

April 6, 2020

San José City Council
200 E. Santa Clara St.
San José, CA 95113

RE: Item 8.3 – Rent Suspension – Letter of Support

Dear Mayor, Vice Mayor, and Councilmembers:

We write in support of the memorandum from Councilmembers Carrasco and Peralez proposing a temporary rent suspension for all tenants impacted by the novel coronavirus (COVID-19) for 90 days. A temporary rent suspension is necessary to protect public health, and City Council has the power to enact this regulation through its emergency and police powers.

In times of crisis, local governments have extraordinary power to preserve the life, health, safety, and wellbeing of their people. Since World War I, local governments have used this power to enact various forms of rent control to preserve people's housing through the economic disruption that accompanies and follows emergencies. These rent control measures have historically protected a tremendous number of individuals and families from exposure to the numerous health and safety risks associated with homelessness.¹

City Council has already shown great leadership by enacting a temporary eviction moratorium and helping to set up an \$11 million emergency rental assistance fund. While these measures are helping to keep people housed, they are not sufficient to address the health and safety risks of tenants who have been impacted by COVID-19.

The \$11 million fund was completely used in just three days,² and the eviction moratorium does not excuse a tenant's obligation to pay rent. This means that tenants who are relying on the eviction moratorium to stay housed are likely to incur huge debts that may destabilize their housing, or they may be forced to make impossible choices between paying for necessities like food and medicine or keeping a roof over their head. Suspending the obligation to pay rent would alleviate these risks.

In San José, where many tenants were living paycheck-to-paycheck even before the COVID-19 crisis, many families have lost all income due to the shelter in place order first issued

¹ See *Birkenfeld v. City of Berkeley* 17 Cal. 3d 129, 154 (1976).

² Marisa Kendall, *Three Days After Launch, \$11 Million Santa Clara County Coronavirus Relief Fund Runs Out of Money*, THE MERCURY NEWS (Mar. 27, 2020, 9:49 PM), <https://www.mercurynews.com/2020/03/27/three-days-after-launch-11-million-coronavirus-relief-fund-runs-out-of-money/>.

by Santa Clara County and extended by Governor Newsom. People of color who are least likely to be able to work from home, most likely to be renters, and most likely to be highly rent-burdened have been hit the hardest.

In the past two weeks alone, there have been over 1,000,000 applications for unemployment benefits in California, adding to a backlog of over 500,000 applications.³ This backlog makes it unlikely that tenants will see the relief they need in time to keep up with rent payments. Of course, the thousands of undocumented workers who live in and support San José cannot access these resources and may be forced to choose between staying home to prevent exposure to COVID-19 and breaking the shelter-in-place order to earn income to survive.

As a temporary measure, the rent suspension merely impacts the timing, not the ability, of landlords to impose rent increases. This means it would not be preempted by the state Costa-Hawkins Rental Housing Act (Costa-Hawkins) because the purpose of that law is only to preserve a landlord's right to set the rent following a vacancy in particular kinds of properties. In the context of this international public health emergency, the delay in exercising the right to collect rent this regulation would impose is permissible under state law.

I. City Council can enact the COVID-19 rent suspension under its emergency and police powers as a valid emergency price control.

Article XI, Section 7 of the California Constitution empowers each city and county to “enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.” This broad authority is traditionally known as the City's police power, and it enables local governments to legislate on matters of “[p]ublic safety, public health, morality, peace and quiet, law and order...”⁴ A wide range of regulations on property rights have been upheld as legitimate exercises of a government's police power.⁵

These powers are heightened during a state of emergency proclaimed by a local governing body.⁶ Government Code Section 8634 authorizes local governments during local emergencies to “promulgate orders and regulations necessary to provide for the protection of life and property.”⁷ Indeed, the primary “purpose of a local emergency proclamation is to provide

³ Jeffrey Bartash, *California Tops 1 Million Jobless Claims in Past Two Weeks — See Which States Have Suffered The Most Coronavirus Layoffs*, MARKETWATCH (Apr. 2, 2020, 11:34 AM), <https://www.marketwatch.com/story/california-tops-1-million-jobless-claims-in-past-two-weeks-see-which-states-have-suffered-the-most-coronavirus-layoffs-2020-04-02>.

⁴ *Berman v. Parker*, 348 U.S. 26, 32 (1954).

⁵ *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

⁶ On March 10, 2020, San José City Council adopted a resolution ratifying the Director of Emergency Services' March 6, 2020 proclamation of a local emergency resulting from community spread of COVID-19.

⁷ Cal. Gov. Code § 8643.

extraordinary police powers, immunity for emergency actions, authorize issuance of orders and regulations, and activate pre-established emergency provisions...”⁸

Governor Newsom has further expanded the scope of these powers through his Executive Order 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.”⁹

City Council’s police power applies to the “...use of real property,” and generally, “so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible.”¹⁰ The broad authority of the police power likewise extends to local governmental authority to enact price controls, including on rent, provided the legislation is “reasonably related to the accomplishment of a legitimate governmental purpose.”¹¹ Local governments are authorized under the police power to regulate landlord/tenant relationships even if these relationships are “private” and the regulated activity associated with that relationship is civil in nature.¹²

Although only a legitimate government interest is required, in this unprecedented public health crisis, the City of San José has a compelling interest in protecting the health and safety of its people. Indeed, local governments have perhaps no more compelling interest than that in preserving the lives of their constituents. This health and safety interest applies to preventing exposure to COVID-19 now by preventing displacement, as well as to preventing the need for families to choose between rent or buying basic necessities through the duration of the crisis and to keeping tenants housed after the crisis is over. City council also has a compelling interest in preventing the crisis from having a disparate impact on people of color and undocumented workers who, as explained above, have been hit hardest financially by the crisis.

