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August 30, 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 Rerenting Rental Premises

Dear Mr. Porterfield:

On behalf of Steve Brown Apartments (“SBA”), I am sending to you and the other City Housing Committee (the “Committee”) members a follow-up letter to my August 4, 2010, letter urging the Committee to place Alderperson Maniaci’s ordinance amendment on file. My previous letter focused on the policy reasons why the Committee should reject this proposal. This letter focuses on the serious legal issues.

1. A Portion of This Proposal Directly Conflicts with State Law and Therefore is Unenforceable.

The ordinance amendment before you eliminates the ability of the owner and the resident to enter into a Non-Standard Rental Provision (“NSRP”) as it relates to when an apartment can be shown. The Wisconsin Administrative Code (“Code”) contains a very detailed section on residential rental practices. As part of that Code, there is a specific section that allows the parties to enter into an NSRP, **including when the owner can show prospective residents the apartment for the following lease year.** See ATCP §134.09(2)(c).

When a local ordinance contradicts State law, the doctrine of preemption applies. What this doctrine means is that local control must yield if one of four conditions exist:

- i. The legislature has clearly and expressly withdrawn the power of municipalities to act;

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- ii. The local regulation logically conflicts with State legislation;
- iii. The local regulation defeats the purpose of State legislation; or
- iv. The local regulations violates the spirit of State legislation.

DeRosso Landfill Co. v. City of Oak Creek, 200 Wis. 2d 642, 657, 547 N.W. 2d 770 (1996).

In this particular situation, the conditions in (ii), (iii) and (iv) above are clearly in play. The reason why the legislature has authorized the owner and resident to be able to use an NSRP is that it is deemed to be a pro-consumer option in that it states in simple, non-legalese language what the parties are agreeing to. The NSRP that is used by SBA is enclosed for your information.

2. **To Require an Owner to Rent to a Particular Resident Directly Violates the Owner's Freedom to Contract.**

The due process clause protects the right of contract, that is, the freedom of persons to enter into contracts which they find to be mutually agreeable. The freedom to contract is a sacred constitutional right which must be protected.

However, we recognize that the freedom to contract is not an absolute right, but must be balanced against the compelling interest of the public. The United States Supreme Court gives us guidance as to what constitutes a "compelling public interest." The Court stated in *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98, 102 (1954):

"Public safety, public health, morality peace and quiet, law and order are some of the more conspicuous examples of the traditional application of the police power to municipal affairs."

Another case only allows for the government to intervene in a private contract if intervention is necessary to "meet a grave temporary emergency in the interest of general welfare." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 243, 98 S.Ct. 2716 (1978).

These cases clearly show that there is no compelling public interest to require an owner to contract with the existing resident. This is especially the case since the right of first refusal to renew a lease is a substantial and extraordinary violation

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of a private contractual relationship. There is certainly no immediate crisis that justifies violating contractual constitutional rights.

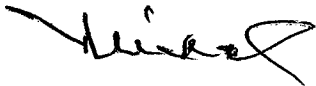
3. **By Attempting to Define When an Owner can Decline to Renew a Lease to an Existing Tenant, the Ordinance Language Creates a Legal Morass.**

We contend that this entire ordinance represents regulation in search of a problem. However, what makes this even worse is that the proposal creates vague and subjective standards which will only lead to on-going litigation. There are at least two exceptions that allow an owner to not renew a lease with an existing tenant that are an invitation to on-going litigation. To conclude that this section creates a full employment law for lawyers is not just rhetoric.

For the legal problems summarized here, combined with the policy reasons why this proposal is contrary to the interests of both residents and owners, my client urges you to place this proposal on file.

Sincerely,

DEWITT ROSS & STEVENS s.c.



Michael R. Christopher

MRC:dso
Enclosure

cc: City of Madison Housing Committee Members (w/encl. - via email only)
George Hank (w/encl. - via email only)
Meg Zopelis (w/encl. - via email only)
Assistant City Attorney Adriana Peguero (w/encl. - via email only)
Stephen Brown (w/encl. - via email only)
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