April 21, 2020

Honorable Members of the City Council
Los Angeles City Hall
200 N. Spring Street
Los Angeles, CA 90012

Re: Legal Analysis of Proposed Renter Protections in Council Files 20-0404, 20-0409, 20-0407

Dear Honorable Council Members:

The undersigned public interest and civil rights law firms write in support of several motions that will be considered by the Los Angeles City Council on April 22, 2020, including agenda item number 37 (CF 20-0407) relative to a rent freeze; agenda item number 38 (CF 20-0409) relative to clarifying that unpaid rent is not subject to the unlawful detainer process; and agenda item number 39 (CF 20-0404) relative to prohibiting the termination of a tenancy during the State of Emergency.

This current public health crisis is the worst we have seen in a century. More than 40,000 people have died across the country, including over 600 in Los Angeles County, and the toll will continue to rise in the coming weeks.1 Due to the strict but necessary Safe at Home orders, businesses have shut down or drastically scaled back across the city, causing massive worker layoffs. According to recent estimates, less than half of Los Angeles County residents are still employed.2 The impact of these layoffs is that millions of Angelenos are wondering how they are going to afford rent and put food on the table. And the crisis is disproportionately affecting Black and Brown communities, reflecting entrenched structural and economic inequalities.3

As public interest law firms serving the most vulnerable residents in Los Angeles County, we are seeing firsthand these devastating impacts of COVID-19. As housing lawyers, we are working around the clock to provide direct services and advocacy support in the midst of this terrible confluence of a catastrophic public health disaster and a worsening crisis of housing instability and homelessness. The simple fact is that Angelenos are only safer at home if they can stay in their homes. While the Mayor and City Council adopted important protections over the last several weeks, the current policies still have substantial gaps that need to be addressed. Our organizations continue to be inundated with calls from tenants who are receiving eviction notices, being locked out of their homes, being intimidated or harassed, being asked to sign forms and produce documents with personal information, or are generally confused about their rights under the existing patchwork of new laws. Tens of thousands more, who are unable to access legal services, are enduring the same conditions.

This crisis demands bold actions from our leaders. In reference to the sweeping emergency rules adopted by the Judicial Council on April 6th, Chief Justice Tani Cantil-Sakauye wrote: “We are at this point truly with no guidance in history, law, or precedent. And to say that there is no playbook is a gross

understatement of the situation.”4 As the Judicial Council did in exercising its powers over the courts, so too the City of Los Angeles must exercise its police powers to the fullest extent and take the courageous steps necessary to keep people housed during the crisis.

I. The City Council should approve item 39 (CF 20-0404) because a complete eviction moratorium is lawful and necessary in this moment.

A. The City’s current eviction ordinance does not prevent all evictions, leaving thousands of Angelenos now at risk of displacement and homelessness.

We applaud the Mayor and City Council for taking action to enact Ordinance 186585 to protect tenants against certain types of eviction during this emergency. But more is needed. The City’s current eviction ordinance does not do enough to discourage the initiation of the eviction process, which sows doubt and confusion leading to renters being harassed and intimidated into leaving their homes. The ordinance also fails to provide any protections against certain types of evictions.

In Los Angeles, tenants are very often displaced from their homes even before an unlawful detainer action is filed. Waiting for eviction proceedings to begin can severely compromise a tenant’s ability to rent another home. Furthermore, many tenants are unaware of their rights, and have little access to legal aid services, especially in the middle of a pandemic. This is why many of the undersigned organizations have vigorously supported a Right to Counsel. Right now, we are far from guaranteeing every tenant access to legal counsel, and if we wait until a court proceeding is initiated, countless tenants will be displaced. By imposing onerous requirements that tenants must prove that nonpayment of rent is due to COVID-19 -- a burden that disproportionately harms immigrant, gig-economy, and informal sector workers – the City has established a confusing and overly technical framework. Unsurprisingly, in the days after this requirement was adopted, our organizations fielded numerous calls and the media reported on widespread examples of tenants being directed to sign documents and provide personal information that is not legally required in order to avoid eviction. Our clients are still receiving eviction notices after the City’s ordinance was adopted, as some landlords are already setting the stage for eviction proceedings as soon as the courts open back up. Other clients are enduring illegal lockouts and other intimidation tactics. If the City Council fails to strengthen the current incomplete framework, renters will only face more confusion, harassment, and intimidation in the midst of an already unimaginable public health threat, which will only increase the risk of displacement and homelessness during and after the emergency.