A rent suspension is closely related to these interests. It would immediately provide relief to tenants who fear they may be forced to break the shelter-in-place order to work to afford basic necessities. It would also support tenants who have lost income due to COVID-19 during the

⁸ RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE RATIFYING AND CONTINUING THE PROCLAMATION OF EXISTENCE OF A LOCAL EMERGENCY ISSUED BY THE DIRECTOR OF EMERGENCY SERVICES, No. __ (approved Mar. 10, 2020).

⁹ Cal. Exec. Order No. N-28-20 (Mar. 16, 2020), available at: <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.16.20-Executive-Order.pdf>

¹⁰ *California Building Industry Assn. v. City of San Jose*, 61 Cal. 4th, 435, 455 (2015).

¹¹ *Birkenfeld v. City of Berkeley* 17 Cal. 3d 129, 158 (1976). See also *Nebbia v. New York*, 291 U.S. 502, 539 (1934) (“Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.”)

¹² *Id.* at 142.

crisis by temporarily eliminating the largest single item on most families' list of monthly expenses. This relief would also limit the disparate impact of the crisis on people of color and undocumented workers because it would level the playing field for tenants who are more highly rent-burdened or unable to access unemployment benefits. Finally, the rent suspension would prevent widespread displacement and homelessness once the pandemic is over by preventing renters relying on the eviction moratorium from racking up an insurmountable balance in unpaid rent.

Moreover, in the context of a local emergency, City Council has even greater authority to enact measures necessary for public health that may restrict property rights.¹³ More specifically, local governments can “legitimately [curtail]” a constitutionally-protected right “when a community has been ravaged by flood, fire or disease, and its safety and welfare are threatened.”¹⁴ California cities have relied on this power to enact curfews that curtail the public’s right to travel during riots that created a safety risk for people who did exercise that right.¹⁵ Likewise, now that the shelter in place order has left many tenants without any income whatsoever, exercising the right to collect rent is virtually impossible, if not meaningless.

II. The COVID-19 Rent Suspension is not preempted by state law because it would not indefinitely restrict a landlord’s right to set the rent.

As explained above, San José can use its police power to “make and enforce within its limits all local, police, sanitary, and other ordinances and regulations *not in conflict with general laws*.”¹⁶ This means that cities are prohibited from passing laws or regulations that contradict state law. “A local ordinance is preempted by a state statute only to the extent that the two conflict.”¹⁷

The purpose of the Costa-Hawkins Rental Housing Act is to “prohibit the strictest type of rent control that sets the maximum rental rate for a unit and maintains that rate after vacancy...”¹⁸ Thus, Costa-Hawkins gives landlords the right “to impose whatever rent they choose *at the commencement of a tenancy*.”¹⁹ This is known among housing law specialists as “vacancy decontrol.”²⁰

¹³ See *In re Juan C*, 28 Cal. App. 4th 1093, 1100 (1994).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Cal. Const. art. XI, Sec. 7 (emphasis added).

¹⁷ *Rental Housing Assn. of Northern Alameda County v. City of Oakland*, 171 Cal.App.4th 741, 752 (2009) (citing *Action Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1243 (2007)).

¹⁸ *Mosser Companies v. San Francisco Rent Stabilization & Arbitration Bd.*, 233 Cal. App. 4th 505, 514 (2015).

¹⁹ *Mak v. City of Berkeley Rent Stabilization Bd.*, 240 Cal.App.4th 60, 68 (2015) (citing *Action Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1237 (2007)).

²⁰ *Action Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1237 (2007).

A rent suspension would be a form of rent control, but of limited duration and applicability such that it would not continue to regulate rents after the emergency. Landlords eligible to impose unregulated rent increases will be able to do so after the emergency has been resolved. Moreover, once the 90-day rent suspension is over, landlords will be free to set the rent at whatever rate they want for any new tenant. Furthermore, because of the eviction moratorium enacted by San José City Council, no tenant who has been impacted by COVID-19 will have to leave their home during the emergency. This means that there will be virtually no vacancies or new tenancies during the period covered by the proposed rent suspension that would implicate Costa-Hawkins' requirement for vacancy decontrol.

Therefore, the proposed rent suspension is not the "strictest type of rent control" that Costa-Hawkins aimed to prevent and it does not conflict with the right to vacancy decontrol that Costa-Hawkins provides to landlords. Therefore, the proposed rent suspension would not be preempted by Costa-Hawkins.

III. Conclusion: the COVID-19 Rent Suspension is a valid and critically needed emergency regulation.

We applaud Councilmembers Carrasco and Peralez for introducing this important emergency measure for preserving the health and safety of the people of San José, and urge City Council to approve this measure to provide relief to COVID-19-impacted tenants wondering how they will make through this emergency without income and without relief from their day-to-expenses.

We welcome the opportunity to meet with you to discuss this letter or the proposed rent suspension in more detail. Please reach out to us at Michael.trujillo@lawfoundation.org or 408-280-2454 to follow up.

Sincerely,



Nadia Aziz
Michael Trujillo
The Law Foundation of Silicon Valley



Katherine J.G. McKeon
Public Counsel

A handwritten signature in blue ink that reads "Michael Rawson". The signature is fluid and cursive, with the first name "Michael" being larger and more prominent than the last name "Rawson".

Michael Rawson
The Public Interest Law Project

CC:
San José City Council
Rick Doyle, City Attorney
David Sykes, City Manager