

April 29, 2020

VIA ELECTRONIC MAIL

City Council
City of Costa Mesa
77 Fair Drive
Costa Mesa, CA 92626

Re: Costa Mesa Moratoria on Evictions and Mandated Rent Forbearance

Dear Councilmembers:

This office represents a large number of property owners and landlords (“Owners” or “Property Owners”) throughout the City of Costa Mesa (“City”). On April 1, 2020, the Costa Mesa City Manager and City Attorney, without providing a meaningful opportunity for property owners and landlords to be heard, issued Proclamation No. 2020-09 (“Eviction Ban” or “Ban”), purporting to prohibit residential and commercial landlords from undertaking eviction procedures for tenants experiencing a “substantial” decrease in income as a result of the pandemic. Not surprisingly, the Eviction Ban has already resulted in more than a “substantial loss” of rent to Property Owners, whose tenants are now using the Eviction Ban to avoid paying any rent. Indeed, the City’s own website makes clear that tenants are not required to make even partial rent payments even if they have the means to do so, and even if they are receiving unemployment or other federal or state benefits. As reported by the Wall Street Journal, national retailers receiving millions in federal stimulus benefits are refusing to pay rent for the foreseeable future. (<https://www.wsj.com/articles/landlords-companies-clash-over-rent-payments-during-coronavirus-11586865600?ns=prod/accounts-wsj>.) Such tenants are taking full advantage of the eviction moratoria imposed at all levels of government.

As set forth below, the Eviction Ban is problematic on many legal fronts and purports to single out landlords and property owners throughout the City to absorb the residents’ and commercial tenants’ claimed economic losses attendant to the crisis. At the same time, the Eviction Ban provides no relief to property owners and landlords, who (presumably) are expected to continue meeting their contractual obligations under the respective leases even where tenants are not honoring theirs. Consider as well that many Property Owners in the City are co-owned or funded by investors and partnerships which include state and union pension funds, endowments and other fixed income investors whose investment in real estate is predicated on the rule of law and the privity (and security) of contracts in which they invest. There are also a many small to medium sized real estate management companies whose income streams will be harmed by the Ban. The City’s unilateral action has set a bad precedent and warning to future investors about heightened risks of investing in assets in the City of Costa Mesa versus other

City Council
April 29, 2020
Page 2

Orange County cities who respect the necessity for contract security and have not passed similar ordinances.

Given the magnitude of the rent loss Property Owners anticipate from implementation of the Eviction Ban, Property Owners will have no choice but to pursue any and all available legal relief against the State of California and City to recover all losses attributable to the government interference with their private contractual relationships. As discussed below, such legal relief will include an award of litigation expenses including attorney's fees and expert fees. Property Owners urge the City to remove itself from their contractual relationships which are already controlled by Governor Newsom's March 27th Executive Order and the California Judicial Council's emergency order temporarily delaying residential and commercial evictions during the pandemic.

1. The COVID-19 Response From Governor Newsom

On March 27, 2020, Governor Newsom issued Executive Order N-37-20, placing temporary limitations on eviction remedies available to landlords. Executive Order N-37-20 temporarily extended the 5-day period by which impacted residential tenants must respond to an unlawful detainer complaint to 60 days. To qualify for the relief, the tenant must notify the landlord of an inability to pay all or a portion of the rent due within 7 days after the rent is due. The tenant must also demonstrate that he or she contracted COVID-19 or needed to care for someone who contracted COVID-19, or suffered a layoff, loss of hours or other loss of income attributable to COVID-19 or the government response to COVID-19. Importantly, Executive Order N-37-20 requires tenants seeking to qualify for such relief to verify their claims with documentation. The relief available to qualifying tenants extends through May 31, 2020. Finally, Executive Order N-37-20 makes clear that the relief is only for a two-month period and that tenants are still required to meet their monthly rent obligations, even for the 60-day period during which the eviction process is delayed. (EO N-37-20 ["Nothing in this Order shall prevent a tenant who is able to pay all or some of the rent due from paying that rent in a timely manner or relieve a tenant of liability for unpaid rent."].)

While Governor Newsom's executive order has its own problems and unintended consequences, it does not purport to modify the terms of existing contractual relationships and simply delays eviction proceedings for a two-month period for those specific residential tenants who can meet the (more) specific criteria for qualifying for relief.

2. The Emergency Order Issued by the California Judicial Council

On April 6, 2020, the California Judicial Council issued a set of emergency rules impacting utilization of the courts to evict tenants. Except in certain rare situations posing an immediate threat to health and safety, Emergency Rule 1 generally forbids the issuance of summons for new unlawful detainer proceedings until 90 days after Governor Newsom declares an end to the state of emergency. The emergency rules do not purport to interfere with existing contracts by waiving

City Council
April 29, 2020
Page 3

contractual interest or late fees or extending deadlines for the payment of rent. Nor do they attempt to declare “winners and losers” by offering substantive relief to tenants claiming to suffer from impacts created by the pandemic or, more egregiously, the response to the pandemic implemented at all levels of government.

