Emily Gordon - Proposed Rent/Security Deposit Ordinance for Meeting 10/30/2018

From: Jeff Ray <jeff@otisraylaw.com>
To: "Council@cityofeastlansing.com" <Council@cityofeastlansing.com>
Date: 10/30/2018 2:10 PM
Subject: Proposed Rent/Security Deposit Ordinance for Meeting 10/30/2018
Cc: Tom Yeadon <tomyeadon@mcgintylaw.com>
Attachments: 20181030141421456.pdf

Please see attached. Thank you.

Jeff Ray

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THE CITY OF EAST LANSING PROPOSED ORDINANCE REGARDING (LANDLORD-TENANT) RENT COLLECTION

PERCEIVED PROBLEM:

The City of East Lansing has made a finding that landlords are violating the Landlord and Tenant Relationships Act, Act 348 of 1972, MCL 554.602 ("the LTRA") by collecting as much as four (4) months' rent in advance, along with a security deposit.

The City of East Lansing has also made findings that these practices are violative of existing law as set forth in a Court of Appeals ruling, to wit: *Sobel v Trony Associates,* 91 Mich App 294 (1979); and,

that Legislative action is necessary at the local level in order to eliminate these practices.

THE ACTUAL PRACTICE:

A fair number of landlords in the City of East Lansing follow the same practices of the college, MSU, in collecting rents. That is, they collect a security deposit consistent with the LTRA and then the rent for the first full rental period, sometimes up to four (4) months.

The reason for that is that the market is largely students, and students are typically receiving their financial assistance from parents, student loans, grants, and the like at the beginning of each semester. This practice not only is consistent with the receipt of such funds, it provides convenience to the students and their families as they plan the academic year and the expenses attendant thereto. There will shortly be over 1,000 new housing options for students which provides plenty of options for students to choose from with varying payment schedules and "rental terms".

THE LAW:

The City of East Lansing has made a finding that the law, as set forth in the LTRA and *Sobel, supra,* prohibit the practices described above. The LTRA, in principal part, provides:

(e) "Security deposit" means a deposit, in any amount, paid by the tenant to the landlord or his or her agent to be held for the term of the rental agreement, or any part of the term, and includes any required prepayment of rent other than the first full rental period of the lease agreement; any sum required to be paid as rent in any rental period in excess of the average rent for the term; and any other amount of money or property returnable to the tenant on condition of return of the rental unit by the tenant in condition as required by the rental agreement. Security deposit does not include either of the following:

The *Sobel* case, in pertinent part, found that the landlord had violated the LTRA by collecting two (2) months' rent at the outset of the lease, in addition to a (one-month equivalent) security deposit. After legally collecting the security deposit portion, the court indicated: "[Thereafter, on the first day of each rental period, defendant (landlord) could require payment of the rent for that rental period.]"

As such, *Sobel* has limitations. It does not prevent the landlord from selecting the appropriate "rental period" nor does it apply when the landlord collects rent for that "rental period". In such cases, the "rental period" can be a week, month, quarter, etc. Indeed, in the publication entitled "A Practical Guide for Tenants and Landlords" published by the State Legislature with the assistance of the MSU Housing Clinic, under "Security Deposit", the following is reprinted:

> ***"The security deposit is an amount of money paid by the tenant to the landlord other than the first rent payment (for whatever period is established in the lease: weekly rent payment, monthly rent payment, semiannual rent payment, and so on)."***

Again, the relevant portion of the LTRA, Section 1(e) speaks to "*...any prepayment of rent other than the first rental period of the lease agreement; any sum required to be paid as rent in any rental period in excess of the average rent for the term; and any other amount of money or property returnable to the tenant on the condition of return of the rental unit by the tenant in condition as required by the rental agreement...*"

Landlords are not violating the principles set forth in the LTRA or by ruling, in *Sobel, supra.* In effect, the City of East Lansing has taken it upon itself to be the interpreter and enforcer of the state legislature's well-worn mandate to landlords under the LTRA. This effort is not appropriate or legal.

THE CITY OF EAST LANSING IS CONSTITUIONALLY PROHIBITED FROM PASSING THE PROPOSED ORDINANCE

The Michigan Supreme Court, in *People v Llewellyn,* 401 Mich 314 (1977), set aside as "null and void" the City of Detroit's attempt to regulate criminal obscenity by local ordinance finding that the "existing state statutory scheme" preempted such action under the Michigan Constitution, Article 7, §22.

The Michigan Constitution, Article VII, §22, declares:

Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

The Court indicated that in making the determination that the state has preempted the field of regulation which the city seeks to enter, the court looks to certain guidelines.

