ALSTON & BIRD

333 South Hope Street, 16th Floor
Los Angeles, CA 90071-1410
213-576-1000 | Fax: 213-576-1100

Paul J. Beard II Direct Dial: 213-576-2564 Email: paul.beard@alston.com

May 20, 2019

VIA EMAIL

Mayor Robert Garcia
City Councilperson Lena Gonzalez
City Councilperson Jeannine Pearce
City Councilperson Suzie Price
City Councilperson Daryl Supernaw
City Councilperson Stacy Mungo
City Councilperson Dee Andrews
City Councilperson Roberto Uranga
City Councilperson Al Austin
City Councilperson Rex Richardson
City of Long Beach

RE: May 21, 2019, City Council Meeting, Item No. 17 ("Tenant Relocation Assistance")

Dear Mayor Garcia and City Councilpersons:

We represent Better Housing for Long Beach ("BHLB"). BHLB is a nonprofit, mutual benefit corporation established for the purpose of educating local and statewide policymakers and government officials, and the public generally, on the rental housing industry in the greater Long Beach area. BHLB advocates for, and vigorously defends, the statutory and constitutional rights of Long Beach rental property owners.

For the reasons provided below, we strongly urge the City Council to reject the proposed "tenant relocation assistance" ordinance. Continued pursuit of that misguided effort will only expose the City to court action challenging any such ordinance.

BACKGROUND

On April 2, 2019, the Council instructed staff to prepare an ordinance that would require rental housing owners to provide a monetary benefit to tenants displaced under certain circumstances. At that meeting, the City also instructed staff to consider whether the ordinance would violate the Costa Hawkins Act "or any other provision of applicable law."

On May 10, staff published a memo updating the Council on its research and findings surrounding the proposed ordinance. Among other things, the memo

recommends exempting all units constructed after February 1, 1995, because of the concern that the courts could deem the ordinance to be a form of rent control in violation of Costa Hawkins. Unfortunately, and contrary to the direction given by Council at its April 2 meeting, staff did not discuss the ordinance's compliance—or lack thereof—with other laws, including the State and Federal Constitutions.

Staff has now presented an ordinance for a first reading at the Council's May 21 meeting. At its core, and with few exceptions, the ordinance would require rental housing owners to pay "relocation benefits" of up to $4,500 to any tenant who (a) receives a notice of rent increase totaling 10 percent or more in any 12-month period, (b) receives a notice to vacate due to the need to rehabilitate the tenant's unit, or (c) receives a notice to vacate and is otherwise in "good standing." The ordinance would require a transfer payment from owner to tenant regardless of the tenant's income level. And the transfer payment would not be based on a tenant's actual relocation cost and would not be conditioned on the tenant's use of such payment for relocation. The money could be used for any private purpose whatsoever.

THE ORDINANCE IS UNLAWFUL

I. THE ORDINANCE WOULD EFFECT AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY

a. THE ORDINANCE'S FORCED TRANSFER PAYMENT FROM OWNER TO TENANT WOULD CONFER ONLY A PRIVATE BENEFIT ON A FAVORED CLASS OF INDIVIDUALS (DISPLACED TENANTS), NOT THE PUBLIC AT LARGE, IN VIOLATION OF THE "PUBLIC USE" REQUIREMENTS OF THE FEDERAL AND CALIFORNIA CONSTITUTIONS

The ordinance would violate the Takings Clause of the Fifth Amendment to the United States Constitution, made applicable to local governments like the City by the Fourteenth Amendment. (*Chicago, B. & Q.R. Co. v. Chicago* (1897) 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897)). The Takings Clause prohibits the government from taking private property unless (a) it is for a "public use" and (b) "just compensation" is paid to the owner. (U.S. Const. amend. V & XIV; *see also Brown v. Legal Foundation of Wash.* (2003) 538 U.S. 216, 231-232 (making clear the Clause's two separate requirements)). If the government "fails to meet the 'public use' requirement," then "that is the end of the inquiry"—"[n]o amount of compensation can authorize such action." (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528)). As the United States Supreme Court has explained: "it has long been accepted that the sovereign"—i.e., the government—may not take the property of *A* for the sole purpose of transferring it to another private party *B*." (*Kelo v. City of New London* (2005) 545 U.S. 477). "Nor would the [government] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." (*Id.* at 478). If a taking is designed simply "to benefit a particular class of identifiable individuals"—such as displaced tenants—then the taking is not for a "public use" and is therefore unconstitutional. (*Id.*). Significantly, takings with only an "incidental" public benefit "are forbidden by the Public Use Clause." (*Id.* at 490 (Kennedy, J., concurring)).

