Fisher Broyles

Paul Beard II
Partner
paul.beard@fisherbroyles.com
Direct: 818-216-3988
4470 W. Sunset Blvd., Suite 93165
Los Angeles, CA 90027
www.FisherBroyles.com

April 28, 2021

VIA EMAIL

Supervisor Nora Vargas (nora.vargas@sdcounty.ca.gov)
Supervisor Joel Anderson (joel.anderson@sdcounty.ca.gov)
Supervisor Terra Lawson-Remer (terra.lawsonremer@sdcounty.ca.gov)
Supervisor Nathan Fletcher (nathan.fletcher@sdcounty.ca.gov)
Supervisor Jim Desmond (jim.desmond@sdcounty.ca.gov)
Board of Supervisors for the County of San Diego

Re: May 4, 2021 Meeting, Item No. 26 (Ordinance To Violate Rental Housing Providers' Rights and Risk Tenants' Health & Safety)

Dear Supervisors,

On behalf of Southern California Rental Housing Association (SCRHA), we strongly urge you to **vote "NO" on Item No. 26**—an ordinance that would impose significant and unlawful burdens on the County's rental housing providers (hereinafter, the "Ordinance").

If the Ordinance is enacted, the County risks a costly and protracted civil rights challenge in federal court, at County taxpayers' expense.

I.
About SCRHA

Formerly known as the San Diego County Apartment Association, SCRHA is one of Southern California's leading trade associations. The Association is a 501(c)6 non-profit organization serving the needs of the rental housing industry in San Diego, Imperial, and southern Riverside Counties. The 2,200 members of SCRHA are individuals and companies who own, manage or provide products and services to more than 128,000 residential rental units, representing a significant portion of southern California's affordable housing stock. The mission of SCRHA is to protect rental housing and educate the industry.

II.
The Ordinance Is Unlawful

A. The Ordinance's Provisions Blocking Enforcement of Court Judgments Unconstitutionally Violate Rental Housing Providers' Due Process Rights

Section 3(c)(3) purports to retroactively block enforcement of final court judgments concerning eviction. This violates housing providers' due process rights.

The Due Process Clauses of the Federal and State Constitutions protect against deprivation of life, liberty, and property, without due process of law. (U.S. Const. amend. XIV (federal due process clause); Cal. Const., art. I, § 7). Significantly, "retroactive application of a statute may be unconstitutional if it is an ex post facto law, if it deprives a person of a vested right without due process of law, or if it impairs the obligation of a contract." (*Doe v. California Dept. of Justice*, 173 Cal. App. 4th 1095, 1106 (2009)). The term "vested" denotes a right that is either "already possessed" or "legitimately acquired." (*Id.*) "A right is vested when it is so perfected that it cannot be taken away by statute." (*Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288, 308). A final judgment confers a vested right on the prevailing party. (*County of San Diego Dept. of Child Support Services v. C.P.*, 34 Cal.App.5th 1, 9-10 (2019); *see also Governing Board v. Mann*, 18 Cal.3d 819, 822 (1977)).

Here, the Ordinance purports to block the enforcement of duly issued court judgments conferring the legal right on rental housing providers to repossess their properties, including by way of writs of possession. In other words, the Ordinance purports to retroactively nullify a vested right held by rental housing providers in violation of their due process rights.

B. The Ordinance's Bans on Evictions and Rent Increases Unconstitutionally Violate the Contracts Clause of the U.S. Constitution

The Contracts Clause of the United States Constitution prohibits local governments from passing "any . . . Law impairing the Obligation of Contracts." (U.S. Const., Art. I, §10, cl. 1). To determine whether a law violates the Contracts Clause, a court engages in a two-step inquiry. (*Sveen v. Melin* (2018) 138 S. Ct. 1815, 1821-22). First, a court will determine whether the law "operate[s] as a substantial impairment of a contractual relationship." (*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 244). "In answering that question, the Court has considered the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." (*Sveen*, 138 S. Ct. at 1822). Second, the court considers "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" (*Sveen*, 138 S. Ct. at 1822 (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 411-412)). Importantly, a law fails at the second step unless the contractual impairment it causes "was necessary to meet an important general social problem." (*Allied Structural*, 438 U.S. at 247).