In addition to the displacement risks stemming from the confusing and incomplete non-payment standards, there are still many grounds for eviction that are simply not covered by the current ordinance. For example, a low-income and undocumented immigrant street vendor may not be able to provide the formal documentation necessary to show a loss of income directly related to the pandemic, even though the City has requested increased enforcement to shut down their business and they are unable to access federal relief programs. Should this person be evicted right now? A worker who is fortunate enough to still be employed may install desk and shelving for a work-from-home station that violates a lease term concerning unapproved decorating or construction. Should this person be evicted right now?

The current eviction ordinance was an important first step, but it is time to eliminate the confusion and close the gaps. Los Angeles renters need the simple yet comprehensive prohibition on evictions proposed under CF 20-0404.

B. The City has the authority under its police power to enact a broad eviction moratorium.

The City has the power to take greater action to protect tenants under both its police powers and emergency powers. The California Constitution sets forth the City’s broad police powers by stating “[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” Legislative enactments analyzed for validity under the police power must be reasonably related to a “legitimate governmental purpose, and [courts must avoid] confus[ing] reasonableness in this context with wisdom.” Ordinances enacted pursuant to the police powers must be upheld unless there is a “complete absence of even a debatable rational basis” that the ordinance serves as “a reasonable means of counteracting harms and dangers to the public health and welfare emanating from a housing shortage.”

While some might suggest that the power to regulate eviction is reserved to the state eviction statutes, all cities and counties, pursuant to their police power, have the authority to create “substantive limitations on otherwise available grounds for eviction,” provided such limitations are not procedural in nature and “do not alter the Evidence Code burdens of proof.” Substantive regulation on the grounds for eviction include limiting the causes of action available to landlords to use as grounds for evicting tenants and have been consistently upheld over the past several decades. Courts have distinguished permissible substantive limitations from impermissible procedural limitations outside the context of a public health emergency. The Motion under File No. 20-0404 directs the City Attorney to prepare an ordinance that would affect substantive limitations on the grounds of eviction, as authorized by the police power, and procedural limitations on eviction, such as prohibiting the issuance of notices and filing of unlawful detainer actions that the City’s emergency powers authorize in these dire circumstances. The Mayor has already invoked his emergency authority to temporarily suspend no-fault evictions if occupants were “ill, in isolation, or under quarantine,” and Ellis Act evictions of occupied rental units. The Mayor’s Public Order included a ban on the issuance of eviction notices and the filing of unlawful detainers on the these grounds.

