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VIA E-MAIL AND REGULAR MAIL

February 7, 2007

Ms. Jessica L. Karls
Wisconsin Legislative Council
1 E. Main St., #401
P.O. Box 2536
Madison, WI 53701-2536
Jessica.Karls@legis.wisconsin.gov

Re: Special Committee on Disaster Preparedness – Eviction Moratorium

Dear Ms. Karls:

I am the attorney for the Apartment Association of Southeastern Wisconsin, Inc. Our Association represents over 1,000 landlords.

I am responding to your e-mail of January 25, 2007 to Bill Malkasian of the Wisconsin Realtors Association, which concerned a proposed amendment to sec. 799.40(4), Wis. Stats. whereby the Governor would have the authority to declare a moratorium on eviction actions affecting residential property during a state of emergency related to public health.

There is a serious defect in the proposed legislation because it does not provide for just compensation to affected property owners. If such a moratorium is imposed by the government, the Fifth Amendment to the U.S. Constitution and Article I, Section 13 of the Wisconsin Constitution require that just compensation be provided for any “taking” of private property for a public purpose.

Depriving property owners of the beneficial use of their property – even if only for a limited time and if the use of the property is ultimately fully restored – constitutes a “taking.” The United States Supreme Court and Wisconsin case law are clear on this issue. The opinion of Justice Brennan in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 98 S.Ct.2646 (1978), defines a “taking” as a situation where the government forces some people alone to bear public burdens which should be borne by the public as a whole. See also *Armstrong v. United States*, 364 U.S.40, 80 S.Ct. 1563, 4 L. Ed. 2d 1554 (1960) and *San Diego Gas & Electric Company v. San Diego*, 450 U.S. 621 (1981).

The Wisconsin Supreme Court said in *Zinn v. State*, 112 Wis.2d 417, 334 N.W.2d 67 (1983) that Art. I, sec. 13 of the Wisconsin Constitution requires payment of compensation in situations where the property has not been condemned but has merely been restricted in use for a period of time before full ownership is returned.

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In *Eberle v. Dane County Board of Adjustment*, 227 Wis.2d 609, 595 N.W.2d 730 (1999), the Wisconsin Supreme Court said that just compensation is required for a regulatory taking which only continues for a temporary period of time.

The current provisions of sec. 779.40(4) allowing a stay of eviction proceedings if a tenant applies for emergency assistance under sec. 49.138 have already been held unconstitutional by Milwaukee County Circuit Judge Kitty K. Brennan. In this case, *Audrey L. Genaw v. Mary Blaha*, No. 02SC011876, decided June 28, 2002, Judge Brennan said on Page 12 of her opinion that “seven weeks and two days is a substantial interference and deprivation to a homeowner of the beneficial use of their property; and, accordingly, the temporary nature of this ‘taking’ does not render it not a ‘taking.’ It’s still a taking.” That decision was not appealed and the defect in current sec. 799.40(4) which fails to provide compensation for landlords who must provide “free rent” to tenants will likely be challenged in a future case.

We also question whether a moratorium on evictions during a health emergency is necessary or desirable on public policy grounds. For example, if we had a pandemic such as bird flu, an announcement of an eviction moratorium could result in many tenants simply refusing to pay rent, even if they are not directly affected by the pandemic. At the very least, this proposed legislation – in addition to providing just compensation to the property owner – should require that only tenants actually sickened by the pandemic would be entitled to an eviction moratorium.

Please bring our concerns to the attention of the Special Committee. Copies of this letter are being sent via e-mail to other interested parties. I will let you know if advance if anyone from our Association will attend the public hearing on February 14, 2007.

Very truly yours,

Heiner Giese
HG/es

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