April 27, 2020

Michael N. Feuer, Esq.
City Attorney
City of Los Angeles
City Hall East, Suite 800
Los Angeles, CA 90012

Re: April 22 Motion – Self Storage Ordinance

Dear Mr. Feuer:

The national Self Storage Association represents the owners and operators of self-storage businesses nationally and, in conjunction with the California Self Storage Association, we represent those businesses in California. To clarify, Inside Self-Storage is a media company and does not represent our members in the policy arena.

We write to you regarding the motion recently made by the City Council directing your office to draft an ordinance "prohibiting the sale, disposal, donation, or confiscation of personal belongings in rented storage units, if an individual's storage lease goes into default resulting from the effects of the Coronavirus emergency."

Our members understand the financial and personal impact that the pandemic is having on many of their customers. They have taken proactive, sympathetic, and reasonable measures to assist their customers during these times, including accepting partial payments and developing payment plans, waiving late fees, suspending lien sales resulting from non-payment, and keeping rents stable. They want to retain valued customers, while keeping them and their employees safe. Furthermore, self-storage leases are month-to-month, providing customers the opportunity to remove their property at any time to avoid additional rent obligations.

In light of the unprecedented efforts our members are already taking, we are troubled by the proposed motion. We believe any further restrictions on property owners are unnecessary in light of the measures already in place to help customers. The motion not only relies on several misconceptions about storage leasing and lien sales in California, it also vastly exceeds the scope of the City's regulatory authority and threatens to infringe the constitutional rights of self-storage operators, many of which are small businesses.

I. The Motion Relies on Fundamental Misconceptions about Storage Leasing and the Lien Sale Process in California.

When self-storage customers fail to pay rent, self-storage owners do not use the eviction process and they do not "confiscate" a customer's property. Instead, self-storage owners use the comprehensive lien sale process established by the California Self-Service Storage Facility Act ("CSSSFA"), Bus. & Prof. Code § 21701, et seq.

For nearly 40 years, the CSSSFA has regulated this process in detail, carefully balancing operators' rights against customers' rights. Entire treatise sections are devoted to this highly tailored and unique area of California law. *See*, *e.g.*, Miller and Starr, 10 Cal. Real Est. § 34:268 (4th ed.) ("Lien of 'self-service' storage facility on tenant's personal property"); 13 Witkin, Summary 11th Personal Property § 240 (2019) ("Self-Service Storage Facility Owner's Lien").

The process protects customers. For instance, a self-storage facility owner must provide a special preliminary notice to renters whose payment has been delinquent for weeks. Bus. & Prof. Code §§ 21703, 21704, 21705. The customer can oppose that notice (*id.* § 21705(b)(2)), in which event he or she is entitled to judicial proceedings before any lien sale can occur (*id.* § 21710). Customers also have redemption rights to their property and can repay any sums owed before the lien sale occurs. (*Id.* §§ 21708, 21709.) Customers receive at least two notices before any lien sale and operators must publish the details of any proposed lien sale for two consecutive weeks in a newspaper of general circulation. (*Id.* § 21707.) Finally, any sale under a lien must be commercially reasonable and deliver to the customer the proceeds after deducting the amount of the lien and costs of sale. *Id.* § 21707. In all, the entire lien sale process in California takes well over two months to legally complete with customers having multiple opportunities to contest or cure any default prior to sale.

Furthermore, it is important to remember that self-storage leases are month-to-month. Customers have the opportunity to remove their property at any time to avoid additional rent obligations if they are unable to pay.

II. An Ordinance Based on the Motion Would Exceeds the Scope of the City Council's Legislative Powers and Is Preempted by the California Self-Service Storage Facility Act.

An ordinance based on the motion would dramatically exceed the scope of the City's authority. A city ordinance "will not be given effect to the extent that it conflicts with general laws either directly or by entering a field which general laws are intended to occupy to the exclusion of municipal regulation." *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 140 (1976). And a "conflict exists if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law either expressly or by legislative implication.'" *Candid Enters., Inc. v. Grossmont Union High Sch. Dist.*, 39 Cal. 3d 878, 885 (1985). That is precisely the case here.

