



Memorandum

TO: HONORABLE MAYOR AND
CITY COUNCIL

FROM: Richard Doyle
City Attorney

**SUBJECT: Domestic Violence Survivors'
Rights to Assume Lease**

DATE: December 7, 2018

This memorandum is intended to address the issue of whether a domestic violence survivor can assume a lease agreement if she or he has been residing with a leaseholder who is the alleged abuser.

Based on the analysis set out below, if a domestic violence survivor is a tenant or lawful occupant of the property, then federal and state law provide a right for them to assume a lease. However, guests or persons otherwise not a tenant or lawful occupant are not permitted to assume the lease.

Background

On April 24, 2018, the Council approved the Mayor's memo directing staff to add a provision to the Tenant Protection Ordinance which would allow victims of violence a mechanism to take over the lease, to the extent allowed by California law. Staff explored amending the Tenant Protection Ordinance to include the option to allow victims who have been residing in the rental unit with an option of taking over the lease. However, they are not currently recommending adding such a provision under the Tenant Protection Ordinance because state and federal law provide protections for those victims.

This memorandum will discuss the scope of the Tenant Protection Ordinance and the rights of survivors of violence to take over a lease under current federal and state law.

Analysis

A. Purpose and Scope of the Tenant Protection Ordinance

The purpose of the San José's Tenant Protection Ordinance (hereafter "TPO") is to promote stability and fairness within the residential rental market and is intended to enable tenants to petition for their grievances, request correction of code violations and necessary repairs, and exercise all their rights under local, state, and federal laws, without fear of retaliation.

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The TPO primarily functions to regulate the grounds for just cause evictions and protect against retaliatory action by the landlord. The TPO also recognizes the rights of survivors of violence under both federal and state law.

Outside of this context, the TPO does not regulate the contractual relationship between landlord and tenants that are extensively covered in California statutory and case law. As discussed below, housing rights for survivors of violence are recognized on a state and federal level.

B. Just Cause Protections for Tenants

Under San José's TPO, Tenant is defined as "a residential tenant, subtenant, lessee, sublessee, or any other person entitled by written or oral rental agreement, or by sufferance, to the use or occupancy of a Rental Unit. Therefore, a person may be defined as a Tenant, and thus protected under the TPO, even though they are not the formal leaseholder, since the definition includes subtenants, sublessees, or any other person entitled by written or oral rental agreement.

California Courts have also extended eviction protections to tenants who are not formal leaseholders based upon the jurisdiction's definition of tenant. (See *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28). In *DeZerega v. Meggs*, the court held that a roommate who was not listed on a former tenant's lease could not be evicted without just cause under the City of Berkeley's Tenant Protection Ordinance. There, a tenant entered into a lease that permitted "two roommates." One of the roommates occupied the leaseholder's unit after securing the landlord's approval. The leaseholder later moved out of the unit and the landlord filed an unlawful detainer action against the roommate. The court held that the roommate could not be evicted without cause because he was a tenant as defined in Berkeley's local eviction-control ordinance. Berkeley defines a tenant to mean "any renter, tenant, subtenant, lessee, or sublessee of a rental unit, or successor to a renter's interest, or any group of tenants, subtenants, lessees, or sublessees of any rental unit, or any other person entitled to the use or occupancy of such rental unit." Berkeley Rent Stabilization and Eviction for Good Cause Ordinance Section 13.76.040. However, the court emphasized the narrowness of its holding. "We do not decide whether a landlord may be barred from evicting a subtenant, or other occupant, who has occupied the premises without the landlord's agreement or knowledge and who seeks to remain on the premises after the departure of all persons to whose occupancy the landlord has consented. We hold only that where a landlord agrees to an occupancy, characterization of the occupancy as a subtenancy does not prevent application of the Ordinance's requirement of cause for eviction." *DeZerega v. Meggs* (2000) 83 Cal.App.4th 28. 42. Thus, *DeZerega's* narrow holding suggests that Courts are hesitant to expand eviction protections to those that a landlord has not approved and do not meet the jurisdiction's definition of a tenant.

Additionally, California courts have found local eviction and rent control protections based on the landlord's implied or express consent to the occupancy. (See *Parkmerced*

Co. v. San Francisco Rent Stabilization & Arbitration Bd. (1989) 215 Cal.App.3d 490; *Miller & Desatnik Management Co. v. Bullock* (1990) 221 Cal.App.3d Supp. 13). In *Parkmerced*, the court held that a tenant's sister was entitled to local rent control protections after the tenant moved out because she was listed as an occupant on the lease and the landlord accepted her rent payments. In *Bullock*, however, the court held that a deceased tenant's mother was not a tenant entitled to just cause eviction protections. There, the defendant continued to make rent payments in her deceased daughter's name and occupied the unit without the landlord's knowledge or consent.