3. *The City’s Order Mandating Residential and Commercial Rent Forbearance*

On March 25, 2020, the City Council attempted to adopt an urgency ordinance that was virtually identical to the April 1, 2020 Eviction Ban. When it was later discovered the City failed to approve the urgency ordinance with the required 4/5ths of the Council voting in favor, the City directed its City Manager to issue the Eviction Ban, employing Section 6-6(a)(6)(a) of the City’s Municipal Code which allows the City’s director of emergency services to issue temporary emergency regulations “reasonably related to the protection of life and property as affected by the emergency.”¹ When the City Council again failed to confirm the City Manager’s Eviction Ban with 4/5ths voting in favor at its April 7th meeting, the City Council instead introduced a new “non-emergency” ordinance at the April 7th meeting. The second reading of this non-emergency ordinance occurred on April 21st, rendering it effective 30-days later on May 21, 2020. At present, only the City Manager’s Eviction Ban purports to be in effect. The method, mechanics and legality of the adoption of both measures raises many questions including whether the original urgency ordinance had sufficient grounds for a “matter [] reasonably related to the protection of life and property.”

The Eviction Ban is not a model of clarity and raises more questions than it resolves. Unlike Governor Newsom’s Executive Order N-37-20, the City’s Eviction Ban applies to both residential *and commercial* tenancies. The Ban also prohibits landlords from even “seeking” rent during the period of the emergency and expressly prohibits service of a notice to terminate pursuant to California Code of Civil Procedure Section 1161 *et seq.* Inexplicably, the Eviction Ban provides tenants with a 30-day period (after rent is due) to even notify landlords of their intent to invoke the Eviction Ban. This would presumably prohibit landlords from seeking rent from any tenants, whether or not they seek to qualify for protection, for a 30-day period after rent is due. The Eviction Ban fails to provide any meaningful standard for determining whether or not a particular tenant qualifies for protection, and is virtually silent with respect to the evidence a tenant must provide as a bases for protection. The Ban, rather, simply states in conclusory fashion that tenants who suffer a “substantial decrease” in household or business income “caused by layoffs or a reduction in the number of compensable hours of work,” or a “substantial decrease in business income caused by a reduction in operating hours or consumer demand,” qualify for protection.

¹ Section 6-6(a)(6)(a) of the Costa Mesa Municipal Code requires the City Council to confirm such emergency proclamations issued by the director of emergency services “at the earliest practical time” after the emergency proclamation is issued.

City Council
April 29, 2020
Page 4

Most troubling (and in stark contrast to Governor Newsom’s executive order and the Judicial Council emergency rules), the Eviction Ban provides that *property owners and landlords may not seek to recover back due rent until 120 days after the Governor declares the emergency is over*. The City failed to put any “end date” on the Eviction Ban and tied the duration of the protection to the end of the emergency as declared by the Governor (not the City). The Ban also purports to directly modify existing contractual relationships by nullifying any late fees while the emergency declaration is in place and throughout the following 120-day period. The Ban provides no relief for landlords and property owners and, presumably, the City expects landlords to continue paying all costs associated with the management and ownership of their rental communities. While the Ban purports to require tenants to repay any back rent due within 120-days after the Governor declares the emergency to be over, the practical effect is that many tenants will never be able to repay the back due rent and will, instead, move to a different property later after exhausting the rent forbearance benefit provided by the City. Indeed, for many tenants, the Eviction Ban will mandate rent forgiveness. The Eviction Ban is the functional equivalent of forcibly requiring landlords to become involuntary lenders to their tenants and to eliminate any charges a lender would impose after evaluating the risks of any particular “debtor.”

4. *Property Owners Will Suffer Millions of Dollars in Rent Losses as a Result of the Eviction Ban*

The extent of Property Owners’ losses are not yet known, but the loss in revenue will be more than “substantial.” Property Owners have been informed by numerous residents and commercial enterprises of all sizes of a claimed inability to pay April rent. The prospects for recovering April rent from Owners’ retail tenants is grave, at best. Many of the retail tenants have informed Owners that they will not pay rent until the crisis dissipates and customers return to their stores in full force. This is true even for tenants who have the ability to pay and, incredibly, have received government benefits to offset their losses. There is no question that Owners will suffer millions of dollars in losses every month.

As noted, the Ban fails to provide any “end date” for the emergency and it is unclear how many months the City will continue to directly interfere with Owners’ contractual relationships. What is clear is that Owners’ losses will grow exponentially every month, much like the spread of the virus. It takes little imagination to come to the conclusion that the losses to be suffered by property owners and landlords throughout the City will total tens of millions (if not hundreds of millions) of dollars by the date which is “120-days” after the Governor declares the emergency is over.