> "First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted. *Noey v Saginaw,* 271 Mich. 595; 261 NW 88 (1935).
>
> Second, pre-emption of a field of regulation may be implied upon an examination of legislative history. *Walsh v River Rouge,* 385 Mich. 623; 189 N.W.2d 318 (1971).
>
> Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. *Grand Haven v Grocer's Cooperative Dairy Co,* 330 Mich. 694, 702; 48 N.W.2d 362 (1951); *In re Lane,* 58 Cal.2d 99;[401 Mich. 324] 22 Cal.Rptr. 857; 372 P.2d 897 (1962);[2] *Montgomery County Council v Montgomery Ass'n, Inc,* 274 Md. 52; 325 A.2d 112, 333 A.2d 596 (1975). While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.
>
> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest...
>
> The four guidelines outlined above lead us to conclude that the state, in its criminal obscenity statutory scheme, has pre-empted the field of regulation which East Detroit seeks to enter with its anti-obscenity ordinance.
>
> We have no express statutory language nor legislative history that indicates one way or the other whether the state statutory scheme pre-empts an ordinance such as the one before us.
>
> However, the two other factors to be considered indicate that an ordinance such as the one before us has been pre-empted because the comprehensiveness of the statutory scheme established by the state shows a pre-emptive intent, and because the nature of the regulated subject matter demands uniform, statewide treatment.
>
> As to the comprehensiveness issue, an examination of the state statutory scheme reveals a broad, detailed, and multifaceted attack on the sale, distribution and exhibition of obscenity." See also: *City of Grand Haven v Grocer's Co-Op Dairy Co,* 330 Mich 694 (1951).

An Attorney General Opinion, No. 6326 (1985), buttresses this argument. The Attorney General was asked to render an opinion regarding whether or not MCL 554.601 et seq., preempted local units of government from requiring landlords to pay interest upon the security deposits of their tenants.

The Attorney General first referred to the case law set forth in *People v Llewellyn,* and found that MCL 554.601 et seq, in its title, provides:

> "An act to regulate relationships between landlords and tenants relative to rental agreements for rental units; to regulate payment, use and investment of security deposits; to provide for commencement and termination inventories of rental units; to provide for termination arrangements relative to rental units; to provide for legal remedies; and to provide penalties."

The AG found that the third-prong of the test in *Llewellyn,* that the legislative scheme established in MCL 554.601 et seq, is fairly pervasive and when this factor was considered together with an examination of the legislative history of MCL 554.601, "it is indeed manifest that the Legislature did intend to preempt local units of government at least with respect to the imposition of interest payments upon tenant's security deposits."

While the AG Opinion is not binding authority, it clearly provides a persuasive basis to conclude, under the auspices of *People v Llewellyn,* and a host of other cases following this line of authority, that the state has preempted the regulation of security deposits and the collection of rents by landlords under MCL 554.601 et seq.

THE PROPOSED ORDINANCE

The proposed Ordinance reiterates several provisions of the LTRA and then adds its own definition in §1006.5 holding that the collection of rent is limited to "the first month's rent". It then adds to the "bases for imposition of terms and conditions", a violation of the above section (see §1008.2(j)). It also adds provisions for suspension of rental licenses for such violations while adding a caveat that no suspension imposed for such violations will begin until the end of the current lease.

These provisions are null and void and preempted by the LTRA as stated. Furthermore, the imposition of penalties and sanctions at the end of the current lease term lacks reason and a fundamental understanding of the fact that landlords enter into leases up to one year in advance with their tenants. That means that there are already contracts with tenants for the entire 2019 calendar year including up to August 2020. This legislative effort obviously seeks to do what committees in East Lansing previously found they were unauthorized to do, that is, interfering with the marketing and private contract rights of local landlords.

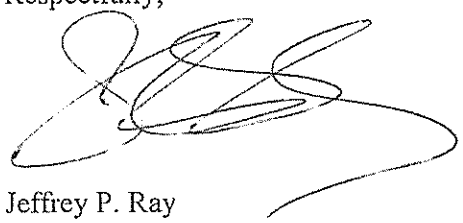
CONCLUSION

The proposed East Lansing Ordinance seeking to regulate payment of rent and seeking to add penalties and license suspensions is unconstitutional on its face and is subject to immediate legal challenge on the basis of preemption, as indicated.

The undersigned interested landlords request that this proposal be removed from the Consent Agenda on October 30, 2018 and ultimately, removed from consideration entirely.

Thank you.

Respectfully,



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Emily Gordon - Proposed Rent Ordinance

From: Jeff Ray <jeff@otisraylaw.com>
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Attachments: 20181030161959325.pdf

This should have been attached to the earlier email. Thank you.

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[Previous Page] [Home Page]

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6326

December 16, 1985

MUNICIPALITIES:

Preemption of authority to adopt ordinance requiring landlord to pay interest upon security deposit of tenant

SECURITY DEPOSIT:

Interest upon security deposit of tenant

The Legislature has, through enactment of MCL 554.601 et seq; MSA 26.1138(1) et seq, preempted local units of government from requiring landlords to pay interest upon the security deposits of their tenants.

