

ZACKS, FREEDMAN & PATTERSON

A PROFESSIONAL CORPORATION

601 Montgomery Street, Suite 400
San Francisco, California 94111
Telephone (415) 956-8100
Facsimile (415) 288-9755
www.zfplaw.com

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Alameda Board of Supervisors
County of Alameda Administration Building
1221 Oak Street, #536
Oakland, CA 94612
CBS@acgov.org

VIA EMAIL AND FIRST CLASS MAIL

Oakland City Council
1 Frank H Ogawa Plaza
2nd Flr.
Oakland, CA 94612
cityclerk@oaklandca.gov

Re: Oakland and Alameda County's Eviction Moratoriums

Dear Alameda Board of Supervisors and Oakland City Council:

We represent a group of Alameda County property owners, throughout Alameda County (the "County"), including in Oakland. We write to demand the Oakland City Council and the Alameda Board of Supervisors immediately rescind Oakland and the County's eviction moratoriums (the "Moratoriums"). The Moratoriums, which have been in place for over a year-and-a-half—and have no end in sight—have brought, and continue to bring, significant harm to landlords throughout the County. As is detailed below, the Moratoriums violate constitutional and state law. Should they not be rescinded forthwith, our client and its members intend to seek judicial relief in federal court in the near future.

The Moratoriums

On April 21, 2020, the Alameda Board of Supervisors adopted Urgency Ordinance No. O-2020-23, which banned evictions in the County, including those for nonpayment and no-fault bases, subject to very few exceptions. That urgency ordinance was then made a permanent part of the County's Code of Ordinances on June 23, 2020, under ACCO § 6.120. The County's moratorium purports to apply to "all evictions from residential units in the unincorporated and incorporated areas of the county." (ACCO § 6.120.030.) That moratorium states it expires sixty

days “after the expiration of the local health emergency.” (ACCO § 6.120.030.) Per the County’s local emergency, the local emergency “shall remain in effect until the [County’s] Board of Supervisors determines that the emergency no longer exists.” (Res. No. R-2020-91.) The County’s position is that it has not expired, and thus the blanket moratorium on evictions is purportedly still in effect.

Oakland passed its eviction moratorium on March 27, 2020. (Ordinance No. 13589.) Like the County’s, that moratorium not only prohibited evictions for nonpayment of rent due to Covid-19-related financial distress, but also all other evictions, with few exceptions. Initially, Oakland’s moratorium on all evictions was set to expire on May 31, 2020, “unless extended.” (Ordinance No. 13589.) Subsequently, however, the moratorium was extended until “the Local Emergency declared on March 9, 2020 has been terminated by the City Council, or August 31, 2020, whichever comes first.” (Ordinance no. 13594.) However, on July 7, 2020, the extension on Oakland’s eviction moratorium was again amended to *only* expire when the local emergency had been terminated by the City Council. (Ordinance No. 13606.) The local emergency has no stated expiration date, and therefore the blanket moratorium on evictions purportedly remains in effect.

The Moratoriums are Illegal

First, the Moratoriums constitute uncompensated takings of public property in violation of the Fifth Amendment of the U.S. Constitution. The Moratoriums are devaluing landlords’ properties by prohibiting landlords from recovering possession of their properties—even for their personal use—and even despite *continued* nonpayment of rents. (*Whitney Benefits, Inc. v. United States* (Fed. Cir. 1985) 752 F.2d 1554, 1558; also see, *Levin v. City and County of San Francisco* (2014) 71 F.Supp.3d 1072 [landlords did not cause the problem to which tenants may now be exposed].) Our client’s members consist of landlords who have suffered significant financial losses due to the Moratoriums, and continue to suffer these losses, notwithstanding the current government relief programs in place. Our client’s members who have applied for funds under Alameda County’s “Housing Secure” program have still not received the large majority of those funds, even though they applied many months prior—and now funds are not currently available.¹ Oakland’s “Keep Oakland Housed” program is reported to have similar deficiencies. Landlords’ “investment-backed expectations” have been violated as a matter of law. (*Apartment Ass’n of Los Angeles Cty., Inc. v. City of Los Angeles* (C.D. Cal. 2020) 500 F. Supp. 3d 1088, 1096, *aff’d*, (9th Cir. 2021) 10 F.4th 905 [“the scope and nature of the COVID-19 pandemic, and of the public health measures necessary to combat it, have no precedent in the modern era, and that no amount of prior regulation could have led landlords to expect anything like the blanket Moratorium”]; also see, *Baptiste v. Kennealy* (D. Mass. 2020) 490 F.Supp.3d 353, 390.)

