the health and safety of other occupants of the property;

2. Freeze rent increases on all residential rental units;
3. Classify unpaid rent as consumer debt, and not subject to the unlawful detainer process; and,
4. Amend the new Article 14.6 of the Los Angeles Municipal Code (LAMC) that offers temporary tenant protections by moving the deadline for a tenant to notify his or her landlord of an intended non-payment of rent for April 2020 and to include penalties for landlords who violate provisions of the ordinance's regulations regarding repayment of rent and/or the establishment of rent repayment agreements amounting to \$500 for the first offense and a misdemeanor for subsequent offenses.

Eviction Prohibitions

With respect to the first request, the motion calls for a prohibition of any eviction during the COVID-19 State of Emergency regardless of the reason other than for imminent health and safety of other occupants of the property.

The City recently enacted Article 14.6 of the LAMC, which during the local emergency period prohibits all no-fault evictions and most at-fault evictions. However, this new law still affords a landlord the right to evict a tenant: (1) when the tenant has not paid rent for reasons unrelated to COVID-19; (2) when the tenant has destroyed the property; or (3) when the tenant has engaged in criminal activity at the property.

On April 6, 2020, the California Judicial Council adopted Emergency Rules applicable to courts statewide that effectively suspend unlawful detainer and foreclosure actions during the California State of Emergency and for a period of 90 days after the emergency is lifted. The only exception is for an eviction necessary to protect public health and safety. Under these rules, a landlord may still file an unlawful detainer action but the landlord will *not* be able to serve the summons and complaint on the tenant for at least 90 days after the expiration of the California State of Emergency. Thus, tenants and homeowners should have no fear of being evicted during the pandemic and for a period of at least 90 days thereafter.

Therefore, the combined effect of the City's new law and the Judicial Council's Emergency Rules provide robust protections for tenants related to the COVID-19 emergency, including enabling tenants to remain in their homes during the period of the emergency, and for at least 90 days thereafter.

The blanket eviction prohibition called for by the motion goes further by eliminating all lawful reasons for an eviction. Thus, for example, a landlord would have no eviction recourse against tenants who damage their apartments or engage in criminal activity from their apartments during the period of the emergency. So, even

when the Judicial Council's Emergency Rules are lifted, a tenant's prior bad conduct during the emergency may not form the basis for an eviction. This broad reprieve would likely exceed the City's police powers and subject the City to legal liability. Although the City generally has the authority to regulate the basis for an eviction, the City's exercise of its police powers must be reasonably related to a legitimate government purpose, in this instance the current COVID-19 pandemic. Stated another way, any eviction protection that the City enacts must be reasonably tied to the pandemic; a broad eviction prohibition that bears no relationship with the emergency would likely not withstand legal challenge. Further, the Constitution prohibits regulations that would substantially impair a contract by undermining the bargain between the parties and interfering with a party's reasonable expectations under their contract. Here, a broad eviction prohibition substantially interferes with private contractual rights by thwarting a landlord's right to pursue an otherwise lawful eviction for reasons unrelated to COVID-19.

Further, Governor Newsom's Executive Order N-28-20 from March 16, 2020, and Executive Order N-37-20 from March 27, 2020, likely preempt the City's ability to enact such a blanket eviction moratorium. Executive Order N-28-20 suspends state law that would otherwise preempt cities from prohibiting evictions based on non-payment of rent but *only* to the extent that the tenant can show the ability to pay rent has been affected by the emergency in some way.

Moreover, state law expressly regulates the eviction process and therefore the City is preempted from altering state law by prohibiting service of an eviction notice. An ordinance that prevents the service of an eviction notice would likely be enjoined through a temporary restraining order.

Finally, a landlord shutting off utilities and replacing locks to evict a tenant is already illegal under state and local law. A tenant experiencing such illegal self-help conduct may contact law enforcement or the Los Angeles Housing and Community Investment Department for further assistance.

Rent Freezes on All Residential Rental Properties

In the second request, the motion calls for an ordinance to prohibit rent increases in the City for *all* residential rental properties. As the motion notes, on March 30, 2020, the Mayor prohibited rent increases on the approximately 600,000 units subject to the City's Rent Stabilization Ordinance (RSO) through 60 days after the local emergency. For the approximately 138,000 non-RSO properties constructed between 1978 and 2005, Assembly Bill 1482 (AB 1482) caps any rent increase at 5 percent, plus the change in the consumer price index, up to a maximum of 10 percent. Any tenant who is not already protected by these two laws is protected by the anti-price gouging statute, Penal Code Section 396, which prevents rental increases of more than 10 percent during a declared state or local emergency.