As shown above, the CSSSFA sets forth in minute detail the rights and remedies of storage customers and operators in the event of any customer default as part of a comprehensive legislative framework governing storage occupancy. It provides specific

timeframes for notice, response, cure, publication and sale. It even goes so far as to include the form of notice that can be sent to customers in the event of default.

When a California statutory scheme so comprehensively regulates a subject, as here, there is no room for supplementation or alteration by cities—let alone an abolition of rights and remedies as the motion threatens. Cal. Const., art. XI, § 7; *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993); *Big Creek Lumber Co. v. Cty. of Santa Cruz*, 38 Cal. 4th 1139, 116 (2006); *Water Quality Assn. v. Cty of Santa Barbara*, 44 Cal.App.4th 732, 741 (1996).

Regardless of whether the Governor has authority to temporarily suspend the provisions of the CSSSFA (*see* Gov. Code § 8571), he has not sought to exercise such power here. Governor Newsom's Executive Order N-28-20 enables local governments to impose certain limitations on residential or commercial evictions, but nothing in that order, nor anything in California law, permits a local government to suspend the procedures outlined in the CSSSFA. Any such ordinance by the City of Los Angeles would thus be preempted by state law.

III. An Ordinance Based on the Motion Would Violate the Well-Established Constitutional Rights of Self-Storage Owners.

An ordinance based on the motion also would violate numerous constitutional protections enshrined in the federal and California Constitutions, including the Contracts Clause, the Takings Clause, and the Due Process Clause.

A. The Contracts Clause

The Contracts Clauses of the U.S. and California Constitutions prohibit the government from passing legislation that "impairs the obligation of contracts." U.S. Const., art I., § 10, cl.1; Cal. Const., art. I, § 9. To determine whether a particular law violates this constitutional guarantee, courts consider "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978)).

In determining whether a contractual impairment is substantial, courts consider "the extent to which the law undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018). If a court determines that a law works a substantial impairment, it then considers "whether the state law is drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Sveen*, 138 S. Ct. at 1822 (quoting *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411–12 (1983)); *see also Interstate Marina Dev. Co. v. Cty. of Los Angeles*, 155 Cal. App. 3d 435, 445 (1984) ("A substantial impairment can only be justified by a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem."). "The government must use the least intrusive means to achieve its goals. It is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well." *Interstate Marina Dev. Co.*, 155 Cal. App. 3d at 445–46 (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 31 (1977)).

Under these standards, an ordinance based on the motion would violate the Contracts Clause. It would fundamentally upend the contractual bargain struck by self-storage owners and their customers by effectively relieving customers of their obligation to pay rent, and leaving owners without any recourse. Owners would be required to allow customers to store their belongings rent free for an unspecified duration of time, thus depriving owners of the opportunity to rent that storage unit to a customer who needs, and wishes to pay for, the space. Such an ordinance would be the quintessential "substantial" impairment, as it "undermines the contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating his rights." *Sveen*, 138 S. Ct. at 1822.

B. The Takings Clause

The Takings Clause, present in both the U.S. and California Constitutions, provides that private property shall not "be taken for public use, without just compensation." U.S. Const., amend. V; *see also* Cal. Const., art I., § 9 (a) ("[p]rivate property may be taken or damaged for a public use . . . only when just compensation . . . has first been paid to . . . the owner.").

The purpose of the Takings Clause is 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." *Lingle v. Chevron Corp*., 544 U.S. 528, 537 (2005) (quoting *Armstong v. United States*, 364 U.S. 40, 49 (1960)). Government action may violate the Takings Clause where it is "the functional[] equivalent [of] the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id*. at 539. To determine whether a particular governmental action rises to this level, courts weigh (1) "the economic impact of the regulation;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations;" and (3) "the 'character of the governmental action'—for instance, the action amounts to a physical invasion or instead merely affects property interests through 'some program adjusting the benefits and burdens of economic life to promote the common good.'" *Id*. (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). This three-part inquiry is "essentially ad hoc," but "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id*. at 540.

