ANDREW M. ZACKS (SBN 147794)
SCOTT A. FREEDMAN (SBN 240872)
ZACKS, FREEDMAN & PATTERSON, PC
601 Montgomery Street, Suite 400
San Francisco, CA 94111
Tel: (415) 956-8100
Fax: (415) 288-9755
az@zfplaw.com
scott@zfplaw.com

Attorneys for Petitioners
San Francisco Apartment Association
Small Property Owners Of San Francisco Institute

FILED
San Francisco County Superior Court
JUL 22 2022
BY: [signature]

601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

SUPERIOR COURT - STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO - UNLIMITED JURISDICTION

SAN FRANCISCO APARTMENT ASSOCIATION, a California non-profit trade association and SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE, a California non-profit corporation

Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a California municipal corporation,

Respondent.

Case No.: CPF-22-517718

~~[PROPOSED]~~ ORDER GRANTING PETITION FOR WRIT OF MANDATE IN PART

Date: May 27, 2022
Time: 9:30 a.m.
Dept: 501
Judge: Hon. Charles F. Haines

The petition of Petitioners San Francisco Apartment Association and Small Property Owners of San Francisco Institute came on regularly for hearing in Department 501 of the above-captioned Court at 9:30 a.m. on May 27, 2022. Andrew Zacks appeared for Petitioners, Wayne Snodgrass appeared for Respondent, and the Honorable Charles F. Haines presided. The Court,

1 having reviewed the papers in support of the petition, those in opposition and reply, and having
2 heard the arguments of counsel, finds good cause to HEREBY ORDER THAT: the petition is
3 GRANTED IN PART.

4 The Court finds that Petitioners have standing to seek and obtain the relief sought by way
5 of their petition, as they collectively represent the owners and operators of tens of thousands of
6 rental units in the City and County of San Francisco whose rights to collect rents and otherwise
7 enforce rental agreements are each adversely affected by San Francisco Ordinance 18-22. More
8 specifically, the enforcement of Ordinance 18-22 would delay the rights of Petitioners' members
9 to collect rents and otherwise enforce the terms of their rental agreements. Their members would
10 thereby have standing to sue in their own right, the interests advanced by this suit and petition are
11 germane to the purposes for which the Petitioners operate, and there is no compelling reason why
12 the personal participation of Petitioners' members is required.

13 The Court further finds that to the extent it creates a longer period to cure or quit for non-
14 payment of rent, Ordinance 18-22 is in direct conflict with Code of Civil Procedure section 1161,
15 and is thereby preempted by state law as it applies to notices for non-payment of rent only. (Tri
16 County Apt. Ass'n v. City of Mountain View (1987) 196 Cal.App.3d 1283, 1293 (Tri County).)

17 Respondent argues that Ordinance 18-22 is permissible, because it regulates the substantive
18 basis for eviction, as opposed to the procedure. The Court finds the argument unpersuasive, for
19 several reasons. First, at its most basic level, the amount of notice to be provided is one of the
20 quintessential aspects of procedure. As Tri County observed, where a local ordinance attempts to
21 serve the same procedural purpose as the statute, but then changes the statewide chronology to suit
22 its own agenda, it is preempted. (*Id.* at 1296) This is precisely the case here: the Ordinance seeks
23 to set a new, longer timeline for the very same notices that are required by Code of Civil Procedure
24 section 1161.

25 Second, viewing Ordinance 18-22 as substantive because it is allegedly a more modest
26 intrusion on timing is equally flawed. Respondent cited no authority for the proposition, and the
27 Court finds it to be without merit. Moreover, as Respondent conceded during oral argument, it
28

601 MONTGOMERY STREET, SUITE 400
SAN FRANCISCO, CALIFORNIA 94111

would be beyond a city's power to extend the relevant notice period to many months, and the Court finds no legal basis to distinguish between the two (a ten-day extension, or a months-long extension) as the State has set the notice period by way of Code of Civil Procedure section 1161(2) at three days.

