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M E M O R A N D U M

TO: **Robert Savidge, Alderman**

THRU: **D. Michael Lyles, City Attorney**

FROM: **Joel Braithwaite, Assistant City Attorney** JAB

DATE: **June 13, 2023**

RE: **Preemption by the Maryland Code for certain laws concerning landlord tenant interactions.**

The City of Annapolis received public comment concerning O-21-23, Requiring landlords to pay to relocate tenants if the City condemns the building or unit, which was up for public hearing at the June 12, 2023, City Council meeting.

Issue: Whether O-21-23 as drafted conflicts with the State Law.

Short Answer: Probably yes. Provisions dealing with (1) Security Deposits or (2) Length of time to Make Repairs or (3) Payments to Tenant in Excess of Rent Escrow Payments or the Security Deposit are likely preempted by the Maryland Code.

A. O-21-23—Tenant relocation due to condemnation

The Ordinance creates a new section of the City Code at 18.10.030 - Tenant relocation due to condemnation which mandates the following: payment of tenant relocation expenses, a 72 hour return of tenant's security deposit, a return of rent paid – prorated – to the tenant for the month of condemnation, and a payment of the greater of three times the tenant's rent or the FMV rent of the condemn unit. The Ordinance also provides that replacement rental accommodations must be comparable to the condemned unit. The Ordinance also provides that tenants are owed an additional month FMV or lease rental payment if tenants are required to move in less than 30 days by the condemnation order.

The Landlords must pay for the tenant to move back into the unit once City-approved repairs are made with a right to return at the tenant's option and payment of the tenant's moving costs back into the unit, if the tenant decides to return. The Lease provisions of the rehabbed space must be

"substantially similar" to the original lease. This Ordinance does not apply if the City finds the unit damage is due to events beyond the landlord's control.

B. O-21-23's Opposition by the Maryland Multi-Housing Association

O-21-23 is being opposed by the Maryland Multi-Housing Association (MMHA). MMHA is a professional trade association established in 1996, whose membership consists of owners and managers of more than 207,246 rental housing homes in more than 937 apartment communities. Our members house over 667,000 residents of the State of Maryland throughout the entire State of Maryland.

MMHA contends that the proposed bill either conflicts with or, at a minimum, undermines existing provisions of State and County law and specifically Md. Code Ann. Real Property § 8-211 Repair of dangerous defects; rent escrow. They argue the following conflicts should be noted:

1. Timeline for repairs prior to initiation of rent escrow action which allows a landlord "a reasonable amount of time" generally not to exceed 30 days to make repairs. A resident must satisfy the notice requirement and allow the landlord an opportunity to cure the defect to preserve their right to file a rent escrow action. The proposed ordinance, however, stipulates that the time period to initiate repairs must not exceed 48 hours after initial notice is given.

2. Timeline for repairs after rent escrow action is brought: The rent escrow statute allows a landlord an additional 90 days from the time the resident files a rent escrow action to cure any defect, before the court will order the landlord to make any necessary repairs. Again, a 48 hour window to make substantial repairs is wholly inconsistent with the existing timeline prescribed by State law.

3. Meritorious claims: If the resident's claims are meritorious, a court may order rent payments in escrow to be distributed to the resident and have their existing lease terminated. Through this mechanism the tenant can be made financially whole, which allows the resident to access these funds to secure alternative housing if needed.

The Maryland Multi-Housing Association asks the City to consider instead "using licensing fees to fund a Tenant Relocation Fund."

C. How Preemption by the Maryland Code Works

"Under [Supreme Court of Maryland] decisions, state law may preempt the local law in one of three ways: 1) preemption by conflict, 2) express preemption, or 3) implied preemption." *Talbot Cnty v. Skipper*, 329 Md. 481, 487 (1993). A local ordinance is preempted by conflict when it prohibits an activity which is intended to be permitted by state law or permits an activity which is intended to be prohibited by state law. *Boulden v. Mayor*, 311 Md. 411, 415-17 (1988). Generally, state law preempts by implication local law where the local law "deal[s] with an area in which the [State] Legislature has acted with such force that an intent by the State to occupy the entire field must be implied." *Cnty Council v. Montgomery Ass'n*, 274 Md. 52, 59 (1975).

