Local Government Eviction Moratoria
Housing Justice Center
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This memorandum addresses the authority of Minnesota cities to adopt local eviction moratoria to address the threats to public health and safety arising from the Covid-19 crisis. It also analyzes potential legal challenges to such moratoria. Housing Justice Center's conclusion is that cities do have authority to enact local eviction moratoria under current conditions. Cities should be able to successfully implement and defend reasonably tailored temporary eviction bans.

A. Minnesota cities have the legal power to impose reasonable temporary moratoria on evictions to protect the health and safety of their citizens during the pandemic.

This is an opportune legal moment for cities to consider local eviction moratoria. Just this year, in 2020, the Minnesota Supreme Court has issued two significant decisions confirming the robust authority of cities to regulate local business activities as part of their inherent police power to protect the health, safety, and welfare of its citizens. In *Graco, Inc. v. City of Minneapolis*, the Court upheld the Minneapolis minimum wage ordinance and began its analysis by emphasizing that "Cities have 'broad power to legislate in regard to municipal affairs[.]'" 937 N.W.2d 756, 759 (Minn. 2020). Then, earlier this month, in *Minnesota Chamber of Commerce v. City of Minneapolis*, the Court upheld the Minneapolis paid sick leave ordinance and concluded its analysis by emphasizing that "Every business and occupation is subject to the reasonable exercise of the police power of the municipality where [the business activity occurs]." No. A18-0771, 2020 Minn. LEXIS 326, at *14 (Minn. June 10, 2020) (quoting *Power v. Nordstrom*, 184 N.W. 967, 969 (Minn. 1921)).

All statutory cities in Minnesota have express legislative authority to legislate for the general welfare. Minn. Stat. §§ 412.221, subd. 32; 365.10, subd. 17; 368.01, subd. 19. *See City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 6 (Minn. 2008) ("Among other powers, statutory cities have the power to enact and enforce ordinances to promote "health, safety, order, convenience, and the general welfare."). Likewise, home rule charter cities include a general welfare clause or "all powers" clause within its charter, or rely on the statute that allows a home rule charter city to use powers granted to statutory cities. Minn. Stat. § 410.33. *See A. C. E. Equip. Co. v. Erickson*, 277 Minn. 457, 460, 152 N.W.2d 739, 741 (1967) ("The general rule is that, in matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state.").

Pursuant to this broad local government police power, the Minnesota Supreme Court has long recognized that "[i]t is entirely appropriate that each municipality of any considerable size should make its own police regulations for the preservation of the health, safety, and welfare of its own citizens." *State v. Crabtree Co.*, 15 N.W.2d 98, 100 (Minn. 1944). As the Minnesota Supreme Court has underscored, municipalities "have a **wide discretion** in resorting to [its inherent police] power for the purpose of preserving public health, safety, and morals or abating public nuisances." 15 N.W.2d at 100 (emphasis added).

Local regulation of privately owned rental housing falls squarely within a city's "wide discretion" to use its local police power to preserve the health, safety and welfare of its citizens. In *Zeman v. City of Minneapolis*, for example, the Minnesota Supreme Court upheld a Minneapolis rental license revocation ordinance because it "was well within its publicly-bestowed power and mandate" to protect the health and safety of the public through "harm-prevention regulation" directed at private rental housing located within the city. 552 N.W.2d 548, 554 (Minn. 1996). The *Zeman* Court held that city ordinances regulating a landlord's use of its property are appropriate if "state regulation appears genuinely designed to prevent harm to the public and is likely to achieve that goal and the harm suffered by the property owner does not appear to be one that should be borne by the entire community." *Id.* As the *Zeman* Court stated: "Protection of the public [by a local government] has long been recognized to carry some individual burdens, including the regulatory prohibition of certain uses of private property." *Id.*

Equally important, the Minnesota Supreme Court and U.S. Supreme Court have long recognized that state and local governments can impose temporary moratoria on foreclosures and evictions during public emergencies based upon their inherent police powers. In 1933, at the height of the Depression, Minnesota enacted a temporary moratorium on residential mortgage foreclosures by extending redemption periods property owners who had gone into default. Mortgage holders challenged the law as an unconstitutional impairment of contract rights. In *Blaisdell v Home Building and Loan Assn.*, the Minnesota Supreme Court upheld the temporary moratorium on foreclosures. 249 NW 334, 338 (1933). The *Blaisdell* Court held state's police powers justified the action in a time of emergency because the measure was "temporary" and the conditions were "reasonable. " *Id.* ("It cannot be said that this law goes beyond what is reasonable to give relief in a temporary emergency.") Notably, in its *Blaisdell* opinion, the Minnesota Supreme Court expressly relied on the reasoning in New York and U.S. Supreme Court decisions that upheld temporary restrictions on evictions.

