magazine

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BORNSTEIN LAW

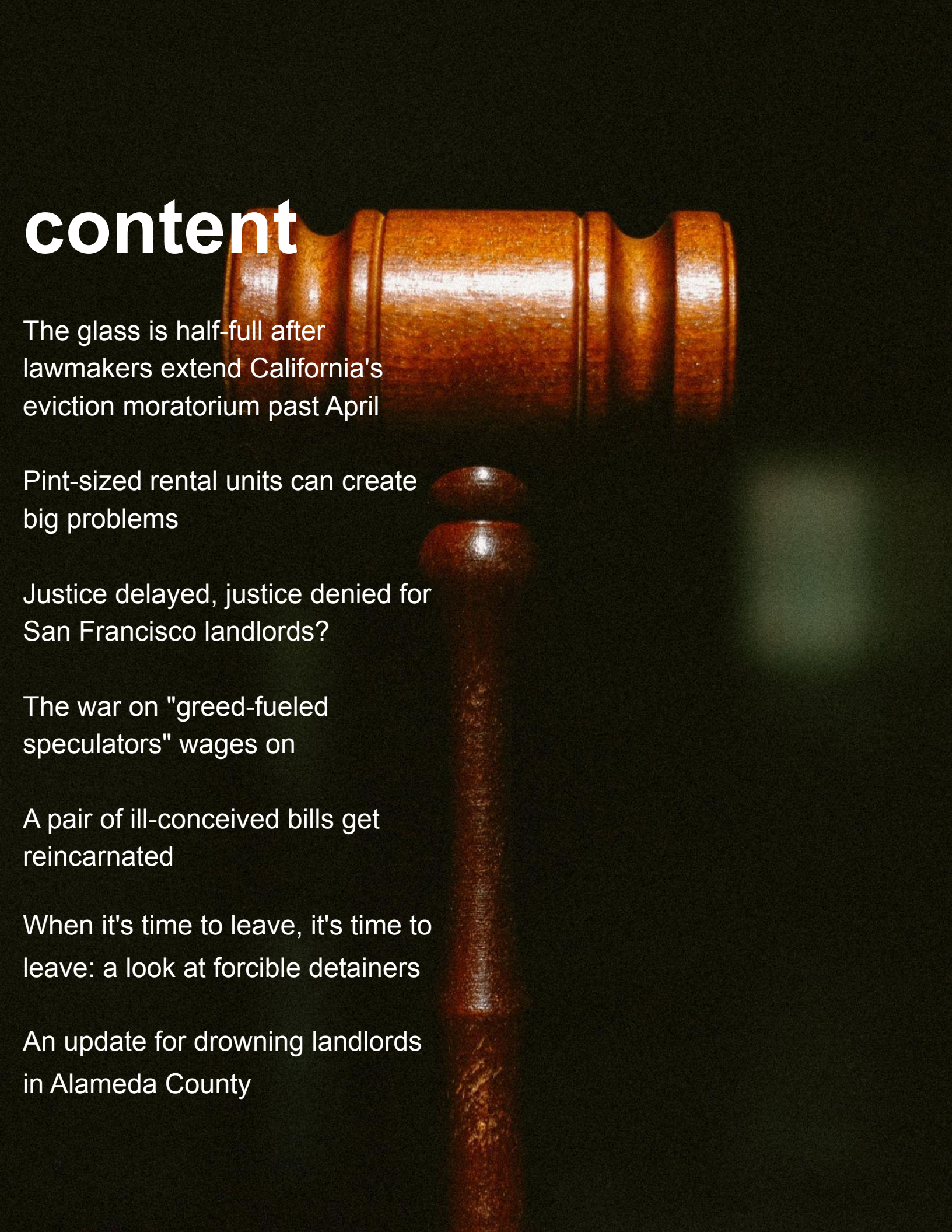
From the desk of Daniel Bornstein

Thanks to our valued clients, colleagues, referral partners, and other friends for your continued engagement.

Through educational webinars, email broadcasts, social media, blogs, podcasts, and other formats, our office has been dedicated to giving the landlording community more ways to digest the legal information you need to survive and thrive in a complicated regulatory regime.