In *Prince George's Cnty v. McBride*, 263 Md. 235, 242-43 (1971), the Supreme Court of Maryland stated:

> This Court has always held repeal by implication in disfavor and has labored to reconcile existing legislation; in this case whatever labor is required is certainly minimal. We conclude by simply quoting the lucid language of Judge Alvey

speaking for the Court in *Garitee v. Mayor, etc., of Baltimore*, 53 Md. 422, 435 (1880):

> If the subsequent Act can be made, by any reasonable construction or intendment, to stand with the previous legislation, that construction will always be adopted. This is a canon of construction as well as established as any principle of law.

McBride, 263 Md. at 242-43; *see also Anne Arundel County v. Board*, 248 Md. 512, 523 (1968).

The Supreme Court of Maryland has emphasized that "[t]here is no particular formula for determining whether the General Assembly intended to preempt an entire area." *Skipper*, 329 Md. at 488. "The primary indicia of a legislative purpose to preempt an entire field of law is comprehensiveness with which the General Assembly has legislated in the field." *Howard County v. Pepco*, 319 Md. 511, 523 (1990). If there is no legislative intent to occupy an area of law, there is no preemption. *Id*.

The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature. *Williams v. Peninsula Reg'l Med. Ctr*., 440 Md. 573, 580 (2014)(citation omitted). "[S]tatutory interpretation begins, and usually ends, with the statutory text itself, for the legislative intent of a statute primarily reveals itself through the statute's very words." *Price v. State*, 378 Md. 378, 388 (2003) (citing *Marriott Employees v. MVA*, 346 Md. 437, 444-45 (1997); *Derry v. State*, 358 Md. 325, 335 (2000)). "A court may neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute; nor may it construe the statute with forced or subtle interpretations that limit or extend its application." *Cnty Council v. Dutcher*, 365 Md. 399, 416-417 (2001). "[I]f the words of a statute clearly and unambiguously delineate the legislative intent, ours is an ephemeral enterprise. We need investigate no further but simply apply the statute as it reads." *Derry*, 358 Md. at 335; *Kaczorowski v. City of Baltimore*, 309 Md. 505, 515 (1987). The "[c]ourt has been most reluctant to recognize exceptions in a statute when there is no basis for the exceptions in the statutory language." *Lee v. Cline*, 384 Md. 245, 256 (2004).

In Maryland, a landlord's obligation for providing a habitable living space is primarily governed by Maryland Code Real Property § 8-211. Repair of dangerous defects; rent escrow. This legal requirement, commonly known as the "implied warranty of habitability," also outlines the rights of tenants when repairs are not made in a timely manner. The landlord and tenant's rights concerning the security deposit are governed by Maryland Code Ann. Real Property § 8-203.

D. No Preemption for Condemnation by the Maryland Code which only applies to Eminent Domain Actions as opposed to O-21-23 which provides for condemning units as uninhabitable.

Under Maryland Code Ann. Real Property § 8-211. Repair of dangerous defects; rent escrow, (g)(3) requires the tenant to notify the landlord of the existence of defects or conditions that may be satisfied by the landlord's receipt of: "a written violation, condemnation or other notice from an appropriate State, county, municipal or local government agency stating the asserted conditions or defects." Thus, the City Code's condemnation of a unit can act to provide the landlord notice of the defects. It is likely that nothing in the proposed Ordinance O-21-23, conflicts with the Maryland Code as the Condemnation Statutes under the Maryland Code contemplate eminent domain actions and not the Condemnation of Housing Units pursuant to the City Code. Maryland Code Ann. Real Property § 8-211 contains the only use of "condemnation" in the Maryland Code referring to condemning a property as uninhabitable, as opposed to condemnation for eminent domain purposes.

E. Provisions dealing with (1) Security Deposits or (2) Length of time to Make Repairs or (3) Payments to Tenant in Excess of Rent Escrow Payments or Security Deposits are likely preempted by the Maryland Code.

(1) Security Deposits under the Maryland Code would preempt O-21-23's provisions which require a Security Deposit be returned 72 hours after condemnation by the City.

Security deposits are governed by Maryland Code Ann. Real Property § 8-203. This is very detailed and governs all landlord tenant security deposit litigation concerning when the landlord is entitled to keep the security deposit, and disagreements about whether the tenant caused damage to the rental unit. The landlord must return a tenant's security deposit plus interest, less any damages rightfully withheld, within 45 days after the tenancy ends. Md. Code Ann., Real Prop. § 8-203, Security Deposits, (e)(1). If the landlord fails to do this without a good reason, the tenant may sue for up to three times the withheld amount, plus reasonable attorney's fees.

If the landlord withholds any part of the security deposit, they must send the tenant a written list of damages, with a statement of what it cost to repair the damages, by first-class mail to the tenant's last known address within 45 days after the tenant moves out. If the landlord fails to do this, they lose the right to withhold any part of the security deposit.