Honorable Perry Bullard

State Representative

The Capitol

Lansing, MI 48909

You have requested my opinion on the question of whether the Legislature, by virtue of MCL 554.601 et seq; MSA 26.1138(1) et seq, has preempted local units of government from requiring landlords to pay interest on their tenants' security deposits.

In People v Llewellyn, 401 Mich 314, 323-324; 257 NW2d 902 (1977), cert den, 435 US 1008; 98 S Ct 1879; 56 L Ed 2d 390 (1978), the Michigan Supreme Court identified four guidelines to be used in making the determination as to whether the state has preempted local units of government from a particular field of regulation. The court stated:

'First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted. Noey v Saginaw, 271 Mich 595; 261 NW 88 (1935).

'Second, pre-emption of a field of regulation may be implied upon an examination of legislative history. Walsh v River Rouge, 385 Mich 623; 189 NW2d 318 (1971).

'Third, the pervasiveness of the state regulatory scheme may support a finding of pre-emption. Grand Haven v Grocer's Cooperative Dairy Co, 330 Mich 694, 702; 48 NW2d 362 (1951); In re Lane, 58 Cal 2d 99; 22 Cal Rptr 857; 372 P2d 897 (1962); Montgomery County Council v Montgomery Ass'n, Inc, 274 Md 52; 325 A2d 112, 333 A2d 596 (1975). While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption.

'Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.' (Footnotes deleted.)

MCL 554.601 et seq; MSA 28.1138(1) et seq, was approved by the Governor on January 9, 1973 and became effective on April 1, 1973. The title of the Act provides that it is:

'AN ACT to regulate relationships between landlords and tenants relative to rental agreements for rental units; to regulate the payment, repayment, use and investment of security deposits; to provide for commencement and termination inventories of rental

units; to provide for termination arrangements relative to rental units; to provide for legal remedies; and to provide penalties.' (Emphasis supplied.)

At the outset, preemption has not occurred here by virtue of guidelines one and four as set forth in Llewellyn. MCL 554.601 et seq; MSA 26.1138(1) et seq, contains no express provision stating that the authority of the state under this act was intended to be exclusive. Nor may it be said that the nature of landlord-tenant relations is a subject matter which demands 'exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.' Llewellyn, 401 Mich 324.

Turning to the third guideline described in Llewellyn, it does appear that the regulatory scheme established by MCL 554.601 et seq; MSA 26.1138(1) et seq, is fairly pervasive. As the Llewellyn court itself observed, 'the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, . . .' Llewellyn, 401 Mich 324. Nevertheless, when this factor is considered together with an examination of the legislative history of MCL 554.601 et seq; MSA 26.1138(1) et seq, it is indeed manifest that the Legislature did intent to preempt local units of government at least with respect to the imposition of interest payments upon tenants' security deposits.

MCL 554.601 et seq; MSA 26.1138(1) et seq, was introduced in the House on March 1, 1972 as HB 5978. 1 HJ 776 (1972). As first introduced, the bill contained the following relevant provisions:

'Sec. 5. The security deposit and any accrued interest shall be held in trust by the landlord and shall not be commingled with the landlord's own funds nor with the funds of any other person, firm or corporation. [Emphasis supplied.]

'. . .

'Sec. 7. A landlord shall pay the prevailing rate of interest for trust funds or the prevailing rate of interest for savings accounts on security deposits. [Emphasis supplied.]

'Sec. 8. The interest on security deposits shall be used in 1 of the following ways:

'(a) Paid annually to the tenant.

'(b) Credited toward the payment of rent.

'(c) Paid to the tenant with return of the security deposit in accordance with the terms of this act.'

Thus, as originally introduced, HB 5978 clearly contemplated that landlords would be required to pay interest to their tenants on all security deposits.

Following its introduction before the House, HB 5978 was referred to the House Committee on Urban Affairs. 1 HJ 776 (1972). On May 18, 1972, that committee reported the bill favorably to the House but with a number of recommended amendments, including amendments to ss 5 and 7. 2 HJ 1829-1830 (1972). These amendments to ss 5 (Amendment 7) and 7 (Amendments) 8 and 9) were subsequently adopted on second reading by the House on May 19, 1972. 2 HJ 1850 (1972). As amended, these two sections read as follows:

'Sec. 5. The security deposit and any accrued interest shall be held in trust by the landlord and shall not be commingled with the landlord's own funds nor with the funds of any other person, firm or corporation. The security deposit and any accrued interest shall be deposited in a regulated financial institution in trust or in the name of the landlord. [Emphasis supplied.]

