

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: April 9, 2012

MEMORANDUM

TO: Landlord/Tenant Subcommittee

FROM: Lana J. Mades, ACA

RE: Impact of 2011 Act 108 and 2011 Act 143 relating to Landlord/Tenant Relations

Two pieces of legislation relating to Landlord/tenant relations have been passed, which will affect Madison General Ordinances. Previously, the Office of the City Attorney submitted a memo as to how 2011 Act 108 affected the MGOs. However, 2011 Act 143 has changed the landscape even further, so that prior memo should be disregarded. This memo gives an overview of the content of these two acts, and details which Madison General Ordinances will be affected.

Because Act 143 was passed extraordinarily quickly, some of the provisions of the law are not clear. It may be some period of time before this law is clarified by the courts or legislature, so the long-term impacts on Madison General Ordinances may be difficult to predict. Additionally, Administrative Rules under ATPC 134 may change in response to the new laws, which may also require further revisions of the MGOs.

For ease of discussion, I have attached to this memo an initial draft of possible ordinance changes in response to Acts 108 and 143. While there have been instances in the past in which ordinances were pre-empted by legislation, but yet were kept on the books in the event such legislation changed in the future, it is the opinion of the City Attorney's office that, given the scope of the changes, the affected ordinances should be revised in this instance.

2011 Act 108

The newly created Wisconsin statute 66.0104 (2011 Act 108) prohibits municipalities from enacting or enforcing ordinances that impact certain aspects of the landlord/tenant relationship. Municipalities are now prohibited from passing or enforcing ordinances that:

1. Limit landlords from obtaining, using or attempting to obtain or use information about tenants or prospective tenants relating to: monthly household income, occupation, rental history, credit information, court records, publicly accessible arrest and conviction records, and social security numbers.
2. Place limitations on landlords with respect to entering into a rental agreement with a prospective tenant during the tenancy of the current tenant.
3. Place limitations on landlords from showing a premises to a prospective tenant during the tenancy of the current tenant.
4. Place requirements on landlords regarding security deposits, earnest money or inspections that are additional to state law.

2011 Act 143

Moratorium on evictions: Wisconsin statute 66.1010 was created to prohibit municipalities from enacting or enforcing a "moratorium on a landlord from pursuing an eviction action under ch.799 against a tenant." While there are numerous areas of the MGOs that prohibit retaliatory evictions, it is the opinion of the City attorney that these ordinances do not conflict with the statute. Under the Black's law definition, a "moratorium" is a "delay or postponement of a legal obligation or an action or a proceeding." Because the City's ordinance is an outright prohibition on retaliatory evictions, rather than simply delaying the eviction, these ordinances are not in conflict with the statute.

Disposition of abandoned property

Act 143 streamlines the procedure that Landlords need to follow if property is left on the premises by the tenant in cases where there is no written agreement to the contrary. It also gives landlords discretion in how to deal with the property, provided they have properly notified the tenants that they are not going to store abandoned property. Because the act allows landlords some amount of discretion in what to do with the money recovered from the sale of the property in cases where there is proper notice and no contrary written agreement, the last line of 32.12(3), which requires return of the proceeds to the tenant would need to be removed or revised as it would be in conflict with State law in certain factual situations.

Severability of rental agreement provisions

If a provision to a rental agreement is found to be legally unenforceable, that provision is severable and the remainder of the contract may be enforced. Exceptions to this rule include the following provisions, which, if included in the contract, acts to make the entire agreement unenforceable: 1) Allows a landlord to increase rent, decrease services, evict, fail to renew or threaten such actions in retaliation for a report to health, safety or law enforcement services; 2) authorizes eviction outside of the procedure set forth in Wisconsin Statutes 799; 3) provides for an acceleration of rent payments upon default; 4) waives landlord's obligation to mitigate damages; 5) requires payment of attorney fees or costs incurred by the landlord, except as allowed under ch. 799 or 814, Wisconsin Statutes; 6) authorizes the landlord to confess judgment against the tenant; 7) imposes liability for personal injury or property damage due to factors outside of the tenant's control; 8) waives the landlord's obligation to keep the premises in a fit and habitable condition; 9) states that the landlord is not responsible for damages or injury caused by the landlord's negligence; and 10) allows a landlord to terminate the tenancy if a crime is committed in the rental property, even if the tenant could not reasonably have prevented the crime.

