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May 3, 2020

Mr. Justin Renteria  
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**Re:** Legal Justifications for Municipal Right to Cure Tenant Protection Ordinance

Dear Mr. Renteria:

The following information is provided to you in response to your May 2, 2020, request for “research/information relating to the implementation of Right to Cure policies in Texas cities,” including “the legal argument(s) cities gave in order to implement Right to Cure.” In summary, we believe that the City of San Antonio has the legal authority to pass a Right to Cure ordinance that restricts a residential landlord’s ability to issue a notice to vacate until after the opportunity to cure has expired. Such an ordinance likely does not violate the Texas Constitution’s prohibition on retroactive laws or laws that impair the obligations of contracts. Finally, we believe that the City Council’s members have legislative immunity for the legislative actions they take, such as passing an ordinance, and that neither the Council nor individual members could not be sued for passing such an ordinance under a tortious interference with contract theory.

**Section 24.005(e) of the Texas Property Code contemplates laws that afford tenants an opportunity to respond to a proposed eviction.**

The City of Austin passed its Opportunity to Cure Ordinance, No. 20200326-090 on March 26, 2020. We believe this ordinance is authorized by Section 24.005(e) of the Texas Property Code, which governs the requirements of a Notice to Vacate that must be issued prior to the filing of a forcible entry and detainer (or eviction) lawsuit. This section reads, “If the lease or applicable law requires the landlord to give a tenant an opportunity to respond to a notice of proposed eviction, a notice to vacate may not be given until the period provided for the tenant to respond to the eviction notice has expired.” TEX. PROP. CODE. § 24.005(e).

Texas courts have upheld this requirement with respect to notices to vacate issued prior to the conclusion of the time period provided for a tenant in some types of federally subsidized housing to request a meeting with the landlord. *See Briones v. Brazos Bend Villa Apartments*, 438 S.W.3d 808, 814 (Tex. App.—Houston [14th Dist.] 2014, no pet.); *Kennedy v. Andover Place Apartments*, 203 S.W.3d 495, 498 (Tex. App.—Houston [14th Dist.] 2006, no pet.). The HUD Model Lease, which governs tenancies in many types of federally subsidized housing, requires a landlord to give a tenant whose tenancy the landlord proposes to terminate “10 days within which to discuss the proposed termination with the Landlord.” HUD Model Lease Paragraph 23(e). Section 24.005(e)

of the Property Code requires a landlord to wait until the expiration of the period provided for either in the lease or by “applicable law.” Therefore, a landlord whose property is governed by the provisions of the HUD model lease is obligated under Section 24.005(e) to wait until the conclusion of the meeting period before they can issue a notice to vacate. Just as the HUD Model Lease offers an opportunity to respond before which a notice to vacate may not issue, a municipality’s Right to Cure ordinance may provide for a similar opportunity, before which a notice to vacate cannot be validly issued.

**“Applicable Law” includes municipal ordinances.**

“Applicable law” as the term is used in Section 24.005(e) includes federal and state laws and well as municipal ordinances, because the Texas Legislature has used that term to include municipal ordinances in other Code provisions. *See* TEX. PROP. CODE § 82.051 (“This chapter does not permit development . . . without a plat if the plat is otherwise required by *applicable law*. A municipality may require as a condition to the development of a previously platted or unplatted subdivision golf course that the subdivision golf course be platted or replatted.”) (emphasis added); TEX. LOC. GOV’T CODE § 212.1352 (“the municipality must issue written findings . . . that the moratorium is justified by demonstrating that applying existing commercial development *ordinances* or regulations and other *applicable laws* is inadequate . . . .”) (emphasis added).

**Home-rule cities like San Antonio possess the authority to enact ordinances unless the Constitution or state law restrict such power.**

“Home-rule municipalities, such as the City of Austin, possess the full power of local self-government.” *Texas Ass’n of Bus. v. City of Austin, Texas*, 565 S.W.3d 425, 438 (Tex. App.—Austin 2018, pet. filed); see also TEX. LOC. GOV’T CODE § 51.072. That means that a home rule city is “fully empowered to legislate and govern within its own city limits as the state could in the same area had the municipality never been incorporated.” *White v. Zoning Bd. of Adjustment of City of Arlington*, 363 S.W.2d 955, 957 (Tex. Civ. App.—Fort Worth 1962, writ ref’d n.r.e.); see also *Chambers-Liberty Ctys. Navigation Dist. v. State*, 575 S.W.3d 339 (Tex. 2019) (“[A] home-rule city . . . has all the powers of the state not inconsistent with the Constitution, the general laws, or the city’s charter.”).

**An opportunity to cure ordinance likely does not violate the Texas Constitution’s prohibition on impairing the obligation of contracts.**

Although Article I, Section 16 of the Texas Constitution forbids “retroactive laws” as well as “any law impairing the obligation of contracts,” the Texas Supreme Court has interpreted these restrictions narrowly. “Changes in the law that merely affect remedies or procedure, or that otherwise have little impact on prior rights, are usually not unconstitutionally retroactive.” *Robinson v. Crown Cork & Seal Co., Inc.*, 335 S.W.3d 126, 146 (Tex. 2010). Laws affecting remedies are not unconstitutional “unless the remedy be taken away altogether, or encumbered with conditions that would render it useless or impracticable to pursue it.” *Id.* at 140 (citing *De*

*Cordova v. City of Galveston*, 4 Tex. 470, 480 (1849)). Courts should consider three factors to determine whether a law runs afoul of the prohibition on retroactive laws, including the nature and strength of the public interest served by the law, the nature of the right impaired by the law, and the extent of the impairment. *Id.* at 145. The Texas Supreme Court has also held that some laws are not invalid under the impairment of contracts clause they are “a valid exercise of the police power necessary to safeguard the public safety and welfare.” *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 635 (Tex. 1996).