'. . .

'Sec. 7. A landlord shall pay the actual rate of interest earned on the security deposit and accrued interest, and all risk of loss of principle shall be the risk of the landlord and not the tenant as pertains to the security deposit.' (Emphasis supplied.)

Section 8 of the Act remained unchanged.

The House amendments, thus, left intact and, indeed, arguably strengthened the provisions requiring landlords to pay interest upon security deposits. HB 5978 was passed by the House in this form and was forwarded to the Senate on May 24, 1972. 2 HJ 1902 (1972).

In the Senate, HB 5978 was referred to the Committee on State Affairs. 2 SJ 1255 (1972). That committee reported on December 11, 1972 presenting a substitute bill with a recommendation that the substitute be approved. 3 SJ 2147 (1972). Significantly, the provisions concerning the payment of interest contained in ss 5, 7 and 8 of the original house bill were entirely deleted. In their stead, the substitute bill contained the following provisions:

'Sec. 4. (1) The security deposit shall be held in trust by the landlord and shall be deposited in a regulated financial institution. A landlord may use the monies so deposited if he deposits with the secretary of state a cash bond or surety bond . . .. [Emphasis supplied.]

'. . ..

'Sec. 5. For the purposes of this act and any litigation arising thereunder, the security deposit is considered the lawful property of the tenant until the landlord establishes a right to the deposit or portions thereof.'

The Senate Substitute was referred to the Committee of the Whole, 3 SJ 2147 (1972), which, on December 14, 1972, reported favorably with recommended amendments. The Senate agreed to the substitute as amended. 3 SJ 2255-56 (1972). Among these amendments were the following amendments to ss 4 and 5 of the Senate Substitute to HB 5978:

'2. Amend page 4, line 8 [Sec. 4. (1)], after 'deposit' by striking out 'shall be held in trust by the landlord and'. [Emphasis supplied.]

'3. Amend page 4, line 11 [Sec. 4. (1)] after 'deposited', by inserting 'for any purposes he desires'.

'. . ..

'6. Amend page 5, line 4 [Sec. 5], after 'thereof' by inserting the following 'as long as the bond provision is fulfilled, the landlord may use this fund for any purposes he desires'.'

With the adoption of these amendments, ss 4 and 5 of the Senate Substitute to HB 5978 read, in pertinent part:

'Sec. 4. (1) The security deposit shall be deposited in a regulated financial institution. A landlord may use the monies so deposited for any purposes he desires if he deposits with the secretary of state a cash bond or surety bond . . .. [Emphasis supplied.]

'. . ..

'Sec. 5. For the purposes of the act and any litigation arising thereunder, the security deposit is considered the lawful property of the tenant until the landlord establishes a right to the deposit or portions thereof as long as the bond provision is fulfilled, the landlord may use this fund for any purposes he desires.' [Emphasis supplied.]

These portions of ss 4 and 5 remained unchanged when the full Senate subsequently passed the Senate Substitute to HB 5978 on December 15, 1972 and returned it to the House. 3 SJ 2272 (1972). The House concurred in the Substitute and the bill was, accordingly, presented to the Governor for his approval. 4 HJ 3346, 3384 (1972).

Given this legislative history, it must be concluded that the Legislature intended to preempt local units of government from requiring landlords to pay interest upon their tenants' security deposits.

As originally introduced, HB 5978 plainly would have required the payment of interest on such deposits. The Senate, however, with the House concurring, deleted this requirement from the bill prior to passage. Had the Legislature stopped here, it might have been possible to conclude that the Legislature merely intended to leave this issue open and subject to local determination. As the foregoing legislative history demonstrates, however, the Legislature also deleted language which would have required security deposits to 'be held in trust by the landlord.' (Senate Substitute to HB 5978, s 4(1), as first introduced.) Even more significantly, the Legislature added language in both ss 4 and 5 of the bill expressly authorizing a landlord, upon posting of the requisite bond, to use such security deposits 'for any purposes he desires.' The sole precondition imposed by the Legislature on such use of security deposits by landlords was the requirement that the landlord must first deposit a cash or surety bond with the Secretary of State. Indeed, s 5, as enacted, provides that 'as long as the bond provision is fulfilled, the landlord may use this fund for any purposes he desires.' This language clearly indicates the Legislature's intent that no other precondition, including a condition requiring the payment of interest, was to be imposed upon a landlord's use of such deposits and preempts local units of government from imposing such conditions or requirements.

I am constrained to conclude and it is my opinion, that the Legislature has, through enactment of MCL 554.601 et seq; MSA 26.1138(1) et seq, preempted local units of government from requiring landlords to pay interest upon security deposits of their tenants.

Frank J. Kelley

Attorney General

[Previous Page] [Home Page]

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State of Michigan, Department of Attorney General
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