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5 Cal. Const. at XI, section 7.
6 Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 159.
7 Id. at 161.
8 Rental Housing Assn. of Northern Alameda County v. City of Oakland (2009) 171 Cal. App. 4th 741, 755, 763, citing Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129, 147-149. In Birkenfeld, the court held that the City of Berkeley’s ordinance requiring landlords to obtain a certificate of eviction before filing an unlawful detainer was an impermissible procedural barrier, calling the process full of “elaborate prerequisites.” Id. at 161. The court held that state law governing unlawful detainer procedures “fully occupy the field of landlord’s possessory remedies,” and therefore preempted the City’s requirement for a certificate of eviction.
9 In Roble Vista Associates v. Bacon, the court upheld a city ordinance that (1) required landlords to offer tenants one-year leases at a fixed rental rate during the lease term and (2) provided an affirmative defense to tenants in unlawful detainer actions if their landlords failed to do so. (2002) 97 Cal.App.4th 335, 337-38, 342. Similarly, in Rental Housing Assn. of Northern Alameda County v. City of Oakland, the court upheld certain portions of a local ordinance that required landlords seeking to recover their units to “act in good faith” and imposed other substantive requirements to substantiate certain causes of action for an unlawful detainer action. (2009) 171 Cal.App.4th 741, 754. These provisions of the ordinance were not preempted by the state unlawful detainer statutes. Id. at 759, 764-765.
Furthermore, courts have upheld ordinances that have incidental procedural impacts. In *San Francisco Apartment Assn. v. City and County of San Francisco*, the court held that unlawful detainer statutes did not preempt a local ordinance that imposed a delay on evicting families and educators on no-fault grounds.\(^{12}\) The court found that the ordinance imposed a “procedural impact, limiting the timing of certain evictions.”\(^{13}\) The procedural impact was “necessary to ‘regulate the substantive grounds’” of no-fault evictions in order to protect children from displacement during the school year.\(^{14}\) Furthermore, the ordinance was not a procedural limitation on the grounds for eviction because it “[did] not require landlords to provide written notice or to do any other affirmative act.”\(^{15}\) The court concluded that the ordinance created a “permissible ‘limitation upon the landlord’s property rights under the police power,’” rather than an impermissible infringement on the landlord’s unlawful detainer remedy” under state law.\(^{16}\) Here, a temporary eviction moratorium removing substantive bases for eviction clearly fits within the category of substantive regulation reserved for the local jurisdiction to regulate.

The City has a significant governmental interest in ensuring housing security and stability and preventing widespread homelessness that will result from evictions that are processed once the emergency orders are lifted, which will create a secondary public health emergency in a city that already has the worst unsheltered crisis and affordable housing crisis in the country. The temporary eviction moratorium proposed under CF 20-0404 is unquestionably related to, and indeed necessary to achieve this important purpose. Such action, taken during the course of a historic pandemic, is unquestionably a reasonable exercise of the City’s police powers, which the courts will grant great deference to. Additionally, as set forth below, the actions are neither preempted nor unconstitutional.

**C. The City is authorized to enact an eviction moratorium by the California Emergency Services Act.**

During a declared state of emergency, the California Emergency Services Act (CESA) authorizes the City Council to “promulgate orders and regulations necessary to provide for the protection of life and property”\(^{17}\) which here includes remaining in existing homes pursuant to shelter in place orders by state and local entities. On March 19, Governor Newsom issued Executive Order N-33-20, which authorized and concurrently included an order from the State Public Health Officer, requiring “all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations.” The Governor’s subsequent Executive Order N-37-20 directly links the need to minimize evictions in order to comply with the stay at home directive in the March 19 Order.\(^{18}\)

On March 4, the Mayor declared a local state of emergency in the City, which has been approved by the City Council.\(^{19}\) As such, the CESA authorizes the City Council to take action to enact orders necessary to provide for the protection of life and property, which will unquestionably be furthered by an eviction moratorium. The CESA requires that the governing body, in this case the City Council, to review the ongoing need to continue the local emergency at least once every 60 days until it terminates


\(^{13}\) Id. at 510, 518.

\(^{14}\) Id. at 518.

\(^{15}\) Id.

\(^{16}\) Id. at 518-19, citing *Birkenfeld*, 17 Cal. 3d at 149.

\(^{17}\) Cal. Gov. Code § 8634.


the emergency. The City Council should exercise its authority to take local measures authorized by state law to effectuate the stay at home orders to ensure public safety.

D. A broad eviction moratorium is supported by the Governor’s Executive Orders suspending any state law that could preempt the local effort, and is not otherwise preempted by existing state law.