The U.S. Supreme Court then affirmed the Minnesota Supreme Court's ruling in *Blaisdell*, holding that the temporary moratorium on foreclosures was justified for the following reasons:

- "An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the State to protect the vital interests of the community."
- "The legislation was addressed to a legitimate end, that is, the legislation was not for the mere advantage of particular individuals but for the protection of a basic interest of society."
- "The conditions upon which the period of redemption is extended do not appear to be unreasonable."

Home Bldg. & Loan Assoc. v. Blaisdell, 290 U.S. 398, 444-45 (1934).

Consistent with these principles, the Minnesota Supreme Court has upheld a municipal zoning ordinance imposing a temporary zoning moratorium because "[i]n the absence of explicit expression of contrary purpose by the legislature, **we are free to hold that under**

general principles conferring on municipalities broad police powers they have authority to adopt moratorium ordinances of limited duration provided they are enacted in good faith and without discrimination." *Almquist v. Marshan,* 787 N.W.2d 565, 572 (Minn. 1976) (emphasis added); *see also Pawn Am Minn LLC v City of St Louis Park,* 787 NW 2d 565 (Minn. 2010) (confirming the viability of the *Almquist* holding regarding temporary zoning moratoria).

The emergency nature of the COVID-19 crisis also implicates another statutory source for local government powers—the Minnesota Emergency Management Act, Minn. Stat. Chapter 12. Definitions of "emergency" and "disaster" in the Emergency Management Act clearly cover the COVID-19 pandemic. "Emergency" is defined as "an unforeseen combination of circumstances that calls for immediate action to prevent a **disaster** from developing or occurring." In turn, "disaster" is defined as "a situation that creates an actual or imminent serious threat to the health and safety of persons, or a situation that has resulted or is likely to result in catastrophic loss to property or the environment, and for which traditional sources of relief and assistance within the affected area are unable to repair or prevent the injury or loss." While much of the Act deals with express powers of the Governor and coordinating activities of various levels of government, there is also an express grant of authority to local governments. Section 12.29 provides that the mayor of a city may declare a "local emergency," which can be extended past three days with the approval of the local governing body. The effect of this declaration of local emergency is to "invoke necessary portions of the response and recovery aspects of . . . applicable local or interjurisdictional disaster plans." The declaration of a "local emergency" by the mayor that invokes a "disaster plan" appears to empower the local government to engage in "emergency management" under the statute. Section 12.03 subd. 4 defines "emergency management" as "the preparation for and carrying out emergency functions . . . to prevent, minimize and repair injury and damage resulting from disasters." "These functions include, without limitation, . . . emergency human services . . . and other functions relating to civilian protection, together with all activities necessary or incidental to preparing for and carrying out these functions." *Id.* Taking action to minimize the threats to public health and safety from an unprecedented wave of evictions and displacement caused by a pandemic should fall within these powers.

Thus, taken together, established Minnesota law strongly supports a city's exercise of its inherent police power to impose a local eviction moratorium when:

- A public emergency exists that threatens the health, safety, and welfare of citizens.
- The ordinance is a good faith effort to address that threat for the broad benefit of the public.
- The conditions of the moratorium ordinance are reasonable and the duration is temporary.

Notably, there already exists in Minnesota a model for what a legally viable temporary eviction moratorium looks like: Governor Walz's Executive Order 20-14, recently clarified in Executive Order 20-73 ("EO 20-14"). EO 20-14 directly tracks with the legal criteria discussed above:

(1) **Public emergency**: The COVID-19 pandemic had created a state-wide "peacetime emergency" because it is "an act of nature" that "threatens lives of Minnesotans," and "local resources are inadequate to address the threat."

(2) **Good faith effort to address emergency for broad public benefit**: "Losing a home is catastrophic at any time, and during the COVID-19 peacetime emergency in particular, losing housing endangers the public peace, health, and safety of all Minnesotans. Public health and safety are promoted by stabilizing households which, through no fault of their own, may suddenly have the inability to pay rent. Providing a temporary moratorium on eviction actions allows these households to remain stably housed as they safeguard the halt of themselves, their families, and other Minnesotans. . . . Restricting evictions is a vital tool to keep Minnesotans in their homes to mitigate the community spread of COVID-19 in Minnesota and nationwide."

(3) **Conditions are reasonable and temporary**: The eviction moratorium does not relieve the tenant from paying rent and expires when the state-wide "peacetime emergency" ends.