Therefore, the courts recognize an occupant's rights to eviction protections if he or she has established a tenancy, or they are considered a tenant under a just cause jurisdiction. San José's TPO's protects against no-cause evictions for not just leaseholders, but subtenants and sublessees or anyone entitled by express or implied agreement to occupancy. However, neither the Courts and the TPO extend eviction protections to persons not recognized as tenants.

C. Current Federal and State Law Protections for Victims of Violence

The right to assume a lease for victims of violence exist only for tenants or lawful occupants. California and federal law permit victims of violence who are tenants or lawful occupants to bifurcate a lease after the alleged abuser is removed from the unit. At the federal level, the Violence Against Women Reauthorization Act of 2013 authorizes lease bifurcation, where a lease is divided as a matter of law and the abusive tenant is removed from the unit while the survivor tenant remains on the lease. Under the Violence Against Women Reauthorization Act of 2013, (hereafter "VAWA 2013"), it states, in pertinent part:

"a covered housing provider may . . . bifurcate a lease, or remove a household member from a lease in order to evict, remove, terminate occupancy rights . . . to such member who engages in criminal activity directly relating to domestic violence, dating violence, sexual assault, or stalking against an individual . . . without regard to whether the household member is a signatory to the lease and without evicting, removing, terminating assistance to, or otherwise penalizing a victim of such criminal activity who is also a tenant or lawful occupant."

According to the HUD's final rule explaining lease bifurcation under the VAWA 2013, only lawful occupants who are listed on the lease agreement are eligible for lease bifurcation. (See HUD Final Rule H 2017-05; 24 C.F.R. 5.2009) This right does not apply to guests or unreported members of a household or anyone else residing in a household who is not a tenant. Accordingly, these individuals may be evicted from the property by following federal and state law procedure.

Alternatively, the California Family Code authorizes court-ordered lease bifurcation in domestic violence situations (see Cal. Fam. Code Section 6321). The court may issue

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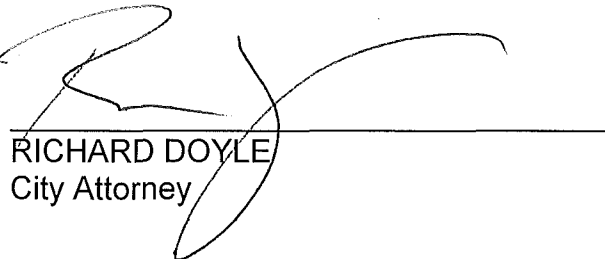
an order removing an abuser from a residence "regardless of which party holds legal or equitable title or is the lessee of the dwelling." However, the court can only issue an order if there are "facts sufficient for the court to ascertain that the party who will stay in the dwelling has a right under color of law to possession of the premises." Therefore, guests or anyone else residing in a household who are not a tenant or a lawful occupant will not be able to bifurcate the lease because they do not have a contractual relationship with the landlord. Accordingly, a landlord may choose to evict these individuals by following state law unlawful detainer procedures.

Additionally, California Code of Civil Procedure Section 1161.3 extends eviction protections for tenants by providing that a landlord shall not, except under limited circumstances, terminate a tenancy or fail to renew a tenancy based upon an act or acts against a tenant or a tenant's household member that constitute domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 1219, stalking as defined in Section 1708.7 of the Civil Code or Section 646.9 of the Penal Code, human trafficking as defined in Section 236.1 of the Penal Code, or abuse of an elder or a dependent adult as defined in Section 15610.07 of the Welfare and Institutions Code, if such acts have been documented by either a court protective order, a peace officer's report, or a qualified third party listed under such section. A tenant is defined as a "tenant, subtenant, lessee, or sublessee." C.C.P. Section 1161.3(d).

Thus, occupants who establish that they are tenants and lawful occupants are permitted to bifurcate and assume the lease under federal and state law. However, survivors of violence who are not tenants or lawful occupants are not by law permitted to assume the lease.

Conclusion

While the TPO regulates just cause evictions of tenants, the right of survivors of violence to assume a lease is a function of state and federal law. If a domestic violence survivor is a tenant or lawful occupant of the property, then federal and state law provide a right for he or she to assume a lease. However, guests or persons otherwise not a tenant or lawful occupant are not permitted to assume the lease.



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