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June 18, 2014

Via: Electronic Mail Only

Steve Duran, City Manager
City of Antioch
sduran@ci.antioch.ca.us

Lynn Tracy Nerland, City Attorney
City of Antioch
lnerland@ci.antioch.ca.us

Re: Proposed Business License Tax for Residential Landlords

Dear Mr. Duran and Ms. Nerland:

This office represents the California Apartment Association ("CAA") on a continuing basis, which has forwarded to us your proposed Business License Tax for Residential Landlords ("Tax") for comment. As set forth below, the proposed Tax runs afoul of the United States Constitution and should not be put on the ballot for voter approval.

The Tax proposes to tax landlords based upon the number of residential units offered to the public--regardless of unit size or rental price. Different amounts have been proposed as the per unit tax, ranging from $150 to $250. Depending on the iteration of the proposal, this range also changes based on the number of units offered by a landlord or for no enumerated reason at all. This method of taxation by the City of Antioch (the "City"), however, violates the Commerce Clause of the United States Constitution because it is unfairly apportioning the amount of tax that landlords pay for providing multifamily housing and discriminating against a specific type of interstate commerce.

A Commerce Clause challenge may be raised when a locality or State taxes or otherwise unfairly burdens interstate commerce. Oklahoma Tax Com'n v. Jefferson Lines, Inc., 514 U.S. 175, 179-180 (1995); see also C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994) (finding town ordinance violated Commerce Clause). The U.S. Supreme Court "makes clear that **renting and otherwise using housing for commercial purposes implicates the federal commerce power**." Groome Resources Ltd., LLC v. Parish of Jefferson, 234 F.3d 192, 206 (5th Cir. 2000) (citing Jones v. U.S., 529 U.S. 848 (2000) and Russell v. U.S., 471 U.S. 858,

862 (1985)) (finding that a residential rental home is used in interstate or foreign commerce) (emphasis added); See also McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 245 (1980).

A tax, license fee, or other regulation that impacts interstate commerce will not offend the Commerce Clause if it is "applied to an activity with a substantial nexus with the taxing State, **is fairly apportioned, does not discriminate against interstate commerce**, and is fairly related to services provided by the State." Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617 (1981) (citing Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (emphasis added)). "[W]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a [locality], a court may properly conclude . . . that the [locality] is imposing an undue burden on interstate commerce." Id. at 629. A tax is only proper when it relates the tax liability to the value of the activities within the locality. See id. The types of tax apportionment approved by courts are generally a percentage of the value of the good or service used or sold within the State or locality. See e.g., Goldberg v. Sweet, 488 U.S. 252, 264 & n.14 (1989) (describing proper taxes).

Here, it is clear that landlords providing rental housing are participating in interstate commerce, as explained by the Supreme Court in Russell and Jones. Therefore, the Tax must comply with the Commerce Clause.

The Tax violates the Commerce Clause because it is not fairly apportioned. It is, at best, an arbitrary number, as evidenced by the multiple iterations of the proposals by the City and its citizens. There is no relation between a flat per unit rate and the overall income of the landlords or the value of the services provided by the landlords. Unlike Commonwealth Edison, where a tax on coal was logically calculated as a percentage of the value of coal mined, the Tax is not rationally related to the value of the service provided. 453 U.S. at 629. A flat fee also ignores the variances in the value provided by landlords. For example, a landlord with a duplex may offer a low rent because of its location within the City or the limited amenities it offers, yet under the most recent proposal, that landlord would be charged a higher per unit rate than a landlord with a high-rise full of luxury apartments, each of which could be rented for double the amount for a unit in the duplex. Without a rational link between the amount charged to landlords and the services provided the Tax cannot stand.

The City claims in its Staff Report dated May 20, 2014, that residential landlords do not provide enough economic benefit to the City because their tenants are not paying a business tax and the landlords are gaining the benefits of owning property. First, to state that having housing where citizens of the City can reside is not economically advantageous is suspect. Without housing for its citizens, there would be no one to support the businesses that pay business taxes or anyone to pay sales taxes. There would be no one to work in the businesses or otherwise. Next, the City has not shown that commercial property owners do not receive the same benefits to owning property as residential owners, nor has it shown that those benefits are outweighed by

business license taxes charged to the tenants of these commercial properties. Finally, the only evidence provided in support of the argument that residential landlords do not provide economic benefit to the City is purely anecdotal and has the sole purpose of painting residential landlords as avoiding their fair share of taxes even though they currently pay a percentage of the value of the services offered like every other business owner. The current business tax valuation easily meets Constitutional requirements because of the clear relation between the services and the tax, but your new proposal does not.

Moreover, the Tax discriminates against one type of interstate commerce, residential rentals. The Tax is facially discriminatory against residential landlords, allowing for sales of residential and commercial property and rental of commercial properties to remain taxed at a rational rate based on actual value, but rental of residential property to be on a per unit basis. The Tax also has a discriminatory effect by placing an additional burden on developers who may desire to create further residential rental properties that would not exist for those who may develop commercial properties or residential properties for sale. In short, the Tax would have the effect of disturbing the market for residential rental properties in the City and the State of California.

Based on the above analysis, it is unlikely that the Tax would survive a challenge based on the Commerce Clause of the United States Constitution. We ask that you seek other methods of raising funds for the municipality that are not arbitrary and discriminatory. If you would like to discuss this matter further, please feel free to contact the undersigned or Joshua Howard, CAA's Senior Vice President of Local Government Affairs.

Sincerely,

PAHL & McCAY
A Professional Corporation

Karen K. McCay

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cc: CAA
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