California Apartment Association
1530 The Alameda, Suite 100
San Jose, CA 95126
408.342.3500 ▪ caanet.org

Via Electronic mail only

May 11, 2020

Hon. Richard Valle
President
Alameda County Board of Supervisors
1221 Oak Street
Oakland, CA 94612

RE: Alameda County Board of Supervisors May 12, 2020 Agenda Item #26

Dear President Valle and Supervisors:

On behalf of the members of the California Apartment Association (CAA), I want to commend the County Board of Supervisors for its efforts to address the COVID-19 pandemic and develop policies and programs that aim to protect Alameda County residents and businesses.

CAA is the non-profit trade organization providing services to rental housing providers across the state and is proud to represent thousands of Alameda County housing providers, especially "mom and pop" operators who rely on their rental investments to sustain their retirement. The Rental Housing Association of Southern Alameda County is affiliated with CAA as an independent chapter of CAA and works with CAA to serve the industry in parts of Alameda County.

CAA has urged its members – and all rental housing providers – to act with compassion towards residents who face coronavirus-related hardships. CAA has asked rental housing providers to follow CAA's Safe at Home Guidelines, which include freezing rent increases and halting most evictions through May 31, 2020. Housing providers throughout the state have taken up the call, at great cost to themselves and their businesses, because it is the right thing to do.

While CAA appreciates Alameda County's efforts to protect renters during the COVID-19 pandemic, the association has grave concerns with provisions in the proposed eviction moratorium coming before the Board of Supervisors on Tuesday, May 12, 2020 as a regular ordinance. Those concerns are as follows:

1. **The ban on all evictions except for limited cases is overbroad, substantially impairs existing contracts, and exceeds the county's police power.**

The ordinance the Alameda County Board of Supervisors will consider on May 12, 2020 places a moratorium not only on evictions for nonpayment of rent caused by COVID-19, but also on **all** evictions regardless of cause, with limited exceptions. This broad eviction moratorium essentially eliminates most lawful reasons for eviction and will remain in place for the length of the local health emergency, which could be well over a year, plus 30 days. A landlord subject

to this rule will have no recourse against tenants who damage the property, engage in criminal activity, or create a nuisance, unless that activity rises to a vague health or safety standard.[1] This means that the county is opting to outright reject the legitimate and pressing needs of housing providers.

Furthermore, under existing state law and rental agreements, a landlord can evict a tenant for material violations of the rental agreement that aren't corrected.[2] Under the county's measure, however, landlords are unable to address even the most egregious violations of the rental agreement. Thus, the measure substantially impairs existing contracts between rental housing providers and their residents. Under the Constitution, an unlawful impairment of contract exists if there is a substantial impairment and if the means chosen to implement the regulation is of a character inappropriate to its public purpose.[3] Banning all evictions even for legitimate causes for the length of the public health emergency goes beyond the scope of protecting tenants with financial difficulties due to COVID-19. Because of the overbreadth of this measure, its validity as a proper exercise of the county's police power is also in question.[4] In fact, the City of Los Angeles recently voted down a similar measure due to advice from their City Attorney that the measure would violate the Constitution for the reasons described above.[5]

To be clear, rental housing providers do not get into this business in order to evict tenants, but eviction is, unfortunately, a necessary – and often singular – tool for addressing the most disruptive situations faced by rental housing providers. Without the ability to legally and peacefully regain possession of property, rental housing providers will be powerless to combat many of the biggest problems they face at a time when it is more important than ever for Californians to have a safe place to call home.