We are excited to launch yet another way to disseminate information through this magazine arrangement. No matter how you get dialed into the latest happenings and insights, there certainly is no substitute for a one-on-one consultation if you find yourself in a problematic situation or need proper counsel to accomplish a real estate goal.

Should you have any questions, I'm highly accessible via email at daniel@bornstein.law.



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The glass is half-full after lawmakers extend California's eviction moratorium past April 1

By passing Assembly Bill 2179 (AB 2179), lawmakers have given rental housing providers a sense of finality to what has been a deluge of regulations to comply with.

Early on in the pandemic, it was newsworthy when an eviction moratorium was extended. But after they were prolonged over and over again, we became resigned to them. On the eve of an eviction about to expire, our clients could just automatically assume that it would be pushed further into the future.

Yet all indications are that AB 2179 is the last and final extension of COVID-related protections.

In a nutshell, the bill extends protections for tenants past the April 1 deadline and through June 30, provided that the renter has applied for rental assistance funds on or before March 31, but who have yet to receive any relief.

That's right - tenants who have a rental application already in the queue can enjoy continued protections, but when the clock struck midnight and April was ushered in, those guardrails no longer existed.

It's been said that "if you don't use it, you lose it." There has been ample time to access the billions of dollars awaiting financially distressed renters, but that opportunity has reached its expiration date.

Another key provision of the bill: cities and counties are prohibited from enacting their own local moratoria, and this is a big deal that will make our lives much easier.

The days have passed when municipalities can craft their own patchwork of regulations for landlords to follow.

Lawmakers sent a clear message that "this is it." While tenants who fell on tough economic times during a world that was largely shut down were able to enjoy protections to stay housed, times have changed. The pandemic seems to have become the endemic. People can dine out. Salons and bookstores are open for business. Schools are in session. There are no stay-at-home orders. Just about every orbit of our lives is allowed to go on.

Good news for landlords with unscrupulous tenants

AB 2179 does not afford protection to tenants who didn't pay the rent either because they didn't apply for rental assistance or earned too much income to qualify. This should be a big relief for those landlords renting to tenants who are "gaming the system," the likes of which are large in number.

We are talking about a tech worker who has a plush job, hasn't lost their employment due to COVID, and goes to work every day. Sometimes, they come back home from work in a new Tesla.

The bill is not good enough for some

Although AB 2179 sailed through the legislature before being signed by Lieutenant Governor Eleni Kounalakis (pinch-hitting for vacationing Governor Newsom), there were detractors.

State Senator Scott Wiener was the lone lawmaker in the Senate who gave the thumbs down, expressing an objection to the state's preemption of additional protections at the local level. Others wanted to give tenants more time to apply for the dwindling supply of rental assistance dollars available.

Our views, for what it's worth

Throughout the long and dark winter of COVID, we have never in our professional careers been forced to study and make sense of so many ever-changing laws and government edicts, much less communicate the law to our clients and friends in an easily digestible fashion.

It seems we were hopscotching from one rule to the next on a weekly or monthly basis. Sometimes, what we posted on Monday was obsolete by Friday.

So, our office welcomes a respite from the constantly changing developments and we are encouraged that there is now uniformity in the rules we must adhere to.

Local governments, who milked the emergency powers granted to them during the pandemic for all it was worth, can no longer make the lives of our clients more difficult by coming up with new ordinances and regulations.

As for the sentiment that tenants should be given even more time to apply for rental assistance, we say that there has been more than enough opportunity for renters to learn about the funds made available and then to seek them out. Short of putting a giant billboard in front of apartment buildings, the efforts to educate tenants on their rights have been colossal. There has been an enormous outreach and the availability of assistance is embedded in statutorily required notices themselves.

For our part, we have urged our community time and time again to work alongside tenants to participate in rent relief programs, even recommending a visit to the rental unit with an iPad or laptop in hand to help renters complete an application.

These archaic moratoriums are being challenged in a lawsuit and some politicians are beginning to come to their senses by expressing a willingness to revisit these absurd eviction bans.

Nobody has a crystal ball but we do understand there is a lengthy timeline for these types of lawsuits to play out. It is our hope that the litigation motivates lawmakers to lift the bans in Alameda County and Oakland, or at least decouple the eviction moratoriums from local states of emergency that remain in place.

