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May 22, 2020

Berkeley City Council
2180 Milvia Street
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SENT VIA EMAIL ONLY

Re: City of Berkeley Ordinance No. 7,693-N.S., Administrative Regulation No. 10.3, and proposed amendments

Dear Berkeley City Council:

We represent the Berkeley Rental Housing Coalition ("BRHC"), a non-profit organization located in Berkeley, California, which advocates for the rights of housing providers in Berkeley. On March 17, 2020, the Berkeley City Council (the "City") adopted Ordinance No. 7,693-N.S. (the "Ordinance"), followed by related Administrative Regulation No. 10.3 (the Regulation") on April 3, 2020. The Ordinance and Regulation unlawfully amend a voter-enacted initiative and purport to restrict residential landlords from accessing unlawful detainer procedures for tenants' failure to pay their rent due to COVID-19 related reasons, during the relevant timeframe in the Ordinance. In doing so, the Ordinance and Regulation violate constitutional and state law, conflict with Governor Newsom's Executive Order on preemption and tenancy terminations, and, as drafted, will ultimately lead to more tenancies being terminated. We understand that on May 26, 2020, the City will consider further amendments to the Ordinance in an attempt to align it with Alameda's recently enacted urgency ordinance, Ordinance No. O-2020-23 (the "Alameda Ordinance"). These proposed amendments only exacerbate the current illegality of the Ordinance, and do so principally by making the already-flawed, temporary restrictions on the collection of unpaid rent into permanent ones of even greater concern. BRHC respectfully urges the City to reject these newly proposed amendments and to rescind and/or amend the Ordinance and Regulation to eliminate the legal deficiencies as outlined below.

The Ordinance and Regulation

First, the Ordinance and Regulation provide that a landlord may not seek to terminate the tenancy of a tenant who fails to pay their rent due to a COVID-19 related reason during the "local State of Emergency." The Ordinance contains no expiration date, but the Regulation states that it "shall terminate one (1) year after the expiration of the local State of Emergency." It is not clear

whether the prohibition is intended to apply for the period that the Regulation is in effect, or if it is intended to be a permanent prohibition. Either way, the City does not have the legal authority to deprive landlords of their unlawful detainer ("UD") rights, either for the extended period of time as set forth under the Regulation, or permanently. The Ordinance purports to derive authority from the Governor's Executive Order and the California Emergency Services Act (the "ESA"). Neither the Governor's Order nor the ESA grant such authority to the City .

On March 3, 2020, the City declared a local state of emergency ("local State of Emergency"), which was ratified on March 10, 2020 via Resolution No. 69,312-N.S. The local State of Emergency was made pursuant to the ESA, sections 8558(c) (defining "local emergency") and 8630 (requiring review of the local emergency every 60 days). The local State of Emergency has no stated expiration date.

On March 16, 2020, Governor Newsom signed Executive Order N-28-20 (the "Order") pursuant to the ESA. The Order permits a locality to temporarily limit actions for non-payment of rent due to the COVID-19 crisis—specifically, *through May 31, 2020*. In pertinent part, the Order provides:

> 1) The time limitation set forth in Penal Code section 396, subdivision (f), concerning protections against residential eviction, is hereby waived. Those protections shall be in effect **through May 31, 2020**.
> . . . .
>
> 2) Any provision of state law that would preempt or otherwise restrict a local government's exercise of its police power to impose substantive limitations on . . . evictions . . . is **hereby suspended** to the extent that it would preempt or otherwise restrict such exercise . . . . [T]he statutory cause of action for unlawful detainer, Code of Civil Procedure section 1161 et seq., and any other statutory cause of action that could be used to evict or otherwise eject a residential . . . . tenant . . . **is suspended** only as applied to any tenancy . . . to which a local government has imposed a limitation on eviction pursuant to this paragraph 2, and only to the extent of the limitation imposed by the local government. **Nothing in this Order shall** relieve a tenant of the obligation to pay rent, nor **restrict a landlord's ability to recover rent due**.
>
> The protections in this paragraph 2 **shall be in effect through May 31, 2020, unless extended**.

(Order, emphasis added.) That is, the Order allows municipalities to delay access to unlawful detainer procedures for a *two-month period* (unless extended). It does not allow a municipality to

either permanently prohibit those proceedings, nor to prohibit them for over year, as the Ordinance and Regulation appear to permit. Instead it specifically provides that it does *not* restrict a landlord's ability to recover unpaid rents.

The Order derives its authority from the ESA. The ESA in part permits the Governor, during a state of emergency, to "suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency . . . where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency." (Gov. Code § 8571, emph. add.) The Order, under the authority of the ESA, permits local government to temporarily restrict some unlawful detainer procedures due to the COVID-19 crisis for a period of *two months*, including those based upon non-payment of rent. It does so by "suspending" the application of eviction statutes during the time the Order is in place.