Although a city’s police power is broad, it cannot conflict with the general laws of the State of California. A conflict exists between a local ordinance and state law if the ordinance “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.” However, when a city or county “…regulates in an area over which it traditionally has exercised control … California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute.”

In enacting Executive Order N-28-20 on March 16, 2020, the Governor explicitly suspended “[a]ny provision of state law that would preempt or otherwise restrict a local government’s exercise of its police power to impose substantive limitations on residential or commercial evictions.” This Executive Order provides explicit authority to enact a broad eviction moratorium. Moreover, the Governor’s Business, Consumer Services and Housing Agency published guidance for city and county governments that explicitly says: “Nor does the Executive Order prohibit a city or county from imposing an absolute limitation on all evictions.”

Consistent with this Order, the City has already adopted an ordinance that goes beyond the provisions of the Governor’s order. Several other cities across California have likewise adopted local ordinances that go further than the Governor’s order, including Oakland, which has adopted a complete eviction moratorium. Even the California Apartment Association does not dispute the ability of a local city to adopt an ordinance that goes further than the Governor’s order, plainly stating, “The Governor’s Order does not preempt local eviction moratoria.”

Beyond the clear legislative intent, there is also no conflict preemption. Under a conflict preemption analysis, the question is whether it is possible for a person to follow both laws at the same time. The Governor’s order is limited to non-payment of rent related to COVID-19. So expanding LA’s ordinance would involve covering other non-payment grounds for eviction and nonpayment eviction that is not proven to be related to COVID-19. Since the Order doesn’t expressly regulate these, and there is intent not to preempt the field, then these would be additional protections at the local level but landlords and tenants could still follow both the Governor’s order and the new Los Angeles provisions, so there is no conflict preemption.

While the Governor’s first Executive Order explicitly removes preemption concerns for the limited types of evictions in the Order, the City may still use its full police powers to go farther than the

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EO for other types of evictions. Put another way, the silence on other types of evictions does not implicitly mean the City is preempted from regulating them. The City is only preempted if there were to be conflict with state law. The City can both comply with the Executive Order and go farther than the executive Order so long as there isn’t a conflict. Because state law grants local jurisdictions the authority to regulate the substantive grounds for eviction,26 no such conflict exists.

E. A broad eviction moratorium is not unconstitutional under the Takings Clause.

The proposed temporary eviction moratorium would not rise to the level of a “taking” under longstanding case law. Both the United States Constitution and the California Constitution prohibit the taking of private property for public use without just compensation.27 The Takings Clause of the California Constitution is generally interpreted congruently with the Takings Clause of the Fifth Amendment.28

The government’s regulation of private property will constitute a taking of such property only if it is “so onerous that its effect is tantamount to a direct appropriation or ouster.”29 Such “regulatory takings” will constitute “per se” takings requiring compensation only if they either (i) result in a permanent physical invasion of property or (ii) deprive a property owner of all economically beneficial or productive use of the property in question.30 Otherwise, government regulation that does not result in a “per se” taking may still constitute a taking, but only if it is found to be “functionally equivalent” to a direct appropriation or ouster under the “essentially ad hoc” fact-specific inquiry described in the Penn Central case.31

Because the proposed measure would neither result in a permanent physical invasion of property nor in a complete deprivation of economic use of the property in question, it should be analyzed under the Penn Central standard. The Penn Central inquiry focuses on two primary factors: (i) the economic impact of the regulation on the property’s owner and (ii) the investment-backed expectations of the owner. This inquiry also takes into account the character of the government action—a taking is more likely to be found when the regulation can be characterized as a “physical invasion by government” as opposed to “a public program adjusting the benefits and burdens of economic life to promote the common good.”32 In analyzing whether a taking has occurred, the court does not analyze whether the owner’s rights in one particular segment of the property have been abrogated, but rather focuses on “the nature and extent of the interference with rights in the parcel as a whole.”33