Here, the Ordinance substantially impairs the obligations set forth in existing rental agreements, with no evidence that its provisions are "necessary to meet an important general social problem." The Ordinance purports to ban all evictions within the County, except if the rental housing provider can prove that the occupant "is an imminent health or safety threat." (*See* Ordinance, §3(c) (Moratorium Prohibiting Residential Eviction Without Just Cause)). "Imminent health and safety threat" is defined to include *only* a "hazard" to "other tenants or

occupants of the same property," and disregards the imminent threats that a tenant may present to the rental housing provider, his agents, or the property itself. (*Id.* § 2). The ban precludes a housing provider from terminating a tenancy on grounds common to all existing rental agreements, including a tenant's material breach. The Ordinance also purports to impose rent control, barring a rental housing provider—from the effective date of the law until July 1—to "increase a Tenant's rent by any amount greater than the CPI for the previous year." (*Id.* § 4 (Moratorium on Residential Rent Increases)).

The bans on evictions and rent increases *destroys*—not just "substantially impairs"—the contractual bargain that rental housing providers negotiate with their tenants, including the reasonable expectation that tenants will abide by the terms and conditions of the tenancy as stated in existing rental agreements.

Further, the ban is not "necessary to meet an important general social problem." (*Allied Structural*, 438 U.S. at 247). There is no evidence of widespread displacement of tenants by County housing providers. And, while the Ordinance cites the lack of "housing affordability" within the County, that is a problem that can be addressed through greater housing production and subsidies for renters—not just within the County, but within the State. Significantly, the affordability crisis is not a problem that housing providers caused or should be forced to bear the entire burden of. In addition, with the County moving into the orange tier of the State's COVID reopening system just days after the Board's April 6 meeting, the Ordinance's excuse that banning evictions is necessary to address COVID transmission rings hollow.

C. The Ordinance's Ban on Evictions Effects an Unconstitutional Taking

The Takings Clause of the Fifth Amendment to the United States Constitution prohibits the government from taking private property unless (a) it is for a "public use" and (b) "just compensation" is paid to the rental housing provider. (U.S. Const. amend. V, XIV; *see also Brown v. Legal Foundation of Washington* (2003) 538 U.S. 216, 231-32 (underscoring the Takings Clause's two separate requirements)). The Takings Clause was enshrined in the Constitution so that the government would not "force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States*, (1960) 364 U.S. 40, 49).

If the government "fails to meet the 'public use' requirement," then "that is the end of the inquiry," and "[n]o amount of compensation can authorize such action." (*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005)). A government taking of property for a private use or purpose is barred. As the United States Supreme Court has explained: "it has long been accepted that the sovereign" (i.e., the government) "may not take the property of A for the sole purpose of transferring it to B." (*Kelo v. City of New London*, 545 U.S. 469, 477; *Calder v. Bull*, 3 U.S. 386 (1798). (holding that "[i]t is against all reason and justice" to presume that the legislature has been entrusted with the power to enact "a law that takes property from A and gives it to B")).

"Nor would the [government] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." (*Kelo*, 545 U.S. at 478). If a taking is designed simply "to benefit a particular class of identifiable individuals," then the taking is not for a "public use" consistent with the Public Use Clause, and is therefore unconstitutional. (*Id.*) Significantly, takings with only an "incidental" public benefit "are forbidden by the Public Use Clause." (*Id.* at 490 (Kennedy, J., concurring); *see also Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419 (1982) (holding that a "taking" under the Takings Clause occurs even when, under the authority of law, "a stranger directly invades and occupies the owner's property" and does not pass to or through the government's hands)).

