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To: Southern Maine Landlord's Association
From: David A. Lourie
Date: August 22, 2016

Per your request, I have reviewed various ordinance proposals being considered by the City of Portland to address the current shortage of affordable rental units within the City. In connection with this opinion I was furnished and reviewed:

1. a memorandum (from my successor Corporation Counsel) Danielle West-Chuhta, dated July 13, 2016;
2. a "Leeway Program", proposed by Councilor Spencer Thibodeau;
3. an informational document concerning the City of Seattle Washington's Tenant Relocation Program; and
4. a document labeled "PORTLAND RENTAL HOUSING SECURITY ORDINANCE", consisting of six "divisions."

Several of the legal problems inherent in these proposals are identified and discussed in Ms. West-Chuhta's Memorandum. I agree with her conclusions with respect to the limitations on City legislation in this area of the law. In fact, the City's powers are actually *more* limited than she has opined.[1] There are sound legal reasons why these proposed measures should not be adopted.

[1] I disagree with Ms. West-Chuhta's conclusions: (1) that the City can to create a private cause of action for violation of city ordinance, enforceable in the Maine court system without city participation; and (2) that the City of Portland can increase the *statutory* notice periods for termination of a tenancy at will beyond 30 days or notice period required for a rent increase beyond the 45 days prescribed by the Legislature. See discussion below.

I. The Proposed "Leeway Program"

The "Leeway Program" would impose a 90-day notice requirement prior to any *no cause eviction.* This requirement would apply to every at-will tenancy, unless the landlord chooses to a buyout the 90-day right (at an amount not to exceed one (1) month's rent.) The stated goal of the program is to "providing flexibility to both landlords and at-will tenants." However, the only "flexibility" provided is for the landlord buyout option. (It should be noted that there is no corresponding "duty" on the part of the tenant to notify the landlord 90 days in advance of termination, so that he/she can find a suitable replacement tenant, there is no tenant buyout, and the right to 90 day's notice would vest in relatively new tenants in the same way as long term tenants.)

The Leeway Program would interfere with the quasi-contractual relationship established under Title 14 of the Maine Statutes, which specifies a 30-day notice of termination.[2] The opinion of the Corporation Counsel seeks to avoid the conflict by conceding that the City's purported right to impose a 90-days' notice of termination will not provide a "legal defense" to a tenant being evicted in the statutory FED action. The City's 90-day notice requirement therefore depends upon the efficacy of the private right to sue for damages after the eviction, a right which is unlikely to be given effect by the courts of the State of Maine. I submit that the creation of an illusionary right to 90 days' notice of termination will mislead tenants as to their rights in the FED action, as they will learn when the judge dismisses their attempt to bring a private cause of action. (See discussion *infra.*)

The "Leeway Program" mechanism also appears to violate substantive due process requirements of the Maine and U.S. Constitutions, because the 90-day notice requirement does not reasonably relate to the stated goal of *providing flexibility to landlords and tenants.*

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2 The common law requires that the 30-day notice be given prior to the commencement of a rental period. This requirement often adds days or weeks to the notice period.

II. The Seattle Tenant Relocation Assistance Program

The suggestion has apparently been made that the City of Portland adopt an ordinance like the Seattle ordinance described as providing monetary benefits and advance notice of the planned development to low income tenants displaced by "housing demolition, substantial rehabilitation or alteration, changes of use or removal of use restrictions." There is apparently no requirement that the tenant be a long-term tenant, or any reference to unintended consequences, such as discouraging the renovation of deteriorating property or economic development through beneficial change in use.[3] Moreover, the program described would make city taxpayers responsible for a portion of the relocation benefits. This liability would be difficult to budget, as the city would not know how many units and tenants will be entitled to relocation benefits and the cost in any given budget cycle. I do not know enough of the program to determine its legality.

III. "Portland Rental Housing Security Ordinance"

The *Portland Rental Housing Security Ordinance* is a hodge-podge of somewhat interconnected proposals. It is divided into five (5) "divisions", with a sixth "division" containing a severability clause. I will discuss each in turn.

1. Divisions 1 (General) and 2 (Fair Housing.)

Divisions 1 and 2 must be considered together, as Division 1 contains *legislative findings and definitions* relating only to Division 2. Division 2 offers protection of renters allegedly discriminated against because the source of their rental funds.