The threshold for a taking under the Penn Central analysis is high. In applying the Penn Central factors, the Ninth Circuit Court of Appeals has observed that “diminution in property value because of governmental regulation ranging from 75% to 92.5% does not constitute a taking” and that it is not aware

26 See Fisher v. City of Berkeley (1984) 37 Cal. 3d 644, 707 (holding that a city may regulate the substantive grounds of eviction, even to the point of “effectively eliminat[ing]” a ground for eviction in state law.) See also Birkenfeld v. City of Berkeley (1976) 17 Cal. 3d 129, 148-149.
27 U.S. Const., amend. 5, 14; Cal. Const., art. I, § 19(a).
of any case in which a court has found a taking where diminution in value of the property in question was less than 50%.\textsuperscript{34} Moreover, a loss of profits due to a restriction on the use of the property – unaccompanined by a physical property restriction – is generally viewed as a weak basis for a takings claim.\textsuperscript{35} As the Supreme Court noted in \textit{Andrus v. Allard}, “[G]overnment regulation -- by definition -- involves the adjustment of rights for the public good” and that although such adjustments often limit in some way the economic exploitation of private property “[i]to require compensation in all such circumstances would effectively compel the government to regulate by purchase.”\textsuperscript{36}

A full eviction moratorium would not constitute a taking under a \textit{Penn Central} analysis because of its limited impact on the overall values of the affected properties, its time-limited nature, and its similarity to existing measures. The eviction moratorium would simply extend the existing City of Los Angeles renter protection ordinance banning the eviction of tenants for COVID-19-related nonpayment of rent to include all tenants for the duration of the declared emergency plus 30 days. This temporary eviction moratorium should not have any long-term economic impact on the value of rental properties and would not defeat the investment-backed expectations of landlords, who are already subject to numerous limitations on the right to evict. Moreover, the character of the government action is precisely that of the “public program adjusting the burdens of economic life to promote the common good” that \textit{Penn Central} explicitly states is unlikely to support the finding of a taking.

\textbf{F. A temporary eviction moratorium is not unconstitutional under the Contracts Clause.}

A temporary moratorium is also not an unconstitutional interference with existing contracts. The Contracts Clause of the Constitution prohibits only “a substantial impairment of a contractual relationship.”\textsuperscript{37} Even a substantial impairment may be upheld if the state has a “significant and legitimate public purpose behind the regulation.”\textsuperscript{38} Courts also assess whether the adjustment of the parties’ rights is reasonable and “appropriate to the public purpose” of the regulation but generally defer to state legislatures in making those determinations.\textsuperscript{39} Since the end of the \textit{Lochner} era, the Contract Clause has not been “read as a serious impediment to state social and economic legislation affecting private contracts.”\textsuperscript{40}

In determining whether a regulation constitutes a substantial impairment, “whether the industry the complaining party has entered has been regulated in the past” is an important consideration in determining whether a law operates as a substantial impairment of a contractual relationship. Because “the landlord-tenant relationship is, if nothing else, heavily regulated,” new laws regulating that relationship are subject to less scrutiny.\textsuperscript{41} Landlords have come to expect that the state legislature and local governments will enact laws that will affect their contractual relationship with tenants. In this case, in response to the COVID-19 pandemic, many policies have been adopted – between the Mayor’s Executive Orders, the City’s adopted existing tenant protection ordinances, the multiple executive orders

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\item \textsuperscript{34} \textit{Colony Cove Props., LLC v. City of Carson}, 888 F.3d 445, 451 (9th Cir. 2018).
\item \textsuperscript{35} \textit{Andrus v. Allard}, 444 U.S. 51, 66 (1979).
\item \textsuperscript{36} \textit{Andrus} at 65.
\item \textsuperscript{38} Id.; United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (holding that the elimination of unforeseen windfall profits is a legitimate state interest).
\item \textsuperscript{39} Id. at 412.
\item \textsuperscript{40} \textit{Troy Ltd. v. Renna}, 727 F.2d 287, 295 (3d Cir. 1984) (citing \textit{Home Bldg. & Loan Ass’n v. Blaisdell}, 290 U.S. 398 (1934) (holding two-year state moratorium on foreclosure of mortgages did not violate Contract Clause)).
\item \textsuperscript{41} Id. at 297-98 (holding law that “simply enlarge[d] the terms of a statutory tenancy” was not substantial impairment of contractual relationship).
\end{itemize}
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from the Governor, and Judicial Council Order – that have significantly changed the terms of the contractual relationship landlords have with their tenants.