Unlike the Order, the Ordinance and Regulation appear to provide that a landlord may not exercise the remedy of UD action to obtain unpaid rent—either ever, or for an unlawfully extended period of time of over twelve months—if the rent was unpaid for a COVID-19 related reason during the local State of Emergency (the "COVID-19 Period"). In other words, the Ordinance and Regulation prevent a landlord from terminating a tenancy for failure to pay rent incurred during the COVID-19 Period—even when the tenant fails to pay the past-due rent *after* the COVID-19 Period ends. Neither the Order, nor the ESA authorize the City to deprive housing providers of such rights. Rather, the ESA authorizes only a temporary suspension of landlords' rights to use the UD remedy—i.e. through the COVID-19 Period *only*. (Also see, *In re Juan C.* (1994) 28 Cal.App.4th 1093, 1101 [finding local curfew imposed under ESA constitutional because it was imposed "only so long as an emergency exists"].) In doing so, the Ordinance and Regulation exceed the authority granted to the City by the Governor's Order and the ESA. Further, the Order unambiguously states: **"Nothing in this Order shall . . . restrict a landlord's ability to recover rent due."** By purporting to "restrict a landlord's ability to recover rent due" via the UD process, the Ordinance and Regulation directly conflict with the Governor's Order and the ESA.

Since the Ordinance and Regulation conflict with the Order and the ESA, they are in conflict with, and preempted by, California's UD statutes. While local government's police powers are broad, they are not so broad as to permit enactment of ordinances that conflict with general laws. (Cal. Const. Art. XI, § 7) The specific purpose of a UD action is to provide landlords a summary proceeding for recovery of possession of their properties based (in part) on any unpaid rent. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 149-151.) Additional procedural requirements imposed by local government that are not found in the UD statutes raise impermissible procedural barriers between landlords and that judicial proceeding. (*Ibid*.) Here, the City is not only imposing an additional procedural 'requirement' on the UD process, it is

depriving landlords of that process to recover unpaid rents and possession of their property in certain circumstances.

Further, the Regulation purports to require landlords to petition to a 'City designee' for the right to evict their tenants for non-payment—a clear procedural hurdle on the UD procedure. If the landlord attempts to recover such rents through the filing of a UD action without obtaining City permission first, the Ordinance subjects the landlord to civil, and potentially criminal, penalties. The Ordinance is inimical to the purpose of the UD statutes and goes beyond the City's police power into a field that is fully occupied by the state. (See, *San Diego Gas & Electric Co. v. City of Carlsbad* (1998) 64 Cal.App.4th 785, 802.) This deprivation is not within the City's police powers, is in violation of the ESA, and is preempted by the UD statutes. The California Supreme Court reached the same conclusion in *Birkenfeld* when Berkeley sought to require landlords to obtain 'certificates of eviction' from it before pursuing their state law unlawful detainer rights. (17 Cal.3d at 151-152) The process proposed here is virtually identical, and because of the conflict it creates with "state statutes that fully occupy the field of landlord's possessory remedies," it is preempted.

Second, by prohibiting landlords from evicting tenants who fail to pay their rent during the COVID-19 Period, the Ordinance and Regulation unlawfully amend Berkeley Rent Stabilization and Eviction for Good Cause Ordinance ("Rent Ordinance") Section 13.76.130(A)(1) ("§ 13.76.130(A)(1)"). Section 13.76.130(A)(1) provides that a landlord may evict a tenant who fails to pay their rent. The Rent Ordinance, including § 13.76.130(A)(1), was enacted pursuant to a voter initiative, and therefore may only be amended by the electorate. (Charter of the City of Berkeley Chpt. 46 § 92, Art XIII(9) ["An ordinance or charter amendment proposed by petition, or adopted by a vote of the people, cannot be repealed or amended except by a vote of the people']; Elec. Code § 9217; Cal. Const. Art. II § 10; *Tesoro Logistic Operations, LLC v. City of Rialto* (2019) 40 Cal. App. 5th 798, 802, *review denied* (Jan. 15, 2020).) While the Rent Ordinance provides the Berkeley Rent Board certain powers and duties, those powers and duties shall only be "necessary to carry out the purposes of [the Rent Ordinance] which are not inconsistent with the [Rent Ordinance]." (Rent Ordinance § 13.76.060(F)(17).) The Ordinance and Regulation are inconsistent with § 13.76.130(A)(1) because they prohibit what § 13.76.130(A)(1) permits, and thus violate local, state, and constitutional law.

Third, the Ordinance and Regulation violate due process, and perpetrate unconstitutional takings of private property on their face.[1] The Ordinance and Regulation devalue landlords' properties by not permitting landlords to use the summary UD procedure to recover possession of their properties despite continued nonpayment of rents. This necessarily means that landlords will be required to invoke the more arduous civil debt recovery process to attempt to remediate the

[1] Thus, the Ordinance and Regulation's "waiver" procedure does not save the Ordinance.

nonpayment issue, even though landlords did not cause the problem to which tenants may now be exposed. (*Levin v. City and County of San Francisco* (2014) 71 F.Supp.3d 1072; *Nollan v. California Coastal Com'n* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374.) Further, as enacted and drafted, the Ordinance will unlawfully force property owners to accept occupants on their property without compensation. (See, *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 435.)

