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TO: Noah Lieberman, Chair of the Landlord Tenant Issues Committee
and Matt Tucker, Director of Building Inspection

FROM: Sofia Nikolic, Legal Intern
supervised by Amber McReynolds, Assistant City Attorney

DATE: February 29, 2024

RE: Proposed Landlord Tenant Ordinances

Overview & Recommendation

This memorandum summarizes law regarding preemption and whether the City of Madison may enact certain landlord-tenant ordinances. Specifically, this memorandum will address two questions. First, can the City enact a partial rent payment ordinance? Second, can the City enact a rent abatement/return ordinance that acts as a consequence for illegal lease provisions? In short, the City cannot enact either of these ordinances because the City is preempted by state law and because leases are dealt with as contracts between private parties.

This memorandum will begin with a background on the questions presented. Next, the memorandum will address the doctrine of preemption generally. Then, the memorandum will describe landlord-tenant law in Wisconsin. With this baseline, the memorandum discusses the specific questions of whether the City can enact the partial rent payment and rent abatement/return ordinances.

I. Background

Two proposed ideas were presented as a way to potentially assist or protect the City's renters. The proposed partial rent payment ordinance relates to eviction proceedings and mitigation of damages. The proposed ordinance would specify that failure to accept partial rent payments would be a failure to mitigate the landlord's damages. This proposed ordinance would therefore prevent the landlord from claiming failed rent payment as damages in an eviction proceeding due to their failure to accept the partial rent payment. The proposed rent abatement/return ordinance relates to rent abatement. The City already has ordinances

regarding rent abatement that are enforceable. Thus, the proposed ordinance would become part of the rent abatement the City already performs. This ordinance would make leases with illegal provisions, under state statute, void. The ordinance would also make the remedy for such void leases the return of all rent paid under the void lease or some form of rent abatement for the illegal provisions. The memorandum goes on to address the law surrounding these issues as well as whether the City is able to enact and enforce these proposals.

II. Preemption Generally

Municipalities in Wisconsin have no inherent powers and therefore must be granted power by the constitution or statute to be able to exercise legislative powers. *Madison v. Schultz*, 98 Wis.2d 188, 195–96, 295 N.W.2d 798 (1980); *Van Gilder v. Madison*, 222 Wis. 58, 75–76, 268 N.W. 108 (1936). However, the state legislature can at times also prevent a municipality from acting either by withholding or explicitly denying municipal action through statute.

Preemption occurs when state law and local ordinance conflict. State law preempts a local ordinance in Wisconsin when one of four things happen: “(1) the state legislature has expressly withdrawn the power of municipalities to act; (2) the ordinance logically conflicts with state legislation; (3) the ordinance defeats the purpose of state legislation; or (4) the ordinance violates the spirit of state legislation.” *Becker v. Dane County*, 2022 WI 63, ¶ 23 (citing *DeRosso Landfill Co. v. City of Oak Creek*, 200 Wis. 2d 642, 651–52, 547 N.W.2d 770 (1996)). If none of these circumstances are present, local ordinances may touch on the same issues that state law does. *Id.*

III. Landlord-Tenant Law

Chapter 66 of the Wisconsin Statutes deals with the powers of municipalities to act. Wis. Stat. Ch. 66. Section 66.0104 specifically prevents municipalities from enacting ordinances that limit a tenant’s responsibility for or landlord’s right to recover any costs, fees, payments, or damages that the tenant is responsible for under the rental agreement. Wis. Stat. 66.0104(2)(c). The rest of this section prevents municipalities from enacting ordinances that limit a landlord’s actions or requires certain actions of the landlord. Wis. Stat. 66.0104. The focus of this section indicates that the state legislature intended to uniformly control landlord-tenant law in Wisconsin in these areas. Section 66.1015(1) prevents a municipality from regulating the amount of rent or fees charged in a residential rental unit. Wis. Stat. 66.1015(1).