Additionally, emergency conditions giving rise to state regulation and the temporary nature of the proposed regulation cautions against finding a substantial impairment. In Home Building & Loan Association v. Blaisdell, the Supreme Court held that a two-year state moratorium on foreclosure of mortgages during the Great Depression did not violate the Contract Clause.42

Finally, it is important to emphasize, the City has already affected existing lease agreements when it enacted the most recent emergency eviction ordinance, but those actions did not rise to the level of a Contracts Clause violation due to the extraordinary governmental interest involved. The proposal under CF 20-0407 is no different. Expansion of the existing policy similarly does not raise Contract Clause concerns, as the same underlying governmental interest would support the expansion.43

G. Several other jurisdictions have enacted significantly stronger measures than what is currently in place for the city of Los Angeles.

Although Los Angeles has acted quickly, it has now fallen behind many other cities in terms of the breadth and depth of its emergency eviction protections. Several cities and counties across the state of California have already moved quickly and decisively to protect their residents by enacting the types of strong provisions proposed under CF 20-0404. Some jurisdictions, like Santa Monica and San Mateo County, have prohibited landlords from attempting to evict tenants by serving notices to vacate or proceeding with the unlawful detainer process. In these jurisdictions, officials have proactively prohibited actions to start unlawful detainer proceedings, instead of just providing a tenant a defense they can assert in a court proceeding. Other jurisdictions, like Oakland, have provided a complete affirmative defense for tenants who are served an unlawful detainer lawsuit, covering nearly all grounds for eviction, absent a public health necessity.

H. Prejudicial assumptions about tenant behavior have no place in the discussion on housing stability during a deadly global pandemic.

Any references to tenant behavior and activity are not relevant to the question of temporarily preventing evictions. Evictions are never the only recourse against illegal behavior, and the theoretical possibility of illegal behavior, for which other enforcement avenues remain open, is not a good reason to risk countless people losing their home during a health emergency, or during the crucial economic rebuilding period right after the health emergency ends. There is nothing in the proposed policy (CF 20-0404) preventing the enforcement of other generally applicable laws, but the policy does offer what is most needed right now - greater housing stability at a time when that has never been more important.

I. The City should ensure that there are penalties for violation of the eviction moratorium.

A violation of the city’s eviction moratorium does not just put one household’s housing at risk. It can have serious public health implications if households are forced out of their homes and are unable to shelter in place. Therefore, the City should act to deter violations of the moratorium by:

43 See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (finding that the Constitution permits restriction of “liberty of contract” by governmental action where such restriction protects the community, health and safety, or vulnerable groups.)
Providing that any aggrieved party or the City may institute a civil proceeding for injunctive relief and/or actual, special, statutory and/or punitive damages for violations of the moratorium;

Providing the court discretion to award a penalty between $1000 and up to $10,000 per violation depending on the severity of a case (similar to the City of Santa Monica);

Providing the court discretion to award actual damages and punitive damages;

Adding a separate civil penalty of up to $5,000 for violations of the Anti-Tenant Harassment Ordinance committed against elderly or disabled tenants (as provided by the City of Santa Monica).

Providing that the prevailing party shall be entitled to costs and reasonable attorneys’ fees;

To ensure meaningful compliance on the ground, violations of the moratorium, and co-occurring harassment actions taken to avoid compliance with the current protections must be met with strong enforcement measures.