Since the enactment of the Ordinance and Regulation, landlords have already been informed by numerous residents of an inability to pay April and/or May rent. Attempted recovery of months of rent through a judicial collection process (*many* months, assuming the local State of Emergency continues without termination), while at the same time being forbidden from recovering ones property on the basis of this unpaid rent, will result in extensive hardship and injury to landlords. In hampering the ability to recover past-due rent—either for over one year or permanently—the Ordinance and Regulation devalue rental properties across the City without paying just compensation. The fact that the Ordinance and Regulation were meant to advance a public interest is irrelevant to the City's liability for damages stemming from their impact.

Finally, and perhaps most troubling, is the Ordinance and Regulation's potential to *increase* the number of evictions after the COVID-19 crisis ends. The Ordinance and Regulation have provided tenants the ability to ignore their contractual obligations during the course of the COVID-19 Period and for six months thereafter. By purporting to prohibit evictions for nonpayment of rent, the invalid Ordinance and Regulation will induce countless tenants to stop paying rent during the COVID-19 Period and to not save for repayment, because the Ordinance and Regulation in effect promises tenants that they'll either never need to pay the past-due rent they owe, or only after a year-plus down the road. When the courts ultimately determine that the Ordinance and Regulation are illegal and void, landlords will exercise their UD rights—but in reliance on the Ordinance and Regulation, tenants will not have set funds aside to repay their past-due rent.

The City's Proposed Amendments to the Ordinance

Notwithstanding the above-identified legal deficiencies, the City is considering further amendments to the Ordinance in an attempt to align it with the equally infirm Alameda Ordinance.[2] While it is unclear whether the current Ordinance and Regulation permanently ban evictions for certain non-payment cases, or if they ban them for a year after the local State of Emergency is over, the proposed amendments plainly make such eviction prohibition permanent, providing that

[2] BRHC has objected to the Alameda Ordinance by way of letter to the Alameda Board of Supervisors, sent on May 11, 2020.

such nonpayment may be a "complete defense" to an eviction action. As noted above, such prohibition serves as an unlawful procedural hurdle to the UD statutes.

Moreover, the proposed amendments' extension of time to allow rent repayments for a period of twelve months after the local State of Emergency, rather than the six months as provided for in the (current) Regulation, further impacts landlords ability to collect these rents—especially since it appears that the landlord will have to *wait* the full twelve months *before* bringing collection efforts. In further hampering the ability to recover past-due rent, the proposed amendments would further devalue rental properties across the County without paying just compensation.

The Recommendation of Councilmember Kate Harrison in support of the proposed amendments provides that: "The proposed amended ordinance also allows a sworn statement attesting to the existence of a COVID-19 impact as acceptable documentation." The proposed amendments in the Ordinance appear silent on this issue, but, assuming that this is so, a presumption that a "sworn statement" meets a tenant's obligation under the proposed amendments impermissibly heightens the burden of proof for the landlord in a UD action. The parties to a UD action are required prove their case or defense by a preponderance of evidence. Under the preponderance of evidence standard, "the parties to an action share the risk of an erroneous determination more or less equally" and "*any other standard* expresses a preference for one side's interests.' " (*In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578, 1589, emph. add..) By permitting a tenant to prove their defense to a UD simply by "attesting" to facts concerning their lack of employment or Covid-19-related medical condition, this presumption expresses preference for the *tenant* because the landlord will have the near-impossible task of obtaining such records from the tenant or third parties. Any such records would indisputably be subject to the tenant's privacy objections, which the landlord would then be required to show a compelling need to justify production. (See, *Pettus v. Cole* (1996) 49 Cal.App.4th 402, 458-461; Cal. Const. Art. 1, § 1.) Given this extraordinary burden placed on the landlord, the landlord is, in effect, prevented from introducing contradictory evidence and/or effectively cross-examining the tenant, in violation of the due process and confrontation clauses of the U.S. and California constitutions.

The proposed amendments will also create an even greater risk of unlawful detainer proceedings, and of litigation generally, by permitting an affected tenant to produce evidence of their financial situation at the later of 45 days after request from the landlord or 30 days after expiration of the local State of Emergency. By so doing, landlords are left to speculate as to the reasons for the tenant's non-payment of rent, thereby increasing the likelihood of them filing appropriate actions to collect unpaid sums before the tenant is even arguably obligated to demonstrate the reason(s). Given the financial strain many landlords face by virtue of a tenant's non-payment of rent, the commencement of many legal proceedings would be expected were Berkeley to adopt this as the rule. Pursuant to the forgoing, the Ordinance and Regulation are patently illegal laws that expose the City to significant liability and will ultimately bring harm to

both landlords and tenants, and the proposed amendments only further compound these problems. BRHC respectfully urges the City to rescind and/or amend the Ordinance and Regulation to eliminate the legal deficiencies outlined herein, and reject the proposed amendments for the reasons outlined above.

Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC

/s/ Emily L. Brough
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