The tenant has the right to be present when the landlord inspects the rental unit for damages at the end of lease, if they notified the landlord by certified mail at least 15 days prior to moving of its intention to move, the date of moving, and the tenant's new address. The landlord must then notify the tenant by certified mail of the time and date of the inspection. The inspection must be within five days before or five days after the tenants move-out date. The landlord must disclose these rights to the tenant in writing when they pay the security deposit. If not, the landlord forfeits the right to withhold any part of the security deposit for damages.

A tenant's rights and duties are different if they were evicted for breach of the lease, or have left the rented property before the lease expired. Under these circumstances, the tenant must send a written notice to the landlord by first-class mail within 45 days of being evicted or leaving the property. This notice must advise the landlord of the tenant's new address and request the return of the deposit. Once the landlord receives the written request, they must take certain steps.

- The landlord must send a list of damages to the rental unit and costs incurred to repair them to the tenant by first-class mail within 45 days. If the landlord fails to send the tenant a list of damages, they forfeit the right to withhold the security deposit.
- The security deposit, plus interest, less any damages rightfully withheld, must be returned within 45 days of the tenant's notice.

(2) Rental Escrow under the Maryland Code Does Preempts O-21-23 which only gives landlord 48 hours to conduct repairs of the tenant's apartment as Opposed to a 30 day period for Rent Escrow.

Under Maryland Code Ann. Real Property § 8-211. Repair of dangerous defects; rent escrow, if a landlord fails to repair serious or dangerous defects in a rental unit, the tenant has the right to pay rent into an escrow account established at the local District Court. The tenant must give the landlord proper notice and adequate time to make the repairs before the right to place rent in escrow accrues. The escrow account can only be set up by the Court. The serious or dangerous conditions include, but are not limited to:

- Lack of heat, light, electricity, or water, unless the tenant is responsible for the utilities and the utilities were shut off because the tenant didn't pay the bill (lack of air conditioning is not considered a serious or dangerous situation that would permit rent escrow);
- Lack of adequate sewage disposal;
- Rodent infestation in two or more units;
- Lead-based paint hazards that the landlord has failed to reduce;
- The existence of any structural defect that presents a serious threat to the tenant's physical safety; and
- The existence of any condition that presents a serious fire or health hazard.

Rent escrow is not provided for defects that just make the apartment or home less attractive or comfortable, such as small cracks in the floors, walls, or ceiling. In order to withhold rent for conditions that constitute a threat to life, health, or safety, the landlord must receive actual notice of the defects including violations from an appropriate government agency, such as the local housing department. The landlord then has a reasonable amount of time after receiving notice to correct the conditions. If the landlord fails to do this, the tenant may go to court to file a rent escrow action.

Before an escrow account can be established, the Court will hold a hearing to evaluate whether a rent escrow account is needed. The judge can take several actions, including returning all or part of the money to the tenant as compensation, returning all or part of the money to the tenant or the landlord in order to make repairs, or appointing a special administrator to ensure that the repairs are made. Once the escrow account is established, the tenant must continue to regularly pay rent into this account.

If a tenant opts to withhold rent without establishing an escrow account, they still must notify the landlord by certified mail of the problems in the unit and of the tenant's refusal to pay the rent. However, the landlord could take the tenant to court and try to evict them. Tenants may then defend the action in Court stating the reasons for withholding rent. If the Court agrees that the condition of the home or apartment poses a serious threat to the tenant's life, health or safety, the tenant will be required at that time to put rent payments into an escrow account until the dispute is resolved.

(3) O-21-23's Payments to Tenants in Excess of the Rental Escrow under the Maryland Code are likely also Preempted.

O-21-23 requires (1) payment of tenant relocation expenses, a return of rent paid – prorated – to the tenant for the month of condemnation, (2) a payment of the greater of three times the tenant's rent or the FMV rent of the condemn unit, (3) payment to tenants for an additional month FMV or lease rental payment if tenants are required to move in less than 30 days by the condemnation order, and (4) payment of the tenant's moving costs back into the unit, if the tenant decides to return. These additional payments are above and beyond any payments to which the tenant would be entitled to under Maryland Code Ann. Real Property § 8-211. Repair of dangerous defects; rent escrow or Maryland Code Ann. Real Property § 8-203. Security deposits, and are likely preempted by these statutes.

If there are any additional questions, please do not hesitate to call or write me. Thanks.