Unconstitutional takings commonly arise in the context of the government attempting to take land or other real-property interest. But that is not the extent of the Takings Clause's reach—and, therefore, of the government's constitutional obligations vis-à-vis property owners. Where, as here, "the demand for money . . . operate[s] upon . .

. an identified property interest by directing the owner of a particular piece of property to make a monetary payment," the Takings Clause applies. (*Koontz v. St. Johns River Water Mngmt. Distr.* (2013) 570 U.S. 595, 613; *see also Horne v. Dep't of Agriculture*, 135 S.Ct. 2419, 2425-26 (2015) (holding that Takings Clause protects against uncompensated takings of personal, as well as real, property)).

The proposed ordinance would violate the federal Public Use Clause. It would require the payment of money from one private party (a rental housing owner) to another private party (a displaced tenant). It would allow the recipient to use the money for any private purpose. And it would do so, not as part of any redevelopment or other general public-benefit program, but to financially benefit a select class of individuals, including wealthy tenants. The proposed ordinance would effectuate a purely private taking for a private purpose, thereby violating the Public Use Clause. The ordinance would also violate the Just Compensation Clause, because it contains no provision for compensating or otherwise mitigating the impacts of the forced transfer payments on rental housing owners.

Proponents of the ordinance, including the City Attorney, may argue that the U.S. Supreme Court's decision in *Kelo v. City of New London* provides the proposed ordinance with legal cover. In *Kelo*, a bare majority upheld a city's taking of homes in an economically distressed area so that a pharmaceutical company (Pfizer) could build a $300 million research facility. *Kelo* was based on a dramatically different set of facts. The city in *Kelo* took private property, not "to benefit a particular class of identifiable individuals" (in that case, Pfizer), but the community at large. As the Court found, the city was merely trying to execute a "carefully formulated . . . economic development plan that it believ[ed would] provide appreciable benefits ***to the community***, including . . . new jobs and increased tax revenue." (*Kelo*, 545 U.S. at 483-84 (emphasis added)). Thus, *Kelo* set forth the narrow rule that, where a taking occurs in order to execute a redevelopment plan benefitting an entire community (in the form of jobs, tax revenue, and other widespread benefits), courts will find that the taking satisfies the Public Use Clause. But, again, the ordinance here is not being proposed to effectuate such a redevelopment plan or any other kind of general public-welfare program.

Proponents also may argue that, under the proposed ordinance, the City would not be "taking" anyone's money, but merely forcing a transfer of payment from one private party to another. But that would be a distinction without a constitutional difference. It is well-established that a law authorizing (let alone *requiring*) one private party to take another private party's property effects a taking—whether or not the property first passes through the government's hands. (*See, e.g., Loretto v. Teleprompter Manhattan Catv Corp.* (1982) 458 U.S. 419 (city law requiring landlords to allow a cable company (not the city) onto property without landlords' consent effected a "taking" by the city)).

Finally, the ordinance's forced transfer payment also violates the California Constitution's "public use" requirement for takings. Like the Federal Constitution, the State Constitution provides that "[p]rivate property may be taken or damaged" only for "a public use." (Cal. Const. art. I, § 19(a)). The California Supreme Court has broadly defined "public use" as "a use which concerns the ***whole community*** or promotes the ***general*** interest in its relation to any legitimate object of government." (*Bauer v. County of Ventura* (1955) 45 Cal.2d 276, 284 (emphasis added); *Council v. San Benito County Governments v. Hollister Inn, Inc.* (2012) 209 Cal.App. 4th 473, 494 (same)). For the reasons described above, the ordinance purports to unconstitutionally authorize a *private* taking for the *private* benefit of a small class of individuals; it is not designed to, and does not, effectuate a use that concerns "the whole community" or that promotes "the general interest" of the

public at large. Thus, it fails to satisfy the "public use" requirement under Article 1, section 19, of the California Constitution.

b. THE ORDINANCE'S FORCED TRANSFER PAYMENT FROM OWNER TO TENANT WOULD EFFECT AN UNCONSTITUTIONAL CONDITION UNDER THE TAKINGS CLAUSE

Even if the proposed ordinance's forced transfer payment effected a ***public*** taking of private property for a ***public*** use or purpose, it would still be unconstitutional under the "unconstitutional conditions" doctrine, as applied in the context of the Takings Clause. Under that doctrine, the City may not condition a person's right or privilege to repossessing a unit[1] on the relinquishment of money payable to the displaced tenant *unless* the City is able to demonstrate that the public's need for that property bears an "essential nexus" and "rough proportionality" to the actual, public impacts associated with the person exercising the right or benefit; if the condition fails either standard, it will be deemed by the courts to be an unconstitutional taking of private property—or, in the words of the United States Supreme Court, an "out-and-out plan of extortion." (*Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 837 (if a condition does not meet the "essential nexus" test, it constitutes an "out-and-out plan of extortion"); *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391 (articulating the "rough proportionality" test); *see also Koontz*, 570 U.S. 595 (applying the unconstitutional-conditions doctrine to money-takings)).