5. *Owners Will Seek to Recover All Their Losses from the City*

It is unclear why the City would provide more protection than that afforded by Governor Newsom and the Judicial Council. Doing so clearly exposes the City to liability for inverse condemnation, substantive due process, procedural due process, equal protection, breach of

City Council
April 29, 2020
Page 5

entitlement agreements, interference with contract, and a host of other legal theories.² The fact that the Ban was enacted to advance a public interest is irrelevant to the City's liability for damages stemming from the drastic impact of the Ban on Owners' communities.

While at one time the public interest served by local legislation tended to lessen the risk of liability for a regulatory taking, the United States Supreme Court has made clear that the public interest advanced by government regulation has no relevance to takings liability. (*Chevron v. Lingle* (2005) 544 U.S. 528, 542-543 [holding that the "public interest" or "government objective" is irrelevant to whether the government action effected a taking.].) Indeed, Justice O'Connor, writing for the majority, made clear that the language in prior takings cases relating to whether the government regulation "substantially advances a legitimate government interest" has no place in takings law: "A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that burden be spread among taxpayers through the payment of compensation." (*Id.* at 543.)

The City's Eviction Ban in this matter falls squarely within the "physical occupation" line of cases the United States Supreme Court (and California courts) have held constitute "per se" categorical takings. (*See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 435 [holding that any government-imposed physical occupation of private property, no matter how small or trivial, constitutes a taking of private property for which the owner is entitled to just compensation and reasoning that "***the power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.***" [emphasis added].) As implemented, the Ordinance will force property owners to accept occupants on their property who are not paying rent. Coupled with California landlord tenant law imposing mandatory obligations on the part of landlords, the owners will also be required to continue incurring the expenses associated with the ownership. In this case, as noted above, those costs are more than "substantial."

As you may know, a property owner is no longer required to attempt to invalidate an offending regulation in state court as a precondition to filing a regulatory takings claim in federal court. Just last year in *Knick v. Township of Scott* (2019) 139 S.Ct. 2162, the U.S. Supreme Court overturned *Williamson County Regional Planning Com. v. Hamilton Bank of Johnson City* (1985)

² Before even getting to the substantive challenges, the City will need to demonstrate that the Eviction Ban was properly adopted. As previously noted, the Eviction Ban was adopted by the City Manager as an "emergency regulation" only after the full City Council was unable to approve an emergency ordinance with the requisite 4/5ths vote by the City Council on March 25th. Nor did 4/5ths of the City Council vote to "confirm" the "emergency" Eviction Ban as soon as "reasonably practicable" after the Eviction Ban was adopted. It remains a mystery how an unelected City official may adopt as an "emergency regulation" the identical provisions the City Council was unable to adopt pursuant to State law provisions governing local "urgency ordinances."

City Council
April 29, 2020
Page 6

473 U.S. 172, holding that property owners need not exhaust state judicial remedies as a prerequisite to filing a regulatory takings claim in federal court. *Knick* made abundantly clear that an aggrieved property owner may pursue its takings claims under 42 U.S.C. § 1983 directly in federal court.³ The Supreme Court reasoned that a taking under the Fifth Amendment to the United States Constitution occurs when the government makes a decision impacting private property and such a taking is not a function of judicial remedies that may or may not be available in the state judicial system.

Accordingly, Property Owners have no obligation to file a petition for writ of mandamus in California Superior Court attempting to invalidate the Eviction Ban before seeking damages under 42 U.S.C. § 1983 in federal court. In such case, Owners would also be entitled to their litigation expenses and attorney's fees under 42 U.S.C. § 1985.

6. *Owners Insist the City Immediately Repeal the Eviction Ban*

The foregoing should make clear that by enacting the Eviction Ban providing benefits well beyond what the State has provided, the City has exposed itself to significant liability risk for all damages associated with the Ban, including the exorbitant damages stemming from the lack of “end date” on the Ban and the 120-day grace period following the, as yet, unknown date. The City may significantly limit its exposure by simply repealing the Ban now.

In the event the City is not willing to repeal the Ban immediately, Owners request the City to provide some level of clarity with respect to the following questions:

- *What authority does the City Manager have to adopt “emergency regulations” when the full City Council was unable to adopt the same provisions as an “urgency ordinance”?*
- *What specific protection of “life and property” does the City Manager claim existed allowing her to adopt the same “emergency regulations” that the City Council was unable to adopt as an urgency ordinance?*
- *If residential or commercial tenants are not required to notify landlords of their intent to take advantage of the Eviction Ban until 30 days after rent is due, does the*

³ This stands in stark contrast to California's law on regulatory takings, which generally requires a landowner to attempt to invalidate a particular law or regulation by writ of administrative mandamus before seeking monetary damages on a regulatory takings theory. (*Hensler v. Glendale* (1994) 8 Cal.4th 1, 13-16.) Because state judicial remedies are no longer a prerequisite to pursuing monetary relief directly in federal court, Owners need not waste time and money challenging the validity of the Eviction Ban on the grounds that it is fatally incomprehensible, denies due process of law and equal protection, or is otherwise arbitrary and capricious and contrary to law.