Chapter 704 generally discusses landlord-tenant leases. The entire chapter uses language common to contracts such as remedies, mitigating damages, breach, default, termination, severability, and performance. Wis. Stat. Ch. 704. This indicates that the state legislature treats leases as contracts between two private parties, rather than an area of direct government involvement. Section 704.02 states that provisions of rental agreements are severable such that any void or unenforceable provisions should not affect other lawful provisions of the lease. Wis. Stat. 704.02.

Also in this chapter, section 704.07 deals with rent abatement for repairs and untenantability. This section allows for rent abatement through municipal ordinance, but only for “conditions that materially affect the health or safety of the tenant or substantially affect

the use and occupancy of the premises.” Wis. Stat. 704.07(5). This is because section 704.07(4) provides rent abatement as the exclusive remedy for a landlord’s failure to fulfill his repair duties. *Raymaker v. American Family Mutual Insurance Co.*, 2006 WI App 117, ¶ 19.

Finally in this chapter, 704.29 relates to recovery and mitigation of damages by landlords. Under this section, a landlord can recover rent and damages due to a tenant’s failure to pay rent. Wis. Stat. 704.29(1). However, the landlord cannot recover amounts that the landlord could mitigate under the section. *Id.* In this section, the state legislature equates mitigation with “reasonable efforts” by the landlord to rerent the premises. Wis. Stat. 704.29(2)(a). At the end of this section, the statute describes actions that will not defeat the landlord’s right to recover rent and damages. Wis. Stat. 704.29(4). This section includes any other act that could reasonably be interpreted as being mitigation and which does not unequivocally demonstrate an intent to release the tenant from the lease. *Id.*

Finally, chapter 799 deals with small claims actions, including evictions. Section 799.40 specifically discusses acceptance of payment in terms of eviction claims. Acceptance of past due rent or any other payment from the tenant will not lead to the dismissal of an eviction claim. Wis. Stat. 799.40(1m). Also, past waiver of a violation or breach, including acceptance of rent, will not be a defense to an eviction action or a claim for damages. Wis. Stat. 799.40(1s). Thus, acceptance of rent will not alter an eviction claim.

IV. The City Cannot Enact a Partial Rent Payment Ordinance

The City cannot enact a partial rent payment ordinance because it is preempted by state legislation. Under section 66.0104(2)(c), the state legislature has expressly withdrawn the power of municipalities to limit a landlord’s right to recover rent owed under a rental agreement. Wis. Stat. 66.0104(2)(c). Thus, an ordinance that would qualify acceptance of partial rent payment as mitigation of a landlord’s damages would prevent a landlord from recovering this rent in an eviction proceeding. Wis. Stat. 704.29(1). Such an ordinance would directly contradict the prohibition against this act in section 66.0104(2)(c). Even if this ordinance was not preempted through express withdrawal of power, such an ordinance would logically conflict with sections 66.0104(2)(c) and 704.29(1). Therefore, under either the first or second prongs of the test restated in *Becker*, the proposed partial rent payment ordinance would be preempted by state legislation.

The proposed ordinance would also directly contradict section 704.29(4). This is because the proposed ordinance would define acceptance of partial rent payment as mitigation of damages. However, section 704.29(4) states that any other act that could be interpreted as mitigation, such as the acceptance of partial rent payment in the proposed ordinance, will not demonstrate an intent to release the tenant and therefore an intent not to recover rent and damages. Therefore, the proposed ordinance would be preempted under the second prong of the test in *Becker*.

Finally, the proposed partial rent payment ordinance would be preempted by section 799.40(1m). This section specifically states that acceptance of past due rent and waiver of rent in the past will not lead to a dismissal of an eviction claim. Wis. Stats. 799.40(1m), (1s). Under this state legislation, the proposed partial rent acceptance ordinance would directly conflict with this legislation under the second prong of the test in *Becker*. This is because the ordinance would change the nature of the state legislation that prevents a dismissal of an eviction claim due to acceptance of rent. Under this logic, the proposed ordinance would also

be preempted because it would defeat the purpose and violate the spirit of the legislation under the third and fourth prongs of the test in *Becker*.