And finally, even were the Court to conclude that Ordinance 18-22 is an attempt to regulate the substantive basis for eviction, Respondent conceded during oral argument (and the Court is persuaded independently) that it would be beyond a city's power to remove non-payment of rent (at least) as a substantive basis for eviction. Permitting a city to extend the notice period for a non-payment of rent eviction, in particular, would allow it to effectively accomplish that impermissible end via a backdoor approach.

Respondent fares no better in its reliance upon San Francisco Apartment Association v. City and County of San Francisco, (2018) 20 Cal.App.5th 510 ("Educators"). The ordinance at issue in Educators did not alter the state law-required notice period for termination of a tenancy, but instead created a particularized class of tenant who could only receive that notice during a specified window of time. The ordinance therefore did not change the procedure to create the protection, but merely had an incidental impact on it. Furthermore, the particular class of tenants in Educators was comprised of teachers and related individuals, who had not failed to perform material obligations of their tenancies. This was significant, insofar as it created a narrow category of faultless individuals and afforded them a substantive and time-limited defense to eviction. Conversely, Ordinance 18-22 provides such a defense to all tenants, and in cases involving even the most fundamental violation of a lease (non-payment of rent). Even the Educators decision itself recognizes that "an ordinance limiting the timing of *all* evictions would appear to be preempted by the unlawful detainer statutes." (Educators, 20 Cal.App.5th at p. 519.)

Respondent's reliance upon Rental Housing Ass'n of N. Alameda County v. City of Oakland, (2009) 171 Cal.App.4th 741 ("Rental Housing"), is misplaced for similar reasons. The ordinance at issue in Rental Housing did not cover non-payment of rent, which the Court finds is the most fundamental of all aspects of a tenancy: the payment of rent in exchange for the right of

possession. (Childs v. Eltinge (1973) 29 Cal.App.3d 843, 854) Instead, the "7 day notice" was only directed at material breaches (other than default in rent) and nuisance-type behavior, where "the specified conduct continue[d] after the landlord provides the tenant written notice to cease". (Rental Housing at 762-3.) While breaches may be cured and nuisances abated by affirmative tenant conduct (e.g., fixing a door is different than not breaking it in the first place), default in the payment of rent can *only* be cured by the payment of rent. It also did not discuss Tri County, which held that local changes to required, state notice periods are preempted if the purposes of two laws are the same. (Tri County at 1296) And finally, insofar as Rental Housing relied upon Birkenfeld v. City of Berkeley, (1976) 17 Cal.3d 129 ("Birkenfeld"), to uphold the ordinance at issue in that matter, the present matter is distinguishable. For one, Birkenfeld held that an intrusion on the unlawful detainer procedure is invalid, irrespective of whether it is 'minor.' Ordinance 18-22 creates such an impediment. And two, Birkenfeld addressed terminations of tenancy pursuant to Code of Civil Procedure section 1161(1), those at the completion of a term, for which no notice period is prescribed (or required) by state law. Birkenfeld is not controlling here, insofar as it did not address cases involving fault-based terminations, or the notices they require. (County of San Bernardino v. Superior Court (1994) 30 Cal.App.4th 378, 388; see also Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 734–735 [stating that cases must be construed in light of the facts presented].)

Finally, as was observed in Educators, the procedural-substantive framework set forth in Birkenfeld was not even necessary to determine the ordinances at issue in Tri County and Channing Properties v. City of Berkeley, (1992) 11 Cal.App.4th 88, were preempted. The conclusions reached in those decisions were equally premised upon principles of implied preemption, which in turn look at the extent to which the "Legislature intended to occupy a particular field…[by looking at] the whole purpose and scope of the legislative scheme." (In re Lane (1962) 58 Cal.2d 99, 102–103) Petitioners convincingly point to the extensive, state law statutory coverage of the field of notices that a landlord is required to give a tenant in the case of a material breach of one's tenancy. These include, for example, Code of Civil Procedure sections

601 Montgomery Street, Suite 400
San Francisco, California 94111

1161(2), 1161(3) and 1161(4), which have been largely unchanged for decades. To the extent there have been changes, i.e. in the recent COVID pandemic, the Legislature has provided for them. (Civ. Proc. Code §§ 1179.01-1179.07) And they have been particularly, and repeatedly, provided for in the case of non-payment of rent. (Civ. Proc. Code 1161(2)(subparagraph 3) and Civ. Proc. Code § 1179.03) These acts sufficiently demonstrate the intent of the Legislature to occupy the field of notice required by a landlord to a tenant, in the case of a material breach of the terms of a tenancy.