The Maine Human Rights Act prohibits discrimination in the rental of housing by reason of the source of the rental funds. Divisions 1 and 2 seek to

[3] It should be noted that the City of Portland adopted ordinances in recent years aimed at preserving or improving residential dwelling units. It is not clear how this proposal would affect those efforts.

reverse the result in Dussault v. RRE Coach Lantern Holdings, LLC, 2014 ME 8, 86 A.3d 52 upholding a judgment that *Coach Lantern* did not discriminate against *Dussault* (in violation of the MHRA.) *Coach* Lantern was willing to rent to the complainant but was unwilling to sign the *tenancy addendum* required by the housing authority. The Court found that it was reasonable for the landlord to decline the burdensome provisions, so it was not discriminating on the basis of the source of the funds. (It should be noted that Division 2 does not apply to tenants at will, as the tenant it applies to situations where a LEASE addendum is refused as in *Dussault,* and the tenant's funding is rendered unavailable.)

The effect of the definitions proposed in Division 1 and the requirement of Division 2 would result in a finding of violation, even if the landlord reasonably refused to agree to burdensome lease requirements imposed by the source of the funds. This result would change landlord participation in Section 8 housing mandatory rather than voluntary. Also, although the *Dussault* Court rejected disparate *impact liability* based on a landlord's decision not to participate in the *voluntary* voucher program established by Section 8, Divisions 1 and 2 would adopt the *disparate impact* analysis rejected in *Dussault.* Moreover, the convoluted balancing test proposed for *disparate impact analysis* in ¶(i)[4] does not provide the intelligible standard required by the Due Process Clause.

2. Division 3 90-Day Notice of Rent Increase

There are three limitations on rent increases proposed in Division 3.

The ordinance requires 90-days prior notice of rent increases, which is contrary to the 2003 statute ("An Act To Regulate the Landlord-Tenant Relationship") amending the 30-day notice required by 14 M.R.S. §6015 to require 45 days' notice.

[4] "For a person to use any tenant screening policy that actually or predictably results in a disparate impact on any person with tenant-based rental assistance unless (i) necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the dwelling owner and (ii) those interests could not be served by another practice that has a less discriminatory effect of persons receiving tenant-based rental assistance."

The amendment ("An Act To Regulate the Landlord-Tenant Relationship"), is an integral nature of the FED process. Evictions are permitted when rent is not paid timely, and in full. The Legislature designed the 45-day notice to give the tenant 15 days to decide (after learning that there would be a rent increase the next month) whether to give the landlord the 30-day notice of termination.[5] If the Tenant fails to pay the higher rent after the 45-day notice (because the City Ordinance purports to require 90 days) the tenant may be evicted.

It is apparent that the Legislature established a state-wide uniform scheme for rent increases, for termination of tenancies, and for the FED process, leaving no room for inconsistent municipal regulation. "Regulating the Landlord-Tenant Relationship" (by varying the timing of a rent increase) cannot be subject to municipal interference.

Moreover, a regulation *merely delaying* some rent increases for an additional 45 days over what the Legislature deemed wise likely violates the requirement of substantive due process. The means selected does relate closely enough to the stated purpose of the ordinance (to alleviate "a serious shortage of affordable rental housing units in the city has resulted in abnormally high rents.") Under this ordinance, rents will still rise, and the mere delay in any rent increase by as much as 45 days does nothing to advance the purpose stated.

The prohibition on raising rent during an existing lease term is of even more dubious validity. It unnecessarily interferes with existing lease arrangements, which govern rent increases during the term of the lease, upon renewal, and during holdover tenancies.

Even more problematic is the provision in the proposed §13.7-30 which would bar rent increases on any dwelling unit which is owned by the same

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5 It is likely that an municipal ordinance change in the rent increase notice requirement will result in litigation over whether the tenant was in arrears as to rent, triggering the 7-day rather than the 30-day termination, and that the dispute over those issues will frustrate the intention of the Legislature to provide a clear, simple, and predictable path for the parties and Court to follow in administering the FED process.

"entity" as any other unit *anywhere* which is not up to code.[6] The non–code-compliant dwelling unit triggering the prohibition could be in a different building altogether. The other unit could be vacant, be in the course of being renovated, or even no longer be a dwelling unit in fact.[7] Even were the concept sound, the provision would be problematic as applied to the myriad forms of ownership (trusts, general partnerships, limited partnerships, LLC's, and other forms of beneficial ownership) in which real property is held. The proposal is also beyond the power of the City to enact and enforce this provision.

3. Division 4 ("Constructive Lease")

Division 4 purports to impose a "constructive lease" upon all residential tenancies for a period of one year after the creation of the tenancy.[8] Termination by the landlord would be prohibited, except for good cause.

Perhaps this device is proposed as a way around the opinion of the Corporation Counsel that the City cannot prohibit "no cause" evictions. It cannot stand for the same reasons.