In sum, a local eviction moratorium that tracks the elements of EO 20-14 and adds specialized findings that support the potential extension of a temporary eviction moratorium at the local level past the expiration of a state-wide eviction moratorium would likely pass muster under the legal principles discussed above.

B. Legal challenges to reasonable local eviction moratoria are unlikely to succeed.

Legal challenges by opponents to local eviction moratoria could take the form of preemption by state law, constitutional challenges based upon substantive due process, impairment of contract, or illegal takings. These challenges are unlikely to succeed if the eviction moratorium meets the criteria set forth above.[1]

1. Local eviction moratoriums are not preempted by state landlord-tenant law—instead, they are fully consistent with it.

Opponents of local eviction moratoriums may attempt to argue that they are barred under the preemption doctrine because, opponents would contend, local limitations on evictions conflict with Minnesota's eviction statutes, Minn. Stat. §§ 504B.285 and 291, which provide that a landlord may recover possession of property from tenants based on nonpayment of rent. This argument is wrong. Minnesota landlord-tenant law expressly recognizes the

1 In the last week landlord groups have filed three lawsuits across the country challenging eviction moratoria. Emergency moratoria ordered by Governors in New York and Connecticut have been challenged along with an ordinance adopted by the City of Los Angeles. The cases mostly assert the kind of constitutional claims discussed herein. None of these cases have been heard by a court yet. HJC will monitor progress on these cases but so far they do not change our view that a reasonably constructed local moratorium on evictions should prevail under current Minnesota law.

power of local governments to use local health and safety ordinances to regulate the conditions under which a landlord may operate its rental property. Critically, Minn. Stat. § 504B.161 and the landmark Minnesota Supreme Court case *Fritz v. Warthen* prohibit a landlord from evicting a tenant for nonpayment of rent when the landlord has failed to operate its rental property "in compliance with the applicable health and safety laws . . . of the local units of government where the premises are located during the term of the lease." § 504B.161, subd. 1(4); *see* 213 N.W.d 2d 339, 342 (Minn. 1973) ("Permitting these matters in defense does not alter or frustrate the unlawful detainer statute's purpose of returning lawful possession in an expeditious manner."). A municipal ordinance temporarily banning the filing of eviction cases is unquestionably such a local health and safety law. Thus, reasonable local eviction moratoria are fully consistent with Minnesota's landlord-tenant law, not in conflict with it.

The preemption doctrine was revisited by the Minnesota Supreme Court earlier this year in *Graco v City of Minneapolis,* 937 NW 2d 756 (Minn. 2020). In *Graco*, the Court decided that the Minneapolis $15/hour minimum wage law was not preempted by the state minimum wage statute under any of the three forms of preemption: express preemption, implied preemption, and field preemption. In reaching this conclusion, the Court emphasized that "[a]s a general rule, conflicts which would render an ordinance invalid exist **only** when both the ordinance and statute contain express or implied terms that are irreconcilable with each other." *Id.* at 816 (citation omitted). The *Graco* Court then identified "three principles for determining whether a municipal regulation and statute are irreconcilable and therefore in conflict." *Id.* at 816-17. First, a "conflict exists where the ordinance permits what the statute forbids. " Second, a conflict exists where the ordinance forbids what the statute **expressly** permits." Third, "no conflict exists where the ordinance, though different, is merely additional and complementary to or in aid and furtherance of the statute." *Graco*, 937 N.W.2d at 760.

Moreover, as the Minnesota Supreme Court emphasized just this month in *Chamber of Commerce v. City of Minneapolis*—which affirmed the Minneapolis paid sick leave ordinance—it is entirely appropriate for a local ordinance to provide greater protections than Minnesota statute so long as compliance with both is possible: "A rule of law that finds a conflict wherever an ordinance adds a requirement different from state law—no matter the substance of the statute or the ordinance—would preempt every local ordinance setting a standard higher than the floor set by the Legislature. Such a rule would unreasonably constrain local government and undermine the powers allowed to cities by state law." *Minnesota Chamber of Commerce v. City of Minneapolis*, No. A18-0771, 2020 Minn. LEXIS 326, at *13 (Minn. June 10, 2020).

Here, as in *Graco* and *Minnesota Chamber of Commerce*, a local eviction moratorium is easily reconcilable with the relevant state statutes, including the eviction statutes, and therefore is not preempted.

First, there is nothing in a local eviction moratorium that "permits" what statute "forbids." *Id.* There is no provision in Minnesota's landlord-tenant statutes that prohibits local eviction moratoria.