The Court finds that that there is a split of authority as to the allowable notice periods for notices other than for the non-payment of rent. On the one hand, Tri-County supports the invalidation of any extended notice period involving fault-based evictions. But, the Court in Rental Housing Ass'n, permitted Oakland to interpose an additional, extended notice period for cases involving substantial violation of a material term of the tenancy, disorderly conduct, or refusal to allow the landlord access to the unit. Similarly, a tenant may be evicted for willfully causing substantial damage to the premises only if, after written notice from the landlord, the tenant "has refused to cease damaging the premises or has refused to either make satisfactory correction or to pay the reasonable costs of repairing such damage over a reasonable period of time. Even though the Rental Housing Ass'n court did not consider Tri-County and its implied preemption analysis, this Court finds that it is bound by Rental Housing Ass'n as to Notices that do not involve non-payment of rent. *Auto Equity Sales, Inc. v. Superior Ct. of Santa Clara Cnty.* (1962) 57 Cal. 2d 450, 456. For this reason, and because Rental Housing did not involve or otherwise address non-payment notices, the Court limits the issuance of the writ to notices for non-payment of rent. Petitioners will have to look to the higher courts if they wish to resolve the conflict between Tri County and Rental Housing Ass'n.

601 Montgomery Street, Suite 400
San Francisco, California 94111

For the foregoing reasons, the Court finds Ordinance 18-22 is both expressly and impliedly preempted by State law to the extent it changes the required notice period before a landlord may file an unlawful detainer case for non-payment of rent only. IT IS HEREBY ORDERED that Ordinance 18-22 is thereby invalid and unenforceable to that extent only. Accordingly,

- Respondent is enjoined from enforcing Ordinance 18-22 to the extent and per the findings set forth above.
- A writ of mandate shall issue forthwith enjoining the City from enforcing Ordinance 18-22 to the extent and per the findings set forth above.

IT IS SO ORDERED. The stay on the ten day notice requirement is lifted upon entry of writ of mandate.

Dated: 7/22/2022

Hon. Charles F. Haines
Judge of the San Francisco Superior Court

601 Montgomery Street, Suite 400
San Francisco, California 94111

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

SAN FRANCISCO APARTMENT ASSOCIATION, a California non-profit trade association and SMALL PROPERTY OWNERS OF SAN FRANCISCO INSTITUTE, a California non-profit corporation Petitioners CITY AND COUNTY OF SAN FRANCISCO, a California municipal corporation, Respondent	Case Number CPF-22-517718 **CERTIFICATE OF MAILING** [CCP 1013a (4)]

I, Kenneth Hunt, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

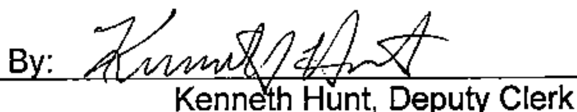
On July 22, 2022, I served the foregoing ORDER GRANTING PETITION FOR WRIT OF MANDATE IN PART by placing a copy thereof in a sealed envelope, addressed as follows:

ANDREW MAYER ZACKS ZACKS, FREEDMAN & PATTERSON, PC 601 MONTGOMERY ST, SUITE 400 SAN FRANCISCO, CA 94111	WAYNE KESSLER SNODGRASS DEPUTY CITY ATTORNEY CITY HALL, ROOM 234 1 DR. CARLTON B. GOODLETT PL SAN FRANCISCO, CA 94102-4682

and I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: July 22, 2022

MICHAEL T. YUEN, Clerk

By: 
Kenneth Hunt, Deputy Clerk