Further, given the severity of the Moratoriums and the extraordinary time they’ve been in place—

¹ <https://www.ac-housingsecure.org/landlord> [Stating: “NOTICE: We have received more requests for funding than we have funds currently available.”]

and in the face of a high vaccination rate and a Bay Area that has been open for business for many months—the County appears to be using the pandemic as a “cursory” justification to rationalize unlawful and unconstitutional policies. (*Texas v. United States* (S.D. Tex. Aug. 19, 2021) No. 6:21-CV-00016, 2021 WL 3683913, at *45; *Chrysafis v. Marks* (2021) 141 S.Ct. 2482; *Tandon v. Newsom* (2021)141 S.Ct. 1294.) The Moratoriums—which have been in place for a year-and-a-half and have no end in sight—also constitute “physical” takings in violation of the Fifth Amendment of the U.S. Constitution because they illegally nullify landlords’ right to occupy their properties without just compensation. (*Cedar Point Nursery v. Hassid* (2021) 141 S.Ct. 2063; *Cynwar v. City & County of San Francisco* (2001) 90 Cal.App.4th 637, 658.)

Second, the Moratoriums are preempted by the State’s Covid-19 Tenant Relief Act (the “Act”), both expressly and impliedly, because they conflict with the Act. (See, *Coyne v. CCSF* (2017) 9 Cal.App.5th 1215, 1224-1225; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 149-151.) Until October 1, 2021, the Act prohibited evictions for nonpayment of rent related to Covid-19 financial distress. But even during the State’s eviction moratorium—which was *temporary*—landlords were still permitted to file actions for, and courts were still permitted to find tenants guilty of, UD for fault, and no-fault “just cause” as defined under Civil Code sec. 1946.2. (CCP § 1179.03.5(a)(3).) Further, while the just cause provisions of Civil Code sec. 1946.2 do not apply where there is a more “protective” local ordinance in place, that protective ordinance must be consistent with that section, not otherwise prohibited by law, and there must be a specific finding in the ordinance that it is more “protective” than sec. 1946.2. (CCP § 1946.2(g)(B); also see, CCP §§ 1179.05(f) [Act does not “provide the Legislature’s understanding of the legal validity on any specific ordinance, resolution, regulation, or administrative action adopted by a city, county, or city and county in response to the COVID–19 pandemic to protect tenants from eviction”].)

In contrast to the Act—which in large part has now expired—the Moratoriums deprive landlords of the UD process *altogether* by prohibiting repossession of their properties in almost all circumstances, thereby conflicting with that law. Oakland and the County will undoubtedly claim they are permitted to continue the imposition of the Moratoriums under the Emergency Services Act, Gov. Code §§ 8550 et. seq. But there is nothing in the ESA that permits local government to, in effect, permanently displace State law. Indeed, the Act *expressly* states that eviction controls in response to the Covid-19 pandemic are a “matter of statewide concern rather than a municipal affair” (CCP § 1179.03.5(e).) And while that Act permits local government to enact “just cause” provisions, the Moratoriums are inconsistent with the Act because they prohibit evictions for almost any “just cause” reason within the Act. Further, the County’s Moratorium fails to comply with CCP sec. 1946.2’s requirement that it expressly find the eviction ordinance more “protective” than that section. The County doesn’t even have an eviction control scheme in place, other than its moratorium. Therefore, CCP sec. 1946.2 controls, not the local law. In sum, because the Moratoriums conflict with the Act, they are preempted and void.

