



DEWITT
ROSS & STEVENSSM
LAW FIRM

www.dewittross.com

Capitol Square Office
Two East Mifflin Street
Suite 600
Madison, WI 53703-2865
Tel 608-255-8891
Fax 608-252-9243

Metro Milwaukee Office
13935 Bishop's Drive
Suite 300
Brookfield, WI 53005-6605
Tel 262-754-2840
Fax 262-754-2845

Please respond to: Capitol Square Office
Direct line: 608-252-9365
Email: mrc@dewittross.com

August 4, 2010

VIA EMAIL ONLY – DAVEPORTERFIELD@CHARTER.NET

David C. Porterfield, Chairperson
Housing Committee
City of Madison
215 Martin Luther King, Jr. Blvd., Room LL-100
Madison, WI 53710

RE: Showing and Re-Renting Rental Premises

Dear Mr. Porterfield:

I represent Steve Brown Apartments relating to an ordinance amendment to Sections 32.12(8) and 32.12(9) of the Madison General Ordinances. The latest version of this proposed ordinance amendment will be considered by the Housing Committee (the "Committee") at your August 4, 2010, meeting. This substitute was drafted on July 27, 2010. Due to the fact that this substitute was drafted so recently and the fact that there are a number of new members of the Committee are reasons enough to refer this proposal to the Landlord-Tenant Subcommittee. Moreover, this proposal is a classic example of regulation in search of a problem. In fact, if adopted, this proposal would be counterproductive to the goal of protecting tenants' rights. For all these reasons, more time is needed to carefully analyze this proposal.

My client has prepared a letter for you which addresses the negative effects on student renters and job retention which will result in unnecessary challenges for property owners and managers. The written comments and oral testimony from people "in the trenches" describes the extent of these problems.

- The amendment would significantly reduce the search and comparison shopping time for prospective renters.
- The "rental frenzy" would dramatically increase as well as the loss of privacy for tenants because of the reduced time to consider various apartments.

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- The “right of first refusal” language in the proposal would encourage the creation of a “black market” in student housing by encouraging desirable housing units to be traded, thereby limiting apartments available in the open market.
- The ordinance amendment would reduce jobs for leasing agents. Moreover, because the showing period would be reduced to about 11 weeks, the same level of professional service to answer inquiries and handle showings would be reduced.
- The changes would unnecessarily exacerbate the marketing challenges facing rental property owners and managers.

In addition to the above arguments made by my client, there are additional legal and policy problems that we see with this proposal.

1. A Portion of the Proposal Violates State Law.

The amendment to M.G.O. 32.12(9) which eliminates the option of landlord and tenant to enter into a Non-Standard Rental Provision (“NSRP”) as it relates to negotiating a different time for the landlord to be able to rent the apartment violates State law. This provision is directly preempted by State law. The Wisconsin Administrative Code contains a detailed section on residential rental practices. There are specific exceptions in State law that prohibit the unauthorized entry of a landlord to an apartment unit. One of those exceptions is stated in ATCP 134.09(2)(c). That section is as follows:

“(c) A rental agreement may include a nonstandard rental provision authorizing a landlord to enter a tenant’s dwelling unit at reasonable times, under circumstances not authorized under par. (a) or (b). The landlord shall include the nonstandard provision, if any, in a separate written document entitled **“NONSTANDARD RENTAL PROVISIONS”** which the landlord provides to the tenant. The landlord shall specifically identify and discuss the nonstandard provision with the tenant before the tenant enters into any rental agreement with the landlord. If the tenant signs or initials the nonstandard rental provision, it is rebuttably presumed that the landlord has specifically identified and discussed that nonstandard provision with the tenant, and that the tenant has agreed to it.”

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Because the State has specifically carved out language that provides the option for a landlord and tenant to agree to an NSRP as to when a landlord can show and lease a unit, the City of Madison (the "City") is prohibited from adopting an ordinance that contradicts State law.

2. To Require a Landlord to Rent to an Existing Tenant, as Opposed to Another Applicant Directly Violates the Landlord's Freedom to Contract.

The "right of first refusal" language in this ordinance is a direct assault on one of our basic freedoms – the freedom to contract. Wisconsin courts have always recognized the freedom to contract as one of the cornerstones of our free enterprise system. See *Watts v. Watts*, 137 Wis.2d 506, 521, 405 N.W.2d 303 (1987) and *Merten v. Nathan*, 108 Wis.2d 204, 211, 321 N.W.2d 173 (1982).

In effect, what this provision is trying to do is to change the student rental market to a conventional rental market. It is akin to trying to put a square peg in a round hole.

3. To Attempt to Define When a Landlord Has a Reasonable Basis to Decline the Renewal of a Lease to an Existing Tenant is Creating a Full Employment Law for Lawyers.

There are two (2) exceptions as stated in this proposal that would allow a landlord to not renew a lease to an existing tenant. They are as follows:

“(b) Behavior or conduct that results in a disruption to the rights of others to the peaceful enjoyment of the premises by the tenant or the tenant's guests.”

“(g) Other Good Cause.”

It is hard to imagine language that would lead to more litigation than these exceptions.

4. The Effective Date of This Ordinance is Going to Add to the Chaos.

The fourth substitute ordinance states that it will become effective as of September 22, 2010. This moves up the effective date that was contained in the third substitute ordinance. The effort to pass this quickly without carefully analyzing its potential impact would be a mistake.

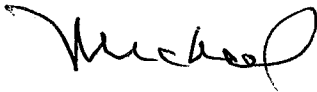
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For all of these reasons, we ask that you refer the latest proposal to your Landlord-Tenant Subcommittee in order to make sure that whatever is ultimately adopted is in everybody's best interest.

Sincerely,

DEWITT ROSS & STEVENS s.c.



Michael R. Christopher

MRC:dso

cc: City of Madison Housing Committee Members (via email only)
George Hank (via email only)
Meg Zopelis (via email only)
Assistant City Attorney Adriana Peguero (via email only)
Stephen Brown (via email only)
Margaret Watson (via email only)