Second, there is nothing in a local eviction moratorium that "forbids" what statute "expressly permits." *Graco*, 937 N.W.2d at 760. To the contrary, the statutory chapter devoted

to landlord-tenant law—Chapter 504B—is replete with references to the role that the local government plays in the statutory regime. For example, the definition of "violation" throughout Chapter 504B is "violation of any state, county or **city** health, safety, housing, building, fire prevention, or housing maintenance code applicable to the building." *See* Minn. Stat. § 504B.001. The housing inspection provisions of § 504B.185 provide that "an inspection shall be made by the local authority charged with enforcing a code claimed to be violated." The tenant remedies action provisions of § 504B.395 provide that the "local department or authority[] charged with the enforcement of codes relating to health, housing, or building maintenance" may bring a tenant remedies action against a landlord in violation of local housing code. The administrator provisions of 504B.445 provide that a court-appointed administrator may be a "local government unit or agency."

Most important, as discussed above, § 504B.161 and *Fritz v. Warthen* specifically authorize affirmative defenses to eviction actions based upon the landlord's violation of "the applicable health and safety laws" of "the local units of government"—which is precisely what a local eviction moratorium would be. *See Ellis v. Doe*, 924 N.W.2d 258, 261-62 (Minn. 2019) ("In *Fritz v. Warthen*, we held that a tenant has a common-law right to assert a violation of the covenants of habitability [in § 504B.161] as a defense to an eviction action."). Indeed, Minnesota courts have not hesitated to dismiss eviction actions where the landlord has failed to comply with local ordinances designed to regulate the operation of rental businesses as part of a city's harm-prevention powers. *See Beaumia v. Eisenbraun*, No. A06-1482, 2007 WL 2472298, at *2 (Minn. Ct. App. Sept. 4, 2007) (reversing district court's eviction of tenants for nonpayment of rent because the owner of the apartment had failed to register the unit in compliance with local ordinance); *Wajda v. Schmeichel*, 2018 Minn. App. Unpub. LEXIS 981, *5-8 (Minn. Ct. App. Nov. 26, 2018) (eviction improper under Minneapolis ordinance because landlord did not obtain a rental license from the city). [2]

Third, the foregoing analysis confirms that local health and safety ordinances such as an eviction moratorium are "complementary to" and "in aid and furtherance" of Minnesota landlord-tenant statutes, and therefore not in conflict with them under *Graco*. 937 N.W.2d at 760. As the *Fritz* Court concluded: "Permitting these matters in defense [to an eviction action] does not alter or frustrate the unlawful detainer statute's purpose of returning lawful

[2] A Washington Supreme Court case is instructive on the preemption issue here. In *Margola Associates v City of Seattle,* 121 Wa. 2d 265 (Wash. 1993), landlords challenged a Seattle ordinance requiring a landlord to have a city issued rental license before filing in eviction court. The landlords argued that the state law permitting evictions placed no such condition on filing an eviction and thus the local requirement was preempted as forbidding something that state law permitted. The Court rejected the argument, noting that under state eviction law tenants are free to raise any defenses under the statute. The license requirement was just another affirmative defense the tenant could raise, and thus not in conflict with the eviction statute. Here, under the same reasoning, violation of a local eviction moratorium would be another affirmative defense the tenant could raise under § 504B.161 and *Fritz v. Warthen*, and thus not in conflict with the eviction statute.

possession in an expeditious manner." 213 N.W.2d at 342. "The legislative objective in enacting the implied covenants of habitability is clearly to assure adequate and tenantable housing within the state. That objective is promoted by permitting breach of the statutory covenants to be asserted as a defense in unlawful detainer actions. If a landlord is entitled to regain possession of the premises in spite of his failure to fulfill the covenants, this purpose would be frustrated." *Id.*

For these same reasons, field preemption is not a problem. Under *Graco*, field preemption occurs only when the relevant statutory scheme "leaves no room for municipal regulation in the area." 937 N.W.2d at 762-63. Here, however, as just discussed, Chapter 504B not only leaves ample "room for municipal regulation," it confirms the importance of municipal regulation throughout its provisions.

Finally, the current state-wide moratorium on evictions under EO 20-14—which has not been terminated by the state legislature despite monthly opportunities—is further evidence that temporary eviction moratoria based on health and safety emergencies are not in conflict with state eviction law. Moreover, EO 20-14 specifically recognizes the possibility that a "local authority" might itself create a "public health measure" to "compel an individual to remain physically present in a particular residential rental property"—the kind of "public health measure" that would include a local eviction moratorium. See EO 20-14 ¶ 7 ("Nothing in this Executive Order shall in any way restrict state or local authority to order any quarantine, isolation, or other public health measure that may compel an individual to remain physically present in a particular residential real property."). Thus, paragraph 7 of EO 20-14 is further proof that a local eviction moratoria based on the COVID-19 emergency is complementary to state law.