Also, chapter 66 clearly indicates a favoring of landlord control over the rental agreement as well as landlord recovery of monies owed under such rental agreement. Section 66.0104's prohibition against municipalities interfering with a landlord's right to recovery and section 66.1015(1)'s prohibition against municipal involvement in the amount of rent charged in a rental agreement show this. Therefore, any ordinance that would interfere with the ability of the landlord to contract with the tenant over these issues would violate the spirit and defeat the purpose of the state legislation. Thus, a court would likely find that state legislation preempted such an ordinance under the third and fourth prongs of the tests in *Becker*.

V. The City Cannot Enact a Rent Abatement/Return Ordinance for Illegal Lease Provisions

The City cannot enact a rent abatement/return ordinance for illegal lease provisions because it is preempted by state legislation. In terms of rent abatement, municipalities have been granted authority to enact ordinances allowing for rent abatement, but only for "conditions that materially affect the health or safety of the tenant or substantially affect the use and occupancy of the premises." Wis. Stat. 704.07(5). However, the proposed ordinance would allow for rent abatement or return of rent under a lease with illegal provisions. For rent abatement purposes, this may be allowed as some illegal provisions of leases could relate to the health and safety of tenants or substantially affect the use of the premises. However, some illegal provisions in leases include not following the state specified procedure for notice of termination of a lease under section 704.17. Wis. Stat. 704.17(5)(a). This would not fall under the health and safety/use and occupancy standard for municipal ordinances that allow for rent abatement. Also, the authority granted to municipalities under section 704.07(5) could not be used to contradict other state legislation on landlord-tenant issues such as what the appropriate remedy is or when eviction claims can be dismissed. Any contradiction of other state legislation would result in the ordinance being preempted under the second, third, or fourth prongs of the test in *Becker*.

State legislation also treats leases as contracts between private parties. This is shown by contract language being used across multiple chapters related to landlord-tenant relations, such as in chapters 66, 704, and 799. This clearly indicates the state legislature's preference for issues related to leases to be dealt with as contracts. Section 704.02 specifically states that void or unenforceable provisions of leases will be severable from the rest of the lease as much as possible. This means that if there were an illegal lease provision, a court would have to interpret and give effect to the rest of the lease without such illegal provision. If the proposed ordinance stated that a lease with an illegal provision in it was completely void, this would directly contradict section 704.02. In this way, the proposed ordinance would logically conflict with the state legislation and therefore be preempted under the second prong of the test in *Becker*.

Return of rent under leases with illegal provisions would also be preempted under the above state legislation. However, the Wisconsin Court of Appeals has ordered the return of all rent paid under a lease that was void and unenforceable under state statute. *Henchey v. Wausau Landmark Corp.*, 2023 WI App 32, ¶ 42. These statements seem contradictory, but the remedy in this case was applied because the Plaintiff argued for it and the Defendant

conceded the issue. *Id.* The Plaintiff's argument relied on the Wisconsin Consumer Act and a case regarding repairs completed by an automotive repair shop. *Id.* at ¶¶ 39–40. Thus, although *Henchey* allowed for the return of all rent under these leases, this case seems to be an outlier. Typically, courts have addressed violations of leases under the Wisconsin Consumer Act as contracts. Therefore, even if the proposed ordinance was not preempted under the above state legislation, it is unlikely that a court would enforce such a remedy based on this precedent.

Conclusion

In conclusion, the City cannot enact the proposed partial rent payment and rent abatement/return ordinances. The proposed partial rent payment ordinance is preempted under every prong of the test in *Becker*. The state legislature has expressly withdrawn the power of municipalities to act in this way and the proposed ordinance logically conflicts with and violates the purpose and spirit of such legislation. The proposed rent abatement/return ordinance is preempted under the second, third, and fourth prongs of the test in *Becker*. This ordinance also would conflict with the way the state legislature has dealt with leases and eviction claims, treating them as contracts between private parties. Although *Henchey* is one example of the proposed rent abatement/return ordinance in action, courts typically do not enforce this remedy under the Wisconsin Consumer Act and basic contract principles. Overall, both of these proposed ordinances would be preempted under state legislation.