Requiring an owner to make a significant payment to a displaced tenant under the proposed ordinance bears no essential nexus or rough proportionality to any conceivable ***public*** impacts[2] caused by the owner. First, any impacts that displacement causes a tenant are of a purely ***private*** nature. The City has not shown (and cannot show) that displacement of a tenant or group of tenants has City-wide, public impacts justifying the forced transfer of money from owners to such tenants.

Second, to the extent the City relies on the vague concept of "housing instability" to justify the ordinance's forced transfer payments, the City has not shown (and cannot show) that *owners* are the cause of such instability (assuming the concept can be defined and actually exists). A number of external factors outside any particular owner's control shapes the market for rental housing and his/her ultimate repossession of a unit, including market rents and the need to rehabilitate units to improve the quality of housing that can be offered to prospective renters. (*See, e.g., Levin v. City & County of San Francisco*, 71 F.Suppp.3d 1072 (N. Cal. 2014) (striking down law requiring owners to pay tenants to vacate, in part because owners are not cause of rental market instability)). Thus, even if tenant displacement produced City-wide, public impacts, it would be wrong—and unjust—to lay those impacts at the feet of owners. The "nexus" test requires that the forced relinquishment of an owner's property as the condition of his or her exercising a right or

[1] BHLB believes that a rental housing owner has the right to repossess his or her unit. Proponents of the proposed ordinance may argue that an owner only has a government-granted "privilege" of doing so. But it matters not to the analysis: the government cannot unconstitutionally burden the exercise of a right *or* privilege by arbitrarily exacting private property as the condition thereof.

[2] Proponents may argue that the forced transfer payment is necessary to mitigate the ***private*** impacts on individual tenants arising out of an owner's repossession of a unit. But, as described in the previous section, private takings—i.e., takings benefitting a select class of private individuals—are unconstitutional under the Public Use Clause.

privilege be premised on public impacts caused ***by that owner and his/her exercise of said right or privilege***—not by circumstances totally outside the owner's control. (*Nollan*, 483 U.S. 825 (public impacts purportedly caused by owner's project); *Dolan*, 512 U.S. 374 (public impacts purportedly caused by owner's project)).

Third, even if there were an essential nexus, no rough proportionality exists between the alleged impacts on tenants and the payment amounts. The relocation payment would be a function of the average rent for a relevantly-sized unit over two months. It would ***not*** be tailored to the alleged impacts. Indeed, making the payment "roughly proportional" to the alleged impacts would be practically impossible—and inherently unfair to the owner—given, again, the incalculable number and variety of factors outside the owner's control that contribute to either (a) the tenant's vacating of a unit,[3] or (b) the nature and amount of the cost to the displaced tenant.

The unconstitutional-conditions doctrine reflects the promise of the Takings Clause. As the U.S. Supreme Court said almost 60 years ago, the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. U.S.*, (1960) 364 U.S. 40, 49). Even if the private impacts to some displaced tenants could be (mis)characterized as "public impacts," the public as a whole would have to bear the burden of addressing them. Indeed, that is precisely what the ordinance proposes with respect to the extra payment proposed for displaced seniors, which would be financed by the City. The same public-financing approach can and should be adopted with respect to *all* transfer payments in order to avoid a conflict with the Takings Clause.

c. THE ORDINANCE'S FORCED TRANSFER PAYMENT FROM OWNER TO TENANT WOULD EFFECT A REGULATORY TAKING UNDER *PENN CENTRAL*

As described in detail above, the proposed ordinance's forced transfer payment would effect a *per se* taking. That is, it categorically would deprive an owner of his/her property, in its entirety, for no public use or purpose, and without any compensation. But even if the ordinance did not effect a *per se* taking, it would certainly effect a regulatory taking under *Penn Central Transportation Co. v. City of New York, 438 U.S. 104* (1978). The *Penn Central* analysis involves "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with investment-backed expectations, and the character of the government action." (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617).

Here, the proposed ordinance's forced transfer payment would implicate all three factors. The financial burden of the forced transfer payment would constitute a severe economic impact for many, if not all, owners. The requirement would interfere with an affected owner's investment-backed expectation that he/she would not be burdened with such a requirement (which would not have existed at the time of the unit's purchase or at

[3] For example, say a tenant voluntarily leaves a unit because of a rent increase that triggers the forced transfer payment. The tenant may leave the unit, not because of an inability to pay, but out of an independent desire to move. Or even if the tenant is unable to pay the increased rent, the inability to pay could be attributable to any number of factors, including underemployment or an insufficient wage/salary. All of those causes for relocation are outside the control of the owner.

the time lease agreements were entered into). As for the "character of the government action," the requirement would amount to a "physical invasion" of the owner's property—either the owner's money or his/her real property: The requirement effectively forces owners to submit *either* to a forced transfer of their property (money) to a third party *or* to occupation of their units on terms not agreed to by those owners and their tenants. (*Guggenheim v. City of Goleta* 638 F.3d 1111 (9th Cir. 2010)).