Where we go from here

Rental housing providers are admonished to stay abreast of the new requirements of AB 2179, including new documentation and disclosures.

As we wade through the new law and formulate guidance, now is the time for landlords and property managers to get their financial houses in order by documenting when rent became due and during what time periods, as well as putting together a ledger of what rent was paid.

It is also prudent to take inventory of any notices sent throughout the lifetime of the tenancy.

Just to make sure that everyone knows the law has teeth, Attorney General Bonta chimes in and sends reminders

California's Attorney General has issued a stern warning to landlords and their attorneys that it is unacceptable to file evictions against tenants who have applied for rental assistance.

Bornstein Law was in receipt of 90-some letters sent to landlord attorneys and, as we told Mercury News, our office felt a bit insulted that we have to be reminded of our obligations to follow the law.

In a press release, Attorney General Rob Bonta said that his office has "reason to believe that some landlords and their attorneys may be filing false declarations to push hardworking Californians out of their homes," going on to say that such actions are illegal and only aggravate the suffering of families already struggling with high housing costs.

It sounds like a script out of a Star Wars movie, but the Attorney General's office has assembled a "strike force" to ensure that tenants are not improperly displaced

We've heard this Jedi term once before when a strike force was established to enforce laws that told local governments to get out of the way of new housing development.

While there will always be some bad actors, our office has always been committed to providing sound counsel for landlords to comply with the law, and not get around it. Along with our colleagues from other firms, we resent the innuendo that somehow attorneys are attempting to sidestep the law. This type of messaging seems politically motivated and beneath the Attorney General, the state's top law enforcement official.

We will have more guidance soon on how to comply with the newly-minted bill of AB 2179 and while we say, "argh, we have to do this again," we are confident that this is the last time we express our angst as we soon near the time when managing landlord-tenant relationships return to how it was before the pandemic.

Until then, please be careful. Landlords have an intergalactic target on their backs.

Pint-sized rental units can create big problems

As more people live in closer quarters, increased legal issues will inevitably arise.

It's been with some amusement to watch the spectacle of how municipalities are responding to calls for denser housing and adjusting to a spate of laws.

Many local governments have been inventive in skirting the California Home Act (SB 9), a law that allows up to four residential units per lot.

Some of these efforts have been comical. Take, for instance, the San Mateo County town of Woodside.

While housing policies and mountain lions aren't usually brought up in the same sentence, the town initially claimed it was exempt because it was home to mountain lions, a protected species.

In San Francisco, the real vulgar f-word is fourplexes.

There are several proposals being floated and one recommendation from the Planning Commission that would upzone all single-family neighborhoods to allow duplexes, essentially exempting them from the requirements of the state's housing density law.

In Berkeley, lawmakers are a bit less recalcitrant.

As the birthplace of single-family zoning, looser regulations are being explored.

This includes lifting limits on high-rises downtown and allowing the addition of up to four units per parcel on previously designated single-family-only zones.

Add to this a Housing Strike Force tasked by Attorney General Rob Bonta to look into and report on cities out of compliance with SB 9 and it makes for an unruly exercise in democracy.

There is much we know and much we don't know

Bornstein Law has been following the housing fight headlines and is anxious to get some clarity on the final product of ordinances and regulations politicians and regulators come up with.

Although we are in a wait-and-see pattern, we do know that there will be a host of legal issues in complying with whatever regulatory regime that follows.

For example, what protections will be afforded to tenants moving into this additional housing stock? Can landlords set market-rate rent, or will rental units (or a portion of them) have to be affordable? Questions abound.

New leases. Clarifying the legal relationship between occupants. Services provided by the landlord such as parking. Increased number of nuisances when more people are living in close quarters. Denser housing and more hybrid quarters like in-law units will beget many challenges best approached with an attorney.

There are many question marks, but let's look at some of the legal issues we routinely encounter when it comes to in-law units.

Rent and eviction controls

Tenants who reside in illegal units are still protected by local ordinances. Disgruntled renters can sue the landlord for all manner of causes including breach of contract, wrongful eviction, retaliation, and fraud.