Moreover, imposing a contractual relationship upon two private parties is contrary to the concept of "liberty of contract" that is central to the original U.S. Constitution.[9] (The proposal appears to violate the 14th Amendment Due Process Clause, the Maine Constitution, and exceed the City's home rule power.

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[6] "Rent charged for a dwelling unit or multiple dwelling unit may be increased only if all dwelling units owned by that entity are in compliance with the state's warranty of habitability law at 14 M.R.S. § 6021 and the city's Housing Code at Sec. 6-106, et seq.

[7] City staff takes the position that the existence of dwelling units shown on City records dispositive. A few years ago the staff unreasonably delayed issuing a demolition permit for the dilapidated structure at 6 Washington Avenue (demanding that my client first pay $150,000 for the "loss of 3 dwelling units" under the City's "Housing Preservation Ordinance", where the *units* were used for storage by B&B Cleaners at all times after 1960!) The City grudgingly issued the permit only because the building was unstable, but continued to demand the $150,000 for the lost units thereafter until the City Council expressly excluded them.

[8] The proposed constructive lease device assumes that every tenant wants the benefits and the burdens of a one-year lease. Common sense would indicate otherwise. Some tenants would not want to be bound to a lease for an entire year.

[9] U.S. Constitution Art. I, § 10, cl. 1: "No State shall . . . pass any . . . Law impairing

Division 4 also purports to bar the courts from issuing writs of possession! This provision clearly interferes with the statutory FED proceeding and is void.

4. Division 5 Enforcement by Private Civil Action

The possibility of creating a private cause of action to enforce such an ordinance is suggested in the Corporation Counsel's memorandum dated July 13, 2016. However, the only precedent Ms. West-Chuhta notes is the Portland Human Rights Ordinance. That ordinance purports to create a private cause of action for enforcement. The legality of the enforcement device in the Portland Human Rights Ordinance has never been litigated, and is subject to serious doubt. The provisions of Division 5 are likely to prove a cruel joke on any person seeking to enforce the provisions of Divisions 2 – 4.

McQuillin's Law of Municipal Corporations states "The well-established general rule" that:

> "a municipal corporation cannot create by ordinance a right of action between third persons or enlarge the common law or statutory duty or liability of citizens among themselves.
> 1. Under the rule, **an ordinance cannot directly create a civil liability of one citizen to another or relieve one citizen from a liability by imposing it on another**.
> 2. As applied to contractual and like obligations and liabilities, **the rule is uniformly sustained**.
> 3 As applied to causes of action in tort, the rule is also applicable not only theoretically but in full and practical effect; **an ordinance cannot directly provide that one person owes a civil duty to another, the breach of which to the damage of the other gives him or her a cause of action.**" 6 McQuillen §22:1 (3d ed.) Emphasis supplied.

Contrary to the Rule, §13.7.25 purports to declare violations of the ordinance to be "civil infractions," and to create a private civil tort remedy for damages, injunction, and attorney's fees in the courts of the State of Maine![10]

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the Obligation of Contracts..."

[10] §13.7.25 declares violations of the proposed ordinance to be a "civil infraction." This term does not appear in Maine statutes other than with regard to the regulation of *money*

The civil action authorized for tenants is contrary to case law on standing in the State of Maine. The Courts have completely closed their doors to neighbors and others seeking to enforce municipal land use ordinances designed to protect neighbors.

> "Furthermore, 30-A M.R.S.A. § 4452(4) (1996), dealing with the enforcement of land use laws and ordinances, provides that "[a]ll proceedings arising under locally administered laws and ordinances shall be brought in the name of the municipality." The Herrles, therefore, would not have standing to initiate enforcement proceedings against Foglio even if it was determined that he was in violation of the ordinance. *Cf. City of Houston v. Tri-Lakes Limited,* 681 So.2d 104 (Miss.1996) (holding that private citizens do not have standing to initiate criminal proceedings for zoning ordinance violations, only local governing authorities and the proper local authorities of any county or municipality may initiate such proceedings)." Herrle v. Town of Waterboro, 2001 ME 1, ¶11, 763 A.2d 1159, 1162 (Me. 1980.)

Since both 30-A M.R.S.A. § 4452(4) (1996), and common law rule are cited in *Herrle.* This precludes a private party from enforcing any municipal ordinance. I would expect the Maine courts to be hostile to arguments parsing *Herrle* or the Rule to allow such an action, where there is a potential flood of litigants waiting to sue each other in Maine Courts asserting municipally created private causes of action created by the 400-odd Maine municipalities.

5. DIVISION 6 SEVERABILITY

If ever an ordinance needed a severability clause it is this ordinance.

Please advise if you have any questions concerning the above.

Sincerely,

David A. Lourie

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transmitters. 32 M.R.S. §6124 1.