II. THE ORDINANCE VIOLATES OWNERS' CONSTITUTIONAL RIGHT AGAINST UNREASONABLE SEIZURE OF PROPERTY

The Fourth Amendment to the United States Constitution, also made applicable to local governments via the Fourteenth Amendment, protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures." (U.S. Const. amend. IV). That constitutional protection reaches personal property, such as money. (*Lavan v. City of L.A.* (2012) 693 F.3d 1022 (applying "seizure" provision of the Fourth Amendment to individual's personal property)).

The ordinance's forced transfer payment effects, not just an unconstitutional taking, but an unconstitutional seizure of personal property, as well. (*Soldal v. Cook County* (1992) 506 U.S. 56, 70 ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands."); *see also Presley v. City of Charlottesville*, 464 F.3d 480 (4th Cir. 2006) (same)). It authorizes the seizure of affected owners' money for transfer to third parties, and it does so arbitrarily and capriciously, without any legitimate public purpose.

III. THE ORDINANCE VIOLATES OWNERS' SUBSTANTIVE DUE PROCESS

The Due Process Clause of the Fourteenth Amendment bars government action that does not substantially advance a legitimate state interest. (U.S. Const. amend. XIV; *Lingle*, 544 U.S. at 542). As the Supreme Court explained, "[t]he 'substantially advances' formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. . . . [A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause." (*Lingle*, 544 U.S. at 542).

The proposed ordinance fails to advance a legitimate governmental objective. A law that merely benefits the ***private*** interests of a select class of individuals is *not* a legitimate governmental interest. And even if the ordinance could be characterized as advancing some ***public*** interest—such as "housing stability"—the ordinance's forced transfer payment would fail to advance that interest. There is no evidence that the ordinance would end rent increases or efforts to rehabilitate units in the City; such increases and notices to vacate would continue. Thus, the proposed would result only in a transfer of wealth from owners to tenants, including wealthy tenants—not the "stabilization" of housing. To the extent the ordinance *does* curtail or eliminate rent increases or the rehabilitation of units, it would do so at significant cost and expense to City residents who need and desire quality housing.[4] The City would be hard-pressed to

[4] The Brookings Institute recently published a report, entitled "What does economic evidence tell us about the effects of rent control?, available at: https://www.brookings.edu/research/what-does-economic-evidence-tell-us-about-the-effects-of-rent-control/. Among other things, that well-respected, non-partisan institute found that when laws make it difficult or expensive for landlords to "invest in maintenance

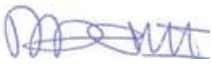
characterize those deleterious consequences as being "legitimate governmental objectives."

CONCLUSION

For all the reasons described above, the City should reject the proposed ordinance. Any attempt to force owners to pay money to displaced tenants should be jettisoned; if the City insists on subsidizing tenants, including well-off tenants, then those subsidies should be paid by the public, not individual owners. To force owners to bear the entire burden of those subsidies would violate their constitutional rights and expose the City to the risk of protracted and costly litigation. In particular, a successful challenge to the ordinance would obligate the City to pay even the successful party's attorneys' fees and costs. (*See, e.g.*, Cal. Civ. Proc. Code § 1021.5; 42 U.S.C. § 1988)).

At a minimum, the City should delay action on the ordinance until staff—and the general public—can adequately vet the proposed ordinance's legality and effectiveness, including the unintended consequences adoption would have on the quality and quantity of rental housing in the City. Despite representations to the contrary, it appears that rental housing owners have not been afforded a full and fair opportunity to be heard on the underlying issues. (To further investigate, we have concurrently issued to the City a Public Records Act request seeking documents that we hope will tell us more about the City's outreach efforts, its process for including and meeting with stakeholders, and potential conflicts of interest.)

Sincerely,



Paul J. Beard II
Attorney for Better Housing for Long Beach

---

because they can't recoup these investment by raising rents," those laws can "lead to decay of the rental housing stock." The report's conclusion? "Rent control appears to help affordability in the short run for current tenants, but in the long-run decreases affordability, fuels gentrification, and creates negative externalities on the surrounding neighborhood." If the ordinance results in rent control—which members of the Council and staff have categorically denied—then it would not advance any legitimate government interest.