Disclosures of building code violations

Currently the ordinances prohibit landlords from accepting earnest money, security deposits or entering into an agreement unless they have first notified the tenant that the property lacks certain basic amenities (such as lacking running water, heat, electricity, plumbing, etc.), that utility charges are not included in the rent, and any outstanding building code violations. MGO 32.08(2). Act 143 imposes fewer restrictions on landlords as it only requires them to notify prospective tenants of building code violations if the landlord has "actual knowledge of the violation," and the violations presents a "significant threat to the prospective tenant's health or safety."

While municipalities can use their home rule authority to impose greater restrictions than State law, such restrictions cannot conflict with the state law or be contrary to direct prohibitions. (See for example, Fox v. Racine, 225 Wis. 542 (1937), where an ordinance prohibiting marathon dance

contests was upheld, even though State law allowed such contests as long as they had a 16 hour time limit.)

Because our current ordinance imposes additional requirements on landlords before accepting earnest money or security deposits, it violates Wisconsin statute 66.0104 (2011 Act 108). The City Attorney's office suggests that the references to earnest money and security deposits be removed. The remaining ordinance language could be maintained in regard to the notice required prior to entering a rental agreement, as it is a greater restriction but is not contradictory to State law.

Information check-in sheet

Act 108 acted to nullify the MGOs having to do with Check-in and Check-out forms. Act 143 then implemented a requirement that landlords provide a check-in form when the tenant "commences his or her occupancy of the premises." Tenants would then have 7 days to complete and return this form.

Timing of security deposit return

The new law changes the timeline by which a landlord must return a security deposit. Previously, if a tenant vacated a lease early, they could provide written notice to the landlord of the early surrender, which would start the clock ticking for the return of the deposit. This has been changed so that if someone leaves early, the landlord does not need to return the money until 21 days after the lease terminates or the property is re-rented.

SUGGESTED AMENDMENTS

The following sections of Chapter 32 should be revised in the following fashion in order to comply with 2011 Act 108 and 2011 Act 143:

32.02(2)(c): Making definition of "earnest money" consistent with ATPC 134.02(3)
-Credit check fees are not considered earnest money

32.02(2)(m): Making definition of "security deposit" consistent with ATPC 134.02(11)
-Removes language specifically related to pet, furniture and key deposits

32.05(d) and (e): Removing any restrictions on showing the property to prospective tenants that are additional to state law including the requirements that 24 hours notice be provided to show the property, and the notice contain the exact time of entry and limits the length of stay

32.07: Rewriting security deposit refund procedures to be consistent with newly created Wisconsin Statutes 704.08 and 704.28, and ATPC 134.06

- Removes the requirement that security deposits cannot exceed 1 months rent
- Removes the requirement that interest be provided on the deposit
- Removes the requirement that landlords include receipts with their security deposit withholding itemization
- Removes the requirement that photographs of damages are to be made available
- Removes the language prohibiting the increase or institution of a security deposit during a tenancy
- Removes the language prohibiting the holding of a security deposit by both a primary tenant and a sublessor
- Removes the requirement of check out forms

32.08(2): Changing the language as to which conditions affecting habitability a landlord must disclose prior to accepting earnest money or a security deposit, so as to not conflict with State law.

32.10(2): Making earnest money procedures consistent with ATCP 134.05

-Removes the requirement of an itemization of amounts withheld from earnest money

32.12(3): To avoid conflicting with 704.05(5)(a)2, clarifies the language regarding proceeds from sale of abandoned property, so that the last line would apply only to rental agreements that have specific provisions on the storage or disposition of property.

32.12(7): Removes restrictions against consideration or use of minimum income requirements or obtaining tenant's social security number

32.12(8): Removes restrictions regarding showing a property during first quarter of lease period

32.12(9): Removes restrictions regarding leasing a property to another tenant during the first quarter of the lease period

Chapter 39 (Department of Civil Rights): Certain portions of this chapter are also be affected by Act 108. These portions include sections 39.03(2)(11) and 39.03(4)(a),(d), as landlords would now be allowed to require that tenants provide social security numbers, and could use conviction records, arrest records and occupational information in making rental decisions. Assistant City Attorney Adrianna Peguero has drafted proposed changes to these chapters.

Other suggested changes (not stemming from Acts 108 or 143)

32.16: Needs to be updated to conform to 704.90(4b), which mandates that a 20 percent or \$20 late fee is reasonable, and that the operator of a storage facility may charge a higher late fee if they can prove it is reasonable

Please let me know if I can be of any more assistance on this matter.

Sincerely,

Lana J. Mades
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Madison City Attorney's office