As described above, the Ordinance bans all evictions, except in the narrow case of a tenant who presents a "hazard" to other tenants or occupants of the same unit. A housing provider cannot remove a tenant for any other kind of behavior and cannot even repossess the unit for himself and/or his family. In sum, the ban all but eliminates or significantly burdens the provider's "rights to possess the property, to use the property, to exclude others from the property, and to dispose of the property by sale or by gift" (certainly not to any buyer wishing to live in the property). (*Bounds v. Superior Court*, 229 Cal. App. 4th 468, 479 (2014) (describing the "bundle of rights" possessed by a property owner in his private property)).

The ban violates the Takings Clause. First, the taking of a housing provider's property rights is not for a public use or purpose. The public does not occupy or use the rental housing units in question, and there is no broad, community-wide purpose or benefit to the ban. **To the contrary, the ban benefits only the private interests of a "a particular class of identifiable individuals"—namely, tenants**. As such, the ban violates the Public Use requirement of the Takings Clause.

Second, the taking goes uncompensated. The ban unduly restricts housing providers' full rights to use, enjoy, and dispose of their units pursuant to their existing rental agreements, in many cases causing providers to suffer extreme financial distress. Yet neither the County nor the Ordinance offers any compensation for that significant economic impact to housing providers. Not only does this violate the Compensation Clause, but it ignores the fundamental purpose of the clause, which is to ensure that the government does not "force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong*, 364 U.S. at 49).

D. The Ordinance's Provisions Concerning "Tenant Rights" Activities on Private Property Unconstitutionally Violate Housing Providers' First Amendment Rights and Effect an Unconstitutional Taking

The First Amendment to the U.S. Constitution protects against local laws that "abridg[e] the freedom of speech." (U.S. Const. amends. I & XIV (First Amendment protections apply as against state and local governments, as held in *Gitlow v. New York*, (1925) 268 U.S. 652 (1925) and *Stromberg v. California* (1931) 283 U.S. 359). Further, an overbroad regulation that sweeps too broadly, and

prohibits protected as well as unprotected speech, violates the First Amendment. (*Board of Trustees of State Univ. of N.Y. v. Fox* (1989) 492 U.S. 469, 483; *R. A. V. v. City of St. Paul* (1992) 505 U.S. 377). Similarly, a regulation that does not permit a reasonable person to distinguish between permissible and impermissible speech is unconstitutionally vague in violation of the First Amendment. (*Grayned v. City of Rockford* (1972) 408 U.S. 104).

In addition to the freedom of speech, the First Amendment also protects an individual's right "to petition the Government for a redress of grievances." The right of access to the courts—including, for example, to file suit against a tenant or a third-party trespasser—is encompassed within the First Amendment's broad protections. (*Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011) ("This Court's precedents confirm that the Petition Clause protects the right of individuals to appeal to courts and other forums established by the government for resolution of legal disputes.")).

Section 2 vaguely defines "imminent health or safety threat" to mean "a hazard to the health or safety of other tenants or occupants of the same property, taking into account (1) the risk of potential spread of coronavirus caused by the eviction, in case of a Local Emergency due to COVID-19, (2) any public health or safety risk caused by the eviction, and (3) all other remedies available to the landlord and other occupants of the property, against the nature and degree of health and safety risk posed by the tenant's activity." But the ordinance does not define "imminent" or "hazard," leaving a reasonable person to guess at the meaning and scope of the term "imminent health or safety threat"—and, therefore, the circumstances under which a unit can be lawfully repossessed under the Ordinance. The concept, as used in the ordinance, is unconstitutionally vague.

Moreover, Section 6 of the Ordinance bars a rental housing provider from "tak[ing] any adverse action against a Tenant" for any of the following reasons: "(1) the Tenant disseminated information about Tenant rights ordinances; (2) the Tenant disseminated information about a Tenant rights organization; or (3) the Tenant belonged to or participated in a Tenant rights organization." (See Ordinance, § 6). Section 6 is fatally unconstitutional.