The motion calls for a moratorium on *all* rent increases, and thus seeks to prevent rent increases on units not subject to the RSO. The state's Costa-Hawkins Rental Housing Act (Costa Hawkins) prevents the City from regulating rents of properties that are not subject to the RSO (i.e., buildings constructed after 1978). In order to enact the ordinance called for by the motion, the Governor or the state legislature must first order a suspension of Costa-Hawkins. Otherwise, such an ordinance is preempted and will likely be enjoined by a court through a temporary restraining order. We note that to the best of our knowledge, no municipality in California has prohibited rent increases on all residential rental properties.

The motion does not explicitly call for eliminating all rent otherwise due during the emergency, which some people refer to as "rent forgiveness." But we call this issue to your attention because such an action would violate the law. A local government may not deprive property owners of their right to compensation for use of their property. Further, a local government may not single out a property owner to bear a burden that should be borne by the public as a whole. Therefore, in order for the City to forgive rents during the period of emergency, the City must pay a property owner just compensation. Given that the City has over a million rental units, this compensation could exceed one billion dollars.

Although we are aware of no municipality that has eliminated rents during the emergency, we understand that the City of San Jose considered such a motion to eliminate rents for 90 days. The motion failed to pass based on, among other things, concerns that such an action would violate the Constitution. The San Jose City Attorney opined that: (1) local entities are preempted by Costa Hawkins from regulating rent on properties that are not subject to a local price control; and (2) rent suspension would likely exceed a local entity's police powers and violate the Constitution. The San Jose City Attorney concluded that the motion if adopted would subject the City to "significant legal exposure." This Office concurs with that analysis.

Reclassification of Unpaid Rent

With respect to the third request, the motion seeks to classify rent that was unpaid during the local emergency as "consumer debt, [and] not subject to the unlawful detainer process." Unpaid rent is already treated as consumer debt under law.

When a tenant fails to pay rent, a landlord may seek to evict the tenant through the filing of a complaint in court. If the landlord proves her case in court, a civil judgment is awarded to the landlord that may include the amount of the past owed rent. After a judgment is entered, a landlord would seek to enforce the judgment through a legal debt collection process, such as garnishing wages. This eviction process is regulated by state law. The City is preempted from trying to alter this process.

Amendments to Ordinance No. 186585

The fourth motion requests that the City Attorney draft a new ordinance to amend Ordinance No. 186585, which is the recently enacted Article 14.6 of the LAMC that provides temporary protections to tenants during the pandemic. The amendment would “move the deadline for a tenant to notify his or her landlord of an intended non-payment of rent for April 2020 and to include penalties for landlords who violate provisions of the ordinance’s regulations regarding repayment of rent and/or the establishment of rent repayment agreements amounting to \$500 for the first offense and a misdemeanor for subsequent offenses.”

Governor Newsom’s Executive Order N-37-20 issued on March 27, 2020, expressly requires a tenant who is unable to pay rent due to COVID-19 to give written notice to the landlord “not to exceed 7 days” after rent is otherwise due. No municipality can extend the deadline in the Governor’s Executive Order.

With respect to the second part of the request, the City’s new law provides that a tenant has 12 months to pay unpaid rent accrued during the local emergency, and states that a landlord may not evict a tenant for nonpayment of rent during the period of emergency or for failing to repay the back rent due during the 12 month repayment period. The law also acknowledges that a landlord and tenant may mutually agree to a plan for repayment of unpaid rent. If a landlord does not adhere to the new law with respect to accepting deferred rent, the law affords the tenant with an affirmative defense in an eviction proceeding, and a landlord who violates the ordinance may be charged with a misdemeanor. However, under the new law, the agreement of a repayment plan is voluntary, both for the landlord and the tenant, and therefore the City could not impose any penalty for failure to exercise that option.

If you have questions regarding this matter, please contact Assistant City Attorney Craig Takenaka at (213) 922-7715.

Sincerely,

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By 
For DAVID MICHAELSON
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