The Certificate of Occupancy is critical

Without one, it is illegal to rent out the unit or collect rent, even if the ADU is in pristine condition. Do you want to maintain the status quo with a tenant renting an illegal unit and hope the relationship doesn't sour, or bring the unit up to code compliance and get the city's permission to rent?

When additional living space cannot be converted to an ADU, the owner can enter into a roommate arrangement

If converting habitable, extra living quarters into an ADU proves to be too costly or impractical, all may not be lost. If the owner of the property desires to rent out the space, they can become roommates of the tenant with a big caveat - the space cannot be segregated and, with the exception of bedrooms, it must be clearly spelled out that the person paying rent has unfettered access to common areas like the kitchen and bathroom.

Gobbling up common areas

There may be laws that prohibit common areas like laundry facilities, storage areas, and parking spaces from being converted to an ADU, or entitle tenants to petition the Rent Board for a rent reduction because "housing services" have been reduced.

Insurance may not protect you

If a fire or some other tragedy occurs in an unwarranted unit, the owner may not be protected. It is a good practice to be upfront with the insurance carrier about the illegal status of the unit to ensure it is covered and if not, find a policy that shields you from liability.

Tiny units can become big problems for buyers and sellers

With the emergence of the ADU industry, many living spaces are misrepresented on the MLS. The buyer may not understand the unit is illegal or fully appreciate the legal repercussions of renting out the unwarranted unit. Having collected rent for many months or years, the seller of the property can still be sued by disgruntled or displaced tenants.

Doing unauthorized work or using unlicensed contractors

We always advise clients not to be penny-wise and a pound foolish by taking shortcuts during the process. In some cases, we have to retroactively go back to pull permits for work that has been performed without the city's permission.

Parting thoughts

As you can see, these pint-sized units can be a ticking time bomb. New housing in whatever form is sorely needed in California to accommodate the demand and blunt calls for increased rent control, but the byproduct of that will be some legal dustups best journeyed with our offices.

Let's go to the drawing board.

Bornstein Law has developed relationships with architectural and planning professionals who have reliable contractors on standby, to get the job done right.

Inexperience and a lack of familiarity with building codes can lead to delays, expensive results, and poor workmanship, but it doesn't end there.

If the unit has an egregious condition that cannot be made code-compliant, it may have to be demolished or removed from residential use. If a Notice of Violation is issued, it can lead to acrimony in the relationship and even invite a costly lawsuit commenced by the tenant.

Please don't go it alone - get in touch with our office for experienced-driven advice.

Justice delayed, justice denied?

On Wednesday, March 23, our industry partners were successful in temporarily blocking the city's newly minted ordinance that makes it necessary for landlords to serve a 10-day warning notice to tenants prior to serving a traditional 3-day notice to "cure or quit."

A victory for rental housing providers in San Francisco, and let's hope it is not short-lived.

While landlords pursuing certain types of evictions can ordinarily serve a 3-day notice, this wasn't ample time for Supervisor Dean Preston and other tenants' advocates.

They successfully pushed through Ordinance No.18-22, which dictated that tenants must be provided written notice and additional time to cure non-payment of rent or other lease violations.

This ordinance, to our knowledge, was the first of its kind.

Resultingly, the San Francisco Apartment Association and the Small Property Owners of San Francisco banded together to file a lawsuit challenging the ordinance.

The main argument was that the carefully choreographed steps of the eviction process are governed by state law and that a local government cannot tamper with this patterned approach.

The Ordinance's 10-day warning period more than quadruples the time it takes for landlords to regain possession of their property, the lawsuit notes, and this flies in the face of state law.

This argument was initially persuasive to Judge Charles F. Haines, who granted a stay until there is a final resolution to the matter.

We caution at this early juncture that the lawsuit is not over but we can ignore the ordinance for now and proceed with unlawful detainer (eviction) actions without affording tenants a ten-day warning period.

This stay on the legislation requiring a 10-day warning prior to a 3-day notice is an indication that our arguments may have merit and deserve to be considered in the courts. We continue to assert that unlawful detainers are under State, not Local, jurisdiction.