2. The 12-month rent deferral policy raises concerns under the Contracts and Takings Clauses of the Constitution.

The ordinance gives tenants 12 months to repay overdue rent. Although we completely agree that many tenants will struggle to pay back rent during this challenging time, any proposal to defer rent payments raises serious concerns under both the contracts and takings clauses of the federal and state constitutions. With respect to former, the United States and California Constitutions prohibit state and local governments from passing laws that impair the obligation of contracts.[6] A 12-month rent deferral period will no doubt cause substantial harm to rental housing providers contrary to their reasonable contractual expectations. Many of our members will see a significant reduction in rental payments and will struggle not only to maintain their properties in accordance with habitability laws but also to house and feed their own families.[7] While those providers comply with many regulations, those regulations and applicable case law all mandate that they receive a reasonable rental rate every month.[8]

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[1] Consider, for instance, the following real life cases: an onsite manager's employment is terminated for theft but the manager refuses to vacate; a tenant is disturbing other tenants' right to quiet enjoyment by making loud noises at night and using racial slurs; a tenant allowed an occupant to move into the unit without obtaining approval and the tenant vacated the unit leaving the unauthorized occupant in place who is disturbing the quiet enjoyment of other tenants.

[2] Code of Civ. Proc. 1161(3).

[3] *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 244; see, e.g., *Ross v. Berkeley* (1987) 655 F.Supp. 820 (finding that a rent control ordinance severely impaired contractual obligations in an unreasonably overbroad manner ill-tailored to its objectives).

[4] *Silver v. Los Angeles* (1963) 217 Cal.App.2d 134, 139 (local government exercise of police powers must be rationally related to a legitimate government objective).

[5] Michael N. Feuer, City Attorney, Letter to Los Angeles City Council (April 17, 2020), p. 2-3.

[6] U.S. Const. art. I, § 10, cl. 1; Cal. Const. art. I, § 9.

[7] The payments rental housing providers need to make are either not receiving any deferment or are only being deferred for a short period of time.

[8] *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App. 4th 204, 220; *Home Building Assn. v. Blaisdell* (1934) 290 U.S. 398; *Levy Leasing Co, Inc. v. Siegel* (1922) 258 U.S. 242; *Marcus Brown Holding Co. v. Feldman* (1921) 256 U.S. 170; *Block v. Hirsch* (1921) 256 U.S. 135

Moreover, such a lengthy rent deferral policy is not properly tailored to address its admittedly noble purposes. As stated above, an impairment of contract exists if there is a substantial impairment and if the means chosen to implement the regulation is of a character inappropriate to its public purpose.[9] In this instance, a policy that would eliminate rental income for such a lengthy period and endanger the ability of rental housing providers to keep their properties in good repair is not sufficiently tailored to serve the purpose of keeping residents housed. Unfortunately, this is not the first time governments have been called on to address an emergency that impacts the average person's ability to pay their bills. In the 1920s, the Supreme Court addressed a series of rent control laws in the wake of World War I. While some may suggest these cases support the constitutionality of this proposal, a careful read indicates otherwise. In all of these cases, the government was allowed to foreclose eviction by a holdover tenant, but the tenant was not exempt from the obligation to pay a reasonable rent.[10] In addition, during the Great Depression, the Court considered a state's mortgage moratorium law that allowed troubled homeowners to extend their mortgage payments through a court review process – even in that case, the homeowners still had to pay a reasonable rental value while the mortgage payments were extended.[11]

With respect to the taking clause, the United States and California Constitutions prohibit the taking of property without just compensation.[12] That just compensation requirement is designed to bar the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[13] By forcing rental housing providers to go 12 months without rent to house tenants impacted by COVID-19, the proposal at issue here represents just the sort of action the taking clause was intended to prevent. At best, the proposal constitutes a regulatory taking under *Penn Central* that inappropriately interferes with the reasonable investment-backed expectations of rental housing providers[14]; at worst, the proposal rises to a physical taking that triggers a categorical duty to compensate owners.[15]

While proponents of this proposal might argue that just compensation is not required in an emergency, the cases reaching that conclusion have been limited to instances of military necessity; furthermore, as indicated by the U.S. Congressional Research Service, such a limitation would only excuse physical damage to property but not *appropriation* of that property to serve pandemic response efforts.[16] A measure that requires rental housing providers to provide housing without rent for several months constitutes such an appropriation of property.