First, the section is unconstitutionally overbroad and vague, in violation of housing providers' First Amendment rights. The section appears to prohibit even a provider's constitutionally protected *oral speech* that merely expresses disapproval of activities related to onsite dissemination of materials or organizing efforts—activities that the provider may reasonably conclude is disruptive of the peace and quiet of other tenants. It arguably also prohibits even speech that simply establishes reasonable time, place, and manner restrictions on tenants' disseminating and organizing activities on private property. Indeed, no reasonable person can ascertain precisely what speech or conduct is and is not barred by section 6.

Second, section 6 appears to endorse unlimited trespass by so-called "tenant rights" groups to proselytize and organize tenants on rental housing providers' properties. To that end, the law purports to eliminate a housing provider's right

to seek relief—from the courts or other government agency or official—in order to preclude such trespass. Thus, section 6 violates providers' right to petition the government (including courts) for a redress of their reasonable grievances.

Finally, to the extent the Ordinance purports to require housing providers to allow third-party trespassers onto their property, for whatever purpose, such a requirement effects an unconstitutional taking of a perpetual and unlimited easement without just compensation. (U.S. Const. amend. V (Takings Clause); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (state law prohibiting rental housing owner from excluding cable company to enter private property without consent, to install/maintain cable box, effected an uncompensated taking)).

E. The Ordinance Cannot Be Enacted on May 4 Consistent with State Law

The Board cannot enact the Ordinance on May 4, without running afoul of state law. Section 1179.05 of the Code of Civil Procedure prohibits "any" ordinance purporting "to protect tenants from eviction" from taking effect "before July 1, 2021." Yet, under section 25123 of the Government Code, "[a]ll ordinances shall become effective 30 days from the date of final passage." Cal. Gov. Code § 25123. Thus, the Ordinance—which purports to place a moratorium on "evictions"—cannot be lawfully enacted on May 4.

F. The Ordinance Does Not—and Cannot—Apply to Incorporated Areas of the County

In the "Applicability" section, the Ordinance unlawfully states that, pursuant to Government Code section 8634, its regulations apply even to incorporated areas (e.g., cities) of the County.

Section 8634 provides, in relevant part, that "[d]uring a local emergency the governing body of a political subdivision, or officials designated thereby, may promulgate orders and regulations necessary to provide for the protection of life and property, including orders or regulations imposing a curfew within designated boundaries where necessary to preserve the public order and safety." (Gov. Code § 8634). The statute does not say that a county regulation based on a county-declared "emergency" applies to incorporated areas within that county. Nor does any case law support that proposition. The only authority for that proposition is found in a 1979 California Attorney General Opinion. (62 Ops. Cal. Atty. Gen. 70). But an Attorney General opinion "is not binding on [any] court." (*Orange County Water Dist. v. Public Employment Relations Bd.* (2017) 8 Cal.App.5th 52, 66). Thus, section 8634 does not confer on the County the authority to subject cities to its regulations.

In any event, even if section 8634 subjected cities to a county's "emergency" regulations, the statute would not apply here. That is because the Ordinance is not an urgency ordinance. Indeed, at April 6 meeting, the Board voted to eliminate Finding (gg), which stated that the Ordinance "is necessary for the immediate preservation of the public peace, health, and safety as described in subdivision (d)

of the Government Code section 25123." There being no emergency, the Ordinance cannot apply beyond the County's jurisdiction.

III.
Conclusion

As explained above, the Ordinance is riddled with constitutional and other legal problems, exposing the County to the risk of a costly and time-consuming legal challenge. Any such Ordinance would be subject to a federal civil rights challenge under 42 U.S.C. § 1983, in federal court, for violation of rental housing providers' constitutional rights. Note that section 1988 of the same statute allows a prevailing civil rights plaintiff to recover its attorneys' fees and costs against a municipality.

The Association urges the Board to categorically reject the proposed Ordinance and instead work collaboratively with all stakeholders to arrive at an equitable resolution of tenants' concerns.

Very truly yours,

Paul J. Beard II
Counsel for SCRHA

CC: County Counsel, David J. Smith (david.smith@sdcounty.ca.gov)
Chief Administrative Officer (cao_mail@sdcounty.ca.gov)