2. Constitutional challenges are unlikely to succeed.

A threshold question with respect to any constitutional challenges is whether the challenged legislation is subject to strict scrutiny by the Court or whether only a rational basis is necessary to sustain the legislation.

In *Fletcher Properties v City of Minneapolis,* 931 N.W. 2d 410 (Minn. App. 2019), landlords challenged the constitutionality of a recently adopted ordinance making refusal to accept Section 8 a violation of the Human Rights ordinance. The plaintiffs argued a strict scrutiny standard was required because the right to own and operate rental property should be considered a fundamental right. The Court disagreed, holding that renting property is not a fundamental right and therefore only a rational basis was needed to sustain the legislation. Because the city ordinance provided a reasonable means to achieve a permissible purpose, the Court held there was no violation of Substantive Due Process. (This decision is currently pending on appeal before the Minnesota Supreme Court.)

If the Minnesota Supreme Court affirms the lower court's decision that owning and operating rental property is not a fundamental right, then any constitutional challenges will have a difficult time demonstrating an eviction moratorium lacks a rational basis. *Fletcher* rejected both contract clause and substantive due process claims and is also consistent

with longstanding Minnesota law. *See Essling v. Markham,* 335 NW 2d 237 (Minn 1983) (freedom of contract is not a fundamental right and must give way to reasonable legislative action).

Opponents of the moratorium could also assert a claim of regulatory takings under the Fifth Amendment. The Minnesota Supreme Court considered a takings claim relating to rental licensing in *Zeman.* The landlord argued that the city's revocation of his rental license eliminated the only economically viable use of his property. The Court applied the three-factor U.S. Supreme Court's *Penn Central* test: the economic impact of the regulation; the extent to which the regulation interfered with distinct investment backed expectations; and the character of the government action. Even though the *Zeman* Court found that the first two factors favored the landlord, the Court concluded they were outweighed by the third factor favoring the city—the fact that the licensing regulation was aimed at public health and safety was a paramount consideration. Thus, the Court concluded there was no taking.

The same result should apply to a takings challenge to a local moratorium aimed at protecting public health and safety. But in the case of an eviction moratorium there are additional reasons the *Penn Central* factors favor upholding the ordinance, principally that opponents cannot demonstrate sufficient economic harm under the first factor. Unlike in *Zeman* landlords are not prevented from operating rental housing or collecting rent. Rent remains due and they retain their right to sue tenants for back rent owed.

In short, none of these constitutional claims should prevail against a carefully constructed local eviction moratorium with reasonable conditions.

C. Suggestions for strengthening the legal viability of a local eviction moratorium.

- When drafting the eviction moratorium, carefully follow the substantive guidance in Section A above.

- Enact the eviction moratorium ordinance before EO 20-14 expires to maximize arguments that this is a reasonable local approach to what is still a state-wide health and safety emergency.

- Consider tracking with the findings and provision in EO 20-14 at a general level, since some courts have already weighed in on the legitimacy of those rationales in granting expedited injunctive motions brought by the Attorney General's Office.

- Make additional health and safety findings that are consistent with the health and safety findings in the EO 20-14 but are specific about the especially severe and continuing public health and safety threats created by COVID-19 in the city that would justify a local eviction moratorium extending past the state eviction moratorium. Potential findings would call out the existence a more concentrated populations with

higher rental populations and more pronounced housing and medical care shortages than in the state in general. In addition, potential findings might call out the disproportionate effect on diverse low-income populations that are concentrated in cities and in rental housing.

- Put a limited time frame on the ordinance and the ability to lift it early and to extend it by "X" months depending on circumstances.

- Make sure the eviction moratorium is in the housing maintenance section of the municipal code, so that it is subject to the health and safety findings that begin most housing maintenance sections of local codes and so that it is clearly subject 504B.161.

- If not already present in the city's housing code in general, make compliance with the local eviction moratoria a condition for operating rental property in the city.

- If not already present in the city's housing code, give the City the affirmative power to enforce by making violation a criminal misdemeanor.

- If not already present in the city's housing code, give the City and tenants a civil cause of action to enforce the eviction moratorium (although they would also be enforceable by the City and tenants through a Tenant Remedies Action, and, for tenants, under 504B.161).