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August 8, 2023

Honorable Lamar Thorpe & City Council
City of Antioch
200 H Street
Antioch, CA 94509

Re: August 8, 2023 City Council Meeting – Agenda Item #F Ordinance Prohibiting Retaliation and Harassment of Residential Tenants

Honorable Thorpe and members of the City Council:

The California Apartment Association (CAA) is the largest statewide trade organization representing rental housing providers and operators. Our local members provide homes to over 60,000 families in Contra Costa County. We respectfully submit these comments for consideration during the second reading of Agenda Item #F.

CAA appreciates the City Council for hearing concerns we raised at the July 25 meeting and amending certain provisions of the ordinance to address those concerns.

Upon review of the amended version of the ordinance, CAA found that one of the amendments was not fully corrected:

Section 4 – Chapter 11-5.03 Harassment by Landlord Prohibited

Subsections (A)(16) and (17). (A)(16) was amended as directed by the City Council. However, (A)(17) is left unchanged. CAA recommends that (A)(17) is removed or include the clause "*except when a landlord is engaged in a tenant eviction process.*" which was added to (A)(16) in the amended ordinance.

Additionally, the revised ordinance still does not address compliance with existing case law that preempts the City of Antioch from enacting certain provisions of the ordinance specifically the following requirements:

Section 2 – Chapter 11-4.01 Retaliation Prohibited

Subsection C includes a presumption of retaliation on the housing provider's part. Section 11-4.01 (c), in relevant part, states:

"In an action by or against a tenant, evidence of the assertion or exercise by the tenant of rights under this title within six months prior to the alleged act of retaliation shall create a presumption that the landlord's act was retaliatory. 'Presumption' means that the court must find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence."

Section 11-4.01 (c) is in direct conflict with state law, specifically Evidence Code section 500, because it creates a presumption affecting the burden of proof – something local ordinances have no power to

do as the rules of evidence are set by state law and are not subject to local variation. (*Orena v. City of Santa Barbara* (1891) 91 Cal. 621, 629 [28 P. 268] [an "ordinance is void ... [to the extent that it purports to] lay down rules of evidence ...."]); (9 McQuillin, Municipal Corporations (3d ed. 1978) § 27.45, p. 670 ["[w]ithout express authority the general rules of evidence or procedure may not be changed by ordinance by a municipal corporation"]); (*see also* 2 Dillon, Municipal Corporations (5th ed. 1911) § 643, p. 983) "[u]nlike the legislature, the governing body of a municipal corporation has no power to prescribe rules of evidence for the guidance of courts. Therefore, a municipal ordinance ... concerning the burden of proof [is void]." (31 Cal.Jur.3d, Evidence, § 5, at p. 37.) *See also Cohen v. St. Louis Merchants' Bridge Terminal Ry*. (1916) 193 Mo.App. 69 [181 S.W. 1080, 1081-1082] ("'the city cannot by ordinance in any wise change or alter the ordinary rules of evidence applicable in this court"').

In fact, the California Supreme Court has already decided that the exact language used in section 11-4.01(c) is in direct conflict with Evidence code section 500 and is therefore preempted and invalid. In *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, the city of Berkeley was sued over the same anti-retaliation provision that the city is considering adopting in section 11-4.01(c).

Berkeley's ordinance stated (just like section 11-4.01(c)): "evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged act of retaliation shall create a presumption that the landlord's act was retaliatory. 'Presumption' means that the Court must find the existence of the fact presumed unless and until its nonexistence is proven by a preponderance of the evidence."

The Court concluded that the ordinance by its express terms created a presumption of retaliation which required the landlord to prove, by a preponderance of the evidence, that the eviction was not retaliatory which altered the traditional allocation of the burden proof as established by Evidence Code section 500. Evidence code section 500 states: "[e]xcept as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Accordingly, pursuant to Evidence Code section 500 the tenant should be required to prove the fact of retaliation because it is "essential" to establishing tenant's defense or claim, but Berkeley's ordinance turned the burden of proof on its head by requiring the landlord to prove the eviction was not retaliatory. Given this, the Court held that the ordinance was in direct conflict with Evidence Code section 500 and that a municipal ordinance could not qualify as a "law," within Evidence Code section 500's exclusionary provision, "[e]xcept as otherwise provided by law." (*Id*. at 699 ["we cannot believe that the Legislature, when it enacted Evidence Code sections 500 and 160 in 1965, ever intended municipal ordinances to come within the exception clause of Evidence Code section 500."])

Like the Berkeley ordinance, section 11-4.01(c) of the city's proposed ordinance is also in direct conflict and preempted by state law. Given that section 11-4.01(c) has the exact same language as the problematic provisions of the Berkeley ordinance which the California Supreme Court struck down, section 11-4.01(c) is also likely to be struck down by the courts if passed into law. Given this, CAA recommends amending or removing this provision.

<u>Section 4 – Chapter 11-5.03 Harassment by Landlord Prohibited</u>

CAA recommends that section 11-5.03 (A)(23) be removed or amended to be consistent with the recent United States Supreme Court Case, *Cedar Point Nursery v. Hassid*.

Section 11-5.03(A)(23) states housing providers may not:

"Prohibit, interfere with, retaliate against, or threaten retaliation against tenant organizing activities or engaging in other political activities. 'Tenant organizing activities' include the following: (a) Initiating contact with tenants to ascertain interest in, or seek support for forming, a tenant association or union, which may include conducting door-to-door surveys; (b) Joining, supporting, or operating a tenant association or union; and (c) Requesting or providing information, offering assistance, distributing literature, convening meetings with or without a landlord or landlord representative, or otherwise acting on behalf of one or more tenants in the building regarding housing conditions, community life, landlord-tenant relations, and/or similar issues of common interest or concern among tenants in the building. (d) This subdivision (A)(23) does not prohibit a landlord from establishing reasonable time, place, and manner requirements of organizing activities so long as the requirements would not effectively prohibit or substantially interfere with organizing activities."

To the extent this provision requires housing providers to allow tenant organizers, advocates, or representatives working with or on behalf of tenants living at the residential real property access to such residential real property, this provision appears to be invalid because it constitutes an unconstitutional physical taking pursuant to the recent United States Supreme Court case, *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021) and its progeny. In *Cedar Point Nursery*, the United States Supreme Court held that a California regulation granting labor organizations a "right to take access" to an agricultural employer's property in order to solicit support for unionization effected an unconstitutional per se physical taking under the Fifth and Fourteenth Amendments.

Similar to how the California regulation in *Cedar Point Nursery* required landowners to allow labor organizations on to their property to solicit support, section 11-5.03(A)(23) also appears to require landlords to allow tenant organization and other advocate groups onto landlords' private property to engage in tenant activities, including "[i]nitiating contact with tenants to ascertain interest in, or seek support for forming, a tenant association or union, which may include conducting door-to-door surveys." Section 11-5.03(A)(23)(a). Accordingly, this mandate appears to constitute a clear physical taking under *Cedar Point Nursery* and will leave the city vulnerable to legal challenge if not removed or amended.

CAA looks forward to the opportunity to continue discussions with the city on how to best prepare local rental housing providers on education and compliance with these new requirements. If the ordinance is approved via second reading, it is our hope that the city spends the following thirty days to engage in meaningful conversations about implementation and makes resources available for rental owners to seek questions and clarity.

Furthermore, we encourage members of the City Council and city staff to be accessible for feedback from key stakeholders, including rental housing providers who still have not been notified of all the new regulations the city is pursuing.

Sincerely,

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