Third, the Moratoriums violate landlords’ substantive and procedural due process rights under the U.S. Constitution. (*Lockary v. Kayfetz* (9th Cir. 1990) 917 F.2d 1150, 1155 (substantive due

process); *Weinberg v. Whatcom County* (9th Cir. 2001) 241 F.3d 746, 752-755 (procedural due process). The Moratoriums violate landlords' substantive due process rights because landlords have a protected property interest in their real properties, and Oakland and the County's continued imposition of the blanket Moratoriums are irrational and lacking in a legitimate government interest because there is no justification for such extreme measures. Indeed, the Act never even imposed such draconian restrictions (it expressly permitted evictions for no-fault bases) and in any event, *its eviction protections have expired*. The Bay Area has seen significant improvement in circumstances relating to the pandemic since March of 2020, and the pandemic should not be used as a "cursory" justification for what would otherwise be an illegal law. The Moratoriums violate procedural due process because they, in effect, deprive landlords of *any* procedure to recover their properties under most cases. (*Birkenfeld, supra*, 17 Cal.3d at pp. 149-151 [specific purpose of a UD action is to provide landlords a summary proceeding for recovery of possession of their properties].)

Finally, the Moratoriums unlawfully amend Oakland's Just Cause for Eviction Ordinance, which was enacted via voter initiative. (Oak. Mun. Code § 8.22.310.) While the Oakland City Council is permitted to amend the Just Cause for Eviction Ordinance to a limited extent (see, Oak. Muni. Code § 8.22.360(F); City of Oakland Measure Y), the County is not, and the City Counsel's moratorium significantly surpasses the permissible scope of amendment permitted by the voters. Thus, the Moratoriums are invalid. (Elec. Code § 9217; Cal. Const. Art II § 10; *Tesoro Logistic Operations, LLC v. City of Rialto* (2019) 40 Cal.App.5th 798, 802.)

In sum, the egregiously overbroad Moratoriums have brought, and continue to bring, significant harm to landlords throughout Oakland and the County. The Moratoriums are patently illegal regulations that drastically exceed Oakland and the County's police power, and their continuation exposes Oakland and the County to significant liability. We therefore respectfully urge the Alameda Board of Supervisors and the Oakland City Council to immediately rescind the Moratoriums to avoid further violations of state and federal law.

Very truly yours,

ZACKS, FREEDMAN & PATTERSON, PC

/s/ Andrew M. Zacks

Andrew M. Zacks

cc: (email only)

David Haubert - District1@acgov.org; david.haubert@acgov.org

Richard Valle - District2@acgov.org; richard.valle@acgov.org

Dave Brown - Disctrict3@acgov.org; dave.brown@acgov.org

Nate Miley - District4@acgov.org; nate.miley@acgov.org
Keith Carson - District5@acgov.org; keith.carson@acgov.org
Rebecca Kaplan - atlarge@oaklandca.gov
Dan Kalb - dkalb@oaklandca.gov
Nikki Fortunato Bas - nfbas@oaklandca.gov
Carroll Fife- District3@oaklandca.gov
Sheng Thao - district4@oaklandca.gov
Noel Gallo - Ngallo@oaklandca.gov
Loren Taylor - District6@oaklandca.gov
Treva Reid - district7@oaklandca.gov
Libby Schaaf - officeofthemayor@oaklandca.gov
Barbara Parker - bjparker@oaklandcityattorney.org
Doryanna Moreno - dmoreno@oaklandcityattorney.org
Maria Bee - mbee@oaklandcityattorney.org
Donna Ziegler - donna.ziegler@acgov.org