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Provo City Council
351 W. Center Street
Provo, UT 84601
Council1@provo.utah.gov

Re: Proposed Ordinance 6.02.030, *Crime-Free Rental Housing Requirements*

Dear Provo City Council,

I write to inform you of our concerns with proposed ordinance 6.02.030, *Crime-Free Rental Housing Requirements*. As you evaluate this ordinance, you should consider the constitutional infirmities inherent in the ordinance.

At the outset, this ordinance differs substantially from similar housing restrictions enacted in other communities in Utah, such as West Valley and Ogden, in that it places mandatory obligations on landlords, as opposed to simply providing incentives to encourage compliance. This significant difference implicates various constitutional concerns, set forth in more detail below.

First, section 6.02.030(1)(d) of the proposed ordinance likely violates the procedural due process rights of landlords by requiring that landlords “serve an eviction notice upon a tenant within five (5) days of receiving substantial evidence that a tenant or the tenant’s guest has been involved in criminal or nuisance activity on the premises.” In particular, several aspects of this provision are constitutionally suspect.

The requirement that landlords evict upon “substantial evidence . . . of criminal or nuisance activity on the premises” is impermissibly vague, which will result in landlords guessing as to when the ordinance requires them to begin eviction proceedings against a tenant. Under the ordinance as currently worded, landlords will lack certainty as to what constitutes “substantial evidence” and what conduct amounts to “criminal or nuisance activity.” In the absence of a definition, one person’s nuisance may be another’s cultural celebration. Additionally, the proposed ordinance provides no process or guidelines for verifying whether tenants have engaged in “criminal or nuisance activity.” Thus, if landlords comply with the terms of the proposed ordinance, they will risk defending litigation from tenants for wrongful eviction if the landlord ultimately lacked probable cause to bring the eviction action.

In *Cook v. City of Buena Park*, a court struck down a similar provision on grounds that while the city had an interest in protecting citizens from crime, the interest was outweighed by the risk of erroneous deprivation of the landlord’s interests. 23 Cal.Rptr.3d 700, 704 (Cal. App. 4th 2005); see also *Garrett v. Escondido*, 465 F.Supp.2d 1043, 1052 (S.D. Cal. 2006) (granting a temporary restraining order against a landlord ordinance where the threat of litigation for wrongful eviction by a tenant was likely). This was so, even where the notice of criminal or nuisance activity necessary to trigger an eviction proceeding came directly from law enforcement. The Provo

proposed ordinance places landlords in an even more untenable position; not only must they evict once on notice that a tenant has engaged in certain behavior, but they must make the determination themselves as to what constitutes conduct sufficient to trigger the ordinance. Requiring by law that landlords evict, while at the same time giving considerable discretion to determine when eviction should occur raises a serious concern that landlords (or other tenants) might inappropriately invoke the ordinance to harass tenants.

Section 6.02.030(1)(d) of the proposed ordinance also runs afoul of the due process clause in that it mandates eviction proceedings commence within five days of receiving notice of criminal or nuisance activity. In *Cook*, the court considered a similar time frame, whereby a landlord was required to begin an unlawful detainer action within ten days of receiving notice of criminal activity upon the premises. The court struck down the ten day time period as constitutionally inadequate, reasoning that ten days was not nearly sufficient to allow an owner to “bolster his evidence [against a tenant] . . . or otherwise investigate the matter and develop his case.” 23 Cal.Rptr.3d at 706. Here, the five days required in the proposed ordinance are also not sufficient time for a landlord to build a case against a tenant, further exposing the landlord to later tenant litigation should the eviction proceeding be unfounded.

Second, the ACLU of Utah is concerned about section 6.02.030(1)(g), which requires landlords to “conduct background checks for every prospective adult tenant prior to entering into a rental or lease agreement with such person,” unless the prospective tenant is a “student at an institution of higher education which maintains a code of conduct.” The proposed ordinance’s disparate treatment of adult renters and students who attend Brigham Young University (the only institution of higher learning in Provo which maintains a student code of conduct) is troubling.

Furthermore, while the ACLU of Utah understands and respects the city of Provo’s interest in combating crime within its boundaries, we believe that any ordinance which has as its underlying purpose to deny housing to those who may have a blemished background runs contrary to the notion that debts to society can be repaid. Moreover, many incidents that do not result in arrest or conviction appear on background checks, such as police visits during domestic violence disputes. Surely the city of Provo would not want to discourage landlords from renting to innocent victims of crime.

In sum, the ordinance as presently drafted is constitutionally vulnerable in that it places mandatory and vague obligations on landlords. Please feel free to contact me should you wish to discuss this further or if I can be of any assistance.

Sincerely,

Marina Lowe
Staff Attorney

cc: Neil Lindberg, Esq., Provo City Council Attorney