An ordinance based on the motion, if enacted, would constitute a classic regulatory taking, thus triggering an obligation on the part of the City to provide "just compensation" to all affected self-storage owners. *First*, the economic impact of this regulation would be severe—and potentially ruinous to members who are small businesses and cannot survive for long if many of its customers cease to pay rent but are nonetheless allowed to occupy rental units rent-free and indefinitely. *Second*, the proposal would undermine "reasonable investment-backed expectations" of self-storage owners who purchased these properties and got into business with the "objectively reasonable" expectation that they would be able to charge rent for their units and have legal recourse if the renters failed to pay rent. *See Bridge Aina Le'a , LLC v. Land Use Comm'n*, 950 F.3d 610, 634–35 (9th Cir. 2020) (distinct investment-backed expectations must be "objectively reasonable" and "unilateral expectation[s]' or 'abstract need[s]' cannot form the basis of a claim that the government has interfered with property rights.") In fact, self-storage owners made their business investments against the backdrop of a decades-old statutory scheme (the CSSSFA) designed

to resolve disputes between owners and customers who do not pay rent. *Cf. Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc) (mobile home park owner who purchased the property subject to a rent-control ordinance could have no "'distinct investment-backed expectation[]' that they would obtain illegal amounts of rent" or that "rent control might someday end, either because of a change of mind by the municipality or court action").

Finally, the "character of the governmental action" here is more akin to a physical invasion of private property than a "program adjusting the benefits and burdens of economic life to promote the common good." *Lingle*, 544 U.S. at 537. After all, an ordinance based on the motion would effectively require self-storage owners to let customers store personal belongings in owners' units free of charge *and* require the owners to allow those belongings to remain there for an indefinite amount of time.

C. The Due Process Clause

The Due Process Clauses of the U.S. and California Constitutions stand as a third constitutional hurdle to the enactment of such an ordinance. U.S. Const. amend. XIV, § 1; Cal. Const. art. I, § 7(a). The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests," including the "specific freedoms protected by the Bill of Rights" and "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'" such as property rights. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 502 (1977)). Thus while the "police power" of the government may be broad, it "must be exercised within a limited ambit and is subordinate to constitutional limitations." *Panhandle E. Pipe Line Co. v. St. Highway Comm'n of Kansas*, 294 U.S. 613, 622 (1935). The City's police power therefore does not afford "unrestricted authority to accomplish whatever the public may presently desire." *Id.* Instead, "[i]t is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury." *Id.*

Therefore, "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; *Rea v. Matteucci*, 121 F.3d 483, 485 (9th Cir. 1997) (under Due Process Clause a "federal interest remains in protecting the individual citizen from state action that is wholly arbitrary or irrational"). Furthermore, a law violates the Due Process Clause if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)(quoting *United States v. Williams*, 553 U.S. 285, 306 (2008)).

An ordinance based on the motion would be arbitrary and irrational because it bears no reasonable relationship to government's interest in protecting public health and safety. Such an ordinance's broad—and indefinite—prohibition on self-storage owners exercising their statutory (and contractual) rights to reclaim real property occupied by customers who have failed to pay rent is not rationally related to protecting the health and safety of the community. It is not reasonably tethered to the COVID-19 pandemic, and even the proposed limitation on the scope of the ordinance to individuals whose "lease goes into default

resulting from the effects of the Coronavirus emergency" is vague and provides little guidance about who may be able to take advantage of its protections.

We and our members reserve all rights to bring legal action should the City exceed its authority under applicable law.

Thank you for your consideration of this letter. You can reach Joe Doherty at (703) 575-8000, x123, to discuss further.

Sincerely,

Joseph L. Doherty

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cc: David J. Michaelson, Esq.