II. The City Council should approve agenda item 38 (CF 20-0409) to clarify that unpaid rent during the emergency period is not grounds for eviction later.

The economic impact of this crisis will reverberate well after the public health emergency ends. Without additional protections for the hundreds of thousands of renters who are losing income as a result of the precautions necessary to address the pandemic, we will see a devastating wave of eviction and resulting homelessness at the end of the 12-month repayment period. The City can prevent this, and protect public health, by prohibiting evictions based on nonpayment of rent due during the COVID-19 emergency, even after the declared emergency ends. Such an action would still permit landlords to collect unpaid rent through traditional contract actions, such as seeking a judgment in small claims court – but unpaid rent that became due during the emergency could not be the basis for an eviction.44

The City has the ability to prohibit such evictions under its well-established power to limit the substantive grounds for eviction.45 Oakland’s eviction moratorium already prohibits evictions for nonpayment of rent that became due during the COVID-19 emergency.46 Southgate and Maywood have also adopted ordinance preventing unpaid rent during the emergency from being grounds for eviction.

The reality is that many tenants, especially low-income tenants, already struggled to pay rent before the pandemic. Coming out of the pandemic, they will be faced with the double hit of months of back rent and unstable or no employment. For tenants that endure this difficult time and successfully pay their rent going forward once the emergency resolves, it would be patently unfair and serve no legitimate public policy to allow their eviction based on back rent accumulated during the current safer-at-home orders.

44 Bevill v. Zoura (1994) 27 Cal. App. 4th 694, 697 (court confirming that if a landlord waits too long to pursue uncollected rent, “the landlord is limited to collecting such rent in an ordinary breach of contract action,” and not through the unlawful detainer process.).
45 See Fisher v. City of Berkeley, 37 Cal. 3d 644, 707 (1984) (holding that a city may regulate the substantive grounds of eviction, even to the point of “effectively eliminat[ing]” a ground for eviction in state law.) See also Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 148-149 (1976).
III. The City should pursue all available options under agenda item 37 (CF 20-0407) to secure a rent freeze on all rental units during the emergency.

A. The City should consider whether it has emergency powers to freeze rents for all rental units during the emergency.

The City has broad police powers and emergency powers pursuant to Government Code section 8634, as discussed above. Governor Newsom further elaborated on the scope of these powers through his Executive Order N-28-20, issued on March 16, 2020, in which he found that “…because homelessness can exacerbate vulnerability to COVID-19, California must take measures to preserve and increase housing security for Californians to protect public health; and…local jurisdictions, based on their particular needs, may therefore determine that additional measures to promote housing security and stability are necessary to protect public health or to mitigate the economic impacts of COVID-19.” 47 A temporary rent freeze on non-RSO units is one such additional measure necessary to protect public health and forestall homelessness. Moreover, it merely impacts the timing, not the ability of landlords to impose rent increases. The delay in exercising the right to collect rent may be permissible in the context of an international public health emergency, and we urge the City Council to direct the City Attorney to consider this possibility.

B. The City should consider whether a temporary rent freeze conflicts with Costa Hawkins.

Costa-Hawkins generally preserves the rights of landlords to set tenants’ initial residential rental rates.48 Under normal circumstances, Costa-Hawkins also permits landlords to increase rents on certain types of units, including units constructed after 1995, subdivided interests in subdivisions, single family homes, and certain condominiums.49

There are several arguments that the City should seriously consider in order to support a temporary rent freeze on non-RSO units under Costa Hawkins. A temporary rent freeze would not prohibit landlords from setting initial rental rates, and landlords eligible to impose unregulated rent increases would be able to do so after the emergency has been resolved. Therefore, a temporary rent freeze is arguably not the “strictest type of rent control” that Costa-Hawkins aimed to prevent. In addition, the City should consider whether a temporary rent freeze would prevent evictions for nonpayment of rent, and might therefore be permissible under Costa-Hawkins’ savings clauses, which provides that Costa-Hawkins does not interfere with the City’s right to regulate the grounds of eviction.50 Tenants who could