While an opportunity to cure ordinance does affect the rights of parties to a contract that has already been executed (i.e. a written lease agreement), such an ordinance does not change the financial duties among the parties. That is to say, such an ordinance does not control, lower, or waive rent. Rather, it merely affects a property lessor’s remedies or procedure for enforcing the contract against a lessee who has not timely paid. The remedy a lessor has for nonpayment of rent (eviction) would still exist, but the lessor’s ability to pursue it is merely delayed. Additionally, the public interest served by an opportunity to cure ordinance is considerable, particularly in a time of a global pandemic and drastic economic contraction, and the rights impaired by the law are relatively slight in comparison. In passing an opportunity to cure ordinance, San Antonio would be protecting the public safety and welfare as well. Given all of these considerations, such an ordinance is likely to be upheld as a valid exercise of San Antonio’s authority to pass municipal ordinances, and would not be struck down as a violation of the Texas Constitution.

**The San Antonio City Council has legislative immunity protecting both the Council and councilmembers from a lawsuit alleging damages as a result of passing an opportunity to cure ordinance.**

The enactment of an ordinance is a legislative function of a City. *City of Grand Prairie v. Turner*, 515 S.W.2d 19, 25 (Tex. Civ. App.—Dallas 1974, writ ref’d n.r.e.). Texas courts recognize that individuals acting pursuant to their legislative capacities have immunity from liability for such actions. *Camacho v. Samaniego*, 954 S.W.2d 811, 823–24 (Tex. App.—El Paso 1997, pet. denied). The legislative immunity doctrine has been extended to municipal figures like mayors and city councilmembers. *See Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998). “[T]he government may not be sued in tort unless a separate, viable tort fits within the limited waiver provided by the [Texas Tort Claims] Act.” *Residents Against Flooding v. Reinvestment Zone No. Seventeen, City of Houston, Tex.*, 26 Supp.3d 738, 772 (S.D. Tex. 2017).

A lawsuit against the San Antonio City Council or any of its members for actions taken in their legislative capacity does not fit within the limited waiver in the Texas Tort Claims Act. Although Texas has waived the immunity that is generally retained by divisions or representatives of government in the Texas Tort Claims Act for causing harm like property damage, personal injury, or death, such immunity is not waived for claims “based on an act or omission of the legislature or a member of the legislature acting in his official capacity or to the legislative functions of a governmental unit.” TEX. CIV. PRAC. & REM. CODE § 101.052. The retention of this legislative immunity means that legislatures, including city councils, and individual representatives of such



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legislatures, are immune from liability for legislative acts. Given this, a plaintiff's lawsuit in tort against the San Antonio City Council or individual councilmembers that seeks money damages as a result of the passage of an ordinance should be dismissed because of absolute legislative immunity.

It is important to distinguish lawsuits seeking money damages from suits seeking equitable relief (e.g. an injunction). A lawsuit brought against the City Council seeking an injunction against the enforcement of the ordinance would not be barred by legislative immunity. *City of Elsa v. M.A.L.*, 226 S.W.3d 390, 392 (Tex. 2007). Nor would a suit seeking a declaration that the ordinance is unconstitutional be barred by legislative immunity. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 552 (Tex. 2019). However, such a suit could not recover money damages from the City. *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 594 (Tex. 2001) ("Sovereign immunity encompasses two principles: immunity from suit and immunity from liability...Immunity from liability protects the State from judgments even if the Legislature has expressly given consent to sue.") There is no such waiver of liability for violations of Article I, Section 16 of the Texas Constitution. Moreover, these challenges would likely fail on the merits because the ordinance does not violate the Texas Constitution, as discussed above.

As a practical matter, however, we expect that property owners or apartment associations that wish to challenge the legality of Right to Cure ordinances will do so in eviction lawsuits in which tenants raise violations of the ordinance as a defense to eviction, rather than through affirmative litigation against municipalities that have passed such ordinances.

## **Conclusion**

Based on our understanding of Texas law, we believe the San Antonio City Council is within its authority to pass a Right to Cure ordinance that provides residential tenants additional time to cure their nonpayment of rent during the COVID-19 pandemic. We believe that such an ordinance is likely consistent with the provisions of the Texas Constitution, and is unlikely to be overturned as a violation of the Texas Constitution's prohibition on laws that are retroactive or that impair contracts. Finally, we believe that the City Council and its individual members are immune from liability from a lawsuit seeking money damages based on the Council's passage of a Right to Cure ordinance.

Should you have questions about any of the material included in this document, please do not hesitate to contact me by phone at (512) 374-2740 or by email at [mlatta@trla.org](mailto:mlatta@trla.org).



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Sincerely,

TEXAS RIOGRANDE LEGAL AID, INC.

*/s/ Marissa Latta*

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Marissa Latta  
*Attorney at Law*