Eviction Ban prohibit landlords from serving statutory notices (such as notices of termination and 3-day pay or quit notices) on ALL tenants including those who do not intend to qualify for protection for the 30-day period?

- *How does the City define the phrase “seek rent” as set forth in Section 1(G) of the Eviction Ban?*
- *Does the Eviction Ban prohibit requests of any form for rental payments during the 30-day period set forth in Section 1(D) of the Eviction Ban?*
- *Does the Eviction Ban prohibit the imposition of interest payments on missed rent payments during the course of the stated emergency and the 120-day grace period?*
- *Does the Eviction Ban prohibit evictions for those residents and commercial tenants who have received federal stimulus benefits intended to be used for rent payments?*
- *Does the Eviction Ban prohibit landlords from seeking rent from those tenants who have received federal stimulus or other governmental monetary benefits intended by the government to be used for rental payments?*
- *How does the City define “substantial decrease in household income” as used in Section 1(C)(1) of the Eviction Ban?*
- *What authority does the City have to modify existing statutory notices (such as notices to terminate, 3-day pay or quit notices, etc.) imposed by California landlord/tenant law, when Governor Newsom’s executive order and the Judicial Council Emergency Rules were careful not to do so?*
- *How does the City define “substantial decrease in business income” as used in the Eviction Ban?*
- *What specific documentation must a tenant provide to the landlord to take advantage of the benefits set forth in Section 1(D)(2) of the Eviction Ban?*
- *May landlords require financial records from tenants seeking to qualify for protection under the Eviction Ban in order to verify whether the tenants have experienced a “substantial decrease in business or household income”?*
- *May landlords require medical records from tenants seeking to qualify for protection under the Eviction Ban?*

City Council
April 29, 2020
Page 8

- *May landlords require certifications from tenants under penalty of perjury as a condition to qualifying for protection under the Eviction Ban?*
- *Is the City prepared to reimburse landlords for the administrative costs needed to ascertain whether a tenant qualifies for protection under the Eviction Ban?*
- *Would a resident or commercial tenant be allowed to take advantage of the Eviction Ban if despite a decrease in wages or business income, they still have the means to pay rent?*
- *What impact does personal or business net worth have on the determination as to whether a resident or commercial tenant has suffered a “substantial decrease” in household income or business income?*
- *Would the Eviction Ban apply to residents who had co-signors/guarantors on the individual leases who have not suffered a substantial decrease in household or business income?*
- *Would the Eviction Ban apply to commercial tenants with guarantors on the individual lease?*
- *Does the rent forbearance provided in the Eviction Ban apply to monthly rent due during the 120-day grace period after the Governor declares the emergency over, or does the rent forbearance only apply to unpaid rent during the emergency period?*
- *How would the Eviction Ban apply to tenancies which are due to expire during the emergency period or the 120-day grace period following the declared end of the emergency?*
- *Does the Eviction Ban require landlords to renew tenancies which expire during the course of the stated emergency or within the 120-day grace period as set forth in the Ban?*

7. Conclusion

As discussed above, the City’s Eviction Ban was not well thought out and will very likely expose the City to tens of millions of dollars in liability (if not more) to landlords and property owners throughout the City. While public agencies understandably feel compelled to “do something to help” in times of crisis, such urgent actions are often not well thought out and lead to much more damage than good. That is certainly the case with the City’s Eviction Ban.

City Council
April 29, 2020
Page 9

The City has also assumed the worst when it comes to property owners and landlords. Property Owners take great pride in their communities and the relationships they have fostered with their residents and commercial tenants. Owners are in a much better position than the City to understand the particular hardships faced by their residents and commercial tenants and do not intend to run into court every time a resident or commercial tenant is unable to pay rent when due. Some tenants will require special arrangements when they experience a short-term loss of income and are unable to pay rent, and Owners will address the needed accommodations from a standpoint of understanding and compassion. The City's Eviction Ban, however, has provided tenants with the ability to ignore their contractual obligations during the course of the declared emergency and for the 120-day period thereafter. As discussed above, Owners will, at minimum, suffer seven-figure losses as a direct result of the Eviction Ban. The City may wish to limit this significant liability by immediately repealing the Ban. Owners insist that it do so.

Respectfully submitted,

RUTAN & TUCKER, LLP



Douglas J. Dennington

DJD:pj

cc: Lori Ann Farrell Harrison, City Manager, City of Costa Mesa
Kimberly Barlow, City Attorney, City of Costa Mesa