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48 A court is disinclined to find field preemption of “land use regulations of local concern” beyond express declaration of the Legislature to occupy the field. City and County of San Francisco v. Post (2018) 22 Cal.App.5th 121, 137.
49 Cal. Const. art. XI, Sec. 7.
rely on their current rental rate remaining constant during this crisis would be better able to afford to remain in their homes with a temporary rent freeze. Because Costa Hawkins enacted vacancy decontrol, landlords already had an incentive to engage in pretextual evictions. 51 Currently, landlords owning non-RSO units have an even more dangerous incentive to evict tenants to make up for lost income during the epidemic and impose prohibitive rent increases on current tenants.

These questions are important, given the magnitude of these crisis. The City should be solution-oriented and do everything in its power to forestall this wave of evictions by enacting a temporary rent freeze.

C. Neither a temporary rent freeze nor a full rental forgiveness order violates the Takings Clause.

As described more fully in Section I.E., the government’s regulation of property in this context will constitute a taking of such property only if it is found to be “functionally equivalent” to a direct appropriation or ouster under the “essentially ad hoc” fact-specific inquiry described in the Penn Central case. 52 A temporary rent freeze ordinance should not have any long-term economic impact on the values of the impacted properties, since any such impact would evaporate the moment the freeze was lifted. Moreover, a temporary restriction on increasing rents is sufficiently similar to (and in many cases may simply overlap with) the City’s Rent Stabilization Ordinance that it would not defeat the investment-backed expectations of affected property owners. It is also the type of “public program” that a Penn Central analysis would be unlikely to deem a taking.

Finally, the state and federal rent forgiveness programs that the proposed resolutions support would also not rise to the level of a taking because of their limited economic impact when compared to the overall value of the properties in question. Although under such a program landlords would not be entitled to collect rent for the duration of the emergency, they would still be able to borrow against their properties, sell their properties, improve them, and continue to benefit from their appreciation in value. Any temporary reduction in value due to such a rent forgiveness program would fall well short of the significant percentages required for the finding of a taking under longstanding case law. Finally, although this specific type of rent forgiveness program may not have been anticipated by the affected property owners, the landlord-tenant relationship is heavily regulated under local and state law and a temporary program limiting a landlord’s ability to collect rent during a public health crisis that requires people to stay in their homes cannot be said to be outside the realm of possibility of anticipated regulation.

D. If the City Council does not act, the Mayor should use his emergency authority to impose a rent freeze.

Given the unprecedented emergency, the City’s broad emergency powers, and the temporary nature of a rent freeze, the City Council should do everything in its power to expand a rent freeze to non-RSO units. To the extent that Mayoral action is needed, the City Council should indicate its support for such action with an ordinance or resolution urging the Mayor to expand a temporary rent freeze. To the extent state law remains a barrier, the Council should urge the Governor to suspend any laws preempting a rent freeze on non-RSO units. But we urge the City Council to pursue local action on a non-RSO rent freeze to the fullest extent possible, considering all the above analysis.

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As set forth above, the City clearly has the power to enact more meaningful protections for tenants during this crisis – including a broader temporary moratorium, to clarify that unpaid rent cannot be the future basis for eviction, and to enact a broad temporary rent freeze. We are in a state of emergency, and the law permits these temporary actions to be taken to safeguard all residents of the City. Your actions now will literally save lives in this City, and allow people to stay safe at home, as intended. We urge you to act now to protect your residents.

Sincerely,

Doug Smith, Public Counsel
Craig Castellanet, Public Interest Law Project
Dianne Prado, Housing Equality & Advocacy Resource Team (HEART)
Greg Spiegel and Tai Glenn, Inner City Law Project
Elena Popp, Eviction Defense Network