In sum, a lengthy rent deferral policy will undoubtedly cause rental housing providers irreparable injury. Once those providers start experiencing hardships under this policy, the governments that enact them are likely to witness the deterioration of an already insufficient housing supply as well as litigation claiming violation of the provisions outlined above. Thus, governments are well advised to carefully design the impact on housing providers to avoid such costly outcomes.

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[9] *Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 244; see, e.g., *Ross v. Berkeley* (1987) 655 F.Supp. 820 (finding that a rent control ordinance severely impaired contractual obligations in an unreasonably overbroad manner ill-tailored to its objectives).

[10] See *Levy Leasing Co, Inc. v. Siegel* (1922) 258 U.S. 242; *Marcus Brown Holding Co. v. Feldman* (1921) 256 U.S. 170; *Block v. Hirsch* (1921) 256 U.S. 135.

[11] *Home Building Assn. v. Blaisdell* (1934) 290 U.S. 398; see also *Wright v. Vinton Branch of Mountain Turs Bank* (1937) 300 U.S. 440.

[12] U.S. Const., 5th Amendment (applicable to states through 14th Amendment); Cal. Const., rt. I, §19.

[13] *Pennell v. San Jose* (1988) 485 U.S. 1, 9.

[14] *Penn Central Trans. Co v. New York City* (1978) 438 US. 104.

[15] See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking); *Lucas v. S.C. Coastal Council* (1992) 505 U.S. 1003 (compensation required when regulations deprive owner of all economically beneficial use of her property).

[16] Sean M. Stiff, Congressional Research Service, *COVID-19 Response: Constitutional Protections for Private Property* (March 27, 2020); see also Gov. Code § 8572 (authorizing the Governor to commandeer or utilize private property during an emergency provided that the reasonable value thereof is paid).

3. **The proposal to prohibit the collection of back rent through the unlawful detainer process is preempted by state law.**

If a tenant does not repay the rent that becomes due within 12 months from the rent due date, the landlord can collect the back rent as any other consumer debt, but the ordinance prohibits the use of the state governed unlawful detainer process to collect the deferred rent that, in some cases, could be deferred for up to 12 months, placing significant financial burdens on small rental housing providers who rely on this income to pay their employees, service providers, property taxes, utility bills, and mortgages. The limitation on collection of back rent through the unlawful detainer process is of questionable validity and likely preempted by state law. When a tenant fails to pay rent, a landlord may seek to evict the tenant through the filing of a complaint in court. (Code of Civ. Proc. § 1166.) If the landlord proves their case in court, a civil judgment is awarded to the landlord that may include the amount of the past owed rent. (Code of Civ. Proc. § 1174.) After a judgment is entered, a landlord would seek to enforce the judgment through a legal debt collection process, such as garnishing wages. This process is regulated and entirely occupied by state law. (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 150-151; Code of Civ. Proc. §§ 1161-1179a). Local governments are preempted from trying to alter this process. (*Birkenfeld,* 17 Cal.3d at pp. 150-151.) The Los Angeles City Council recently rejected a similar concept because their city attorney warned the concept was preempted by state law.[17]

CAA understands that the novel coronavirus pandemic presents a health and financial crisis to all Californians. Housing providers are doing everything they can to work with residents. They are acting with compassion and understanding during these difficult times. However, rental operators are losing faith in their local lawmakers to engage in reasonable policy if there are no guardrails and protections in these emergency laws that protect all residents, businesses, and housing providers.

CAA respectfully requests you re-consider this measure and explore assistance programs that help impacted renters remain in their homes without seriously jeopardizing the ability of the housing provider to continue to offer homes for rent.

Sincerely,

Joshua Howard
Executive Vice President, Local Government Affairs
California Apartment Association

[17] Michael N. Feuer, City Attorney, Letter to Los Angeles City Council (April 17, 2020), p. 4.