~ Noni Richen, President of SPOSF/SPOSFI

The war on “greed-fueled speculators” wages on

Not so long ago, we submitted that California's laws and public policy surrounding rental properties look like a modern-day Robin Hood. A deep distrust, if not antipathy, for cash-rich investor-buyers, can be found in a myriad of laws and regulations. For example, SB 1079 levels the playing field for non-corporate investors when foreclosed homes go on the auction block. Under that law, multiple homes cannot be bundled together but must be sold individually.

Now, a proposed bill goes for the jugular.

Enter AB 1771, legislation authored by Assemblyman Chris Ward out of San Diego, that would create a 25% tax on any capital gains realized by selling a residential property within three years of buying it, although the tax rate would be reduced the longer the owner owns it.

This punitive tax would be wiped out after seven years of ownership. So clearly, the intent of the bill is to discourage those who have been called "greed-fueled speculators" from gobbling up homes and flipping them for a profit, a phenomenon that economists and politicians say is contributing to California's astronomical home prices and deferring the dream of homeownership for many individual buyers who can not outbid more endowed investors.

It has been estimated that the tax would create revenue of $4.02 billion. Consistent with the Robin Hood economics of the state, these funds would go into a "Speculation Recapture Community Reinvestment Fund."

How's that for an inflammatory name? Investors are so villainized that profits now have to be "recaptured" as if the money earned through a real estate investment were stolen from the community. The proceeds of an astute investment, it is is reasoned, must be seized in order to fund affordable housing, schools, and benefit infrastructure.

Apartments with at least 15% of units considered to be "affordable" would be exempted, as would first-time home buyers, relocating military personnel, long-term homeowners, and homeowners who subdivide a lot on which they will live.

Is it only hurting the fat cat investors?

Although AB 1771 is designed to curtail investor activity, it would impact regular homeowners with upward mobility looking to upgrade or forced to sell their home because of some life calamity like death or divorce. It would also put a damper on already critically low inventory as potential sellers are compelled to hold onto their homes longer.

The good news? AB 1771 is unlikely to pass.

Large investors don't have a lot of friends among tenants' advocates in the state capitol, but it will take 2/3rds of lawmakers in both houses of the Legislature. That's because AB 1771 would result in a taxpayer paying a higher tax within the meaning of Section 3 of Article XIIIA of the California Constitution.

This is a tall bar to overcome.

The bill was inspired by the rapid buying and selling of homes aided by programs like short-lived Zillow Offers, an easy way for homeowners to sell their homes for cash while slashing the regular bidding, sales, and closing processes.

It turns out that while Zillow Offers bloated the company's balance sheet, it was difficult to generate profits from short-term home flips and has since been shuttered so that the company can focus on its growing, margin-rich internet services business.

While we don't believe the legislation at hand will pass, make no mistake that large investors have a target on their backs and that further measures will be introduced to narrow the divide between the big fish and little fish.

Bornstein Law joins our industry partners in arguing that the root of rising home prices is not real estate speculation but a woeful lack of housing stock. While state laws have paved the way for denser housing, local governments have come up with many inventive excuses to sidestep these statutes.

A pair of ill-conceived bills gets reincarnated. The measures would disallow landlords from going out of business and collect reams of information in a statewide rent registry.

Can rental property owners be sentenced to life without parole?

Along with his colleagues David Chiu and Richard Bloom, California Assemblyman Alex Lee introduced AB 854, a bill dubbed the "Stay in Business Forever Act." The bill was the latest attack on the Ellis Act in a long and storied history of efforts to erode the rights of landlords to leave the rental market.

The legislation died on the vine just two months ago, but guess what? It's back.

Not to be deterred, Assemblyman Lee introduced AB 2050, which would prohibit many rental housing providers to terminate tenancies and exit the landlording business until all owners of the property have had their ownership stake for at least five years.

Landlords should be able to move into their building, retire from the rental business when the day comes, or convert their property to their heart's desire.

Yet anyone who uses the 1986 law that cemented a landlord's right to bow out of the landlording business is called a "greed-fueled speculator."

The previous iteration of the bill didn't garner enough votes and we hope that the newly introduced AB 2050 shares the same fate.

Is the fourth time the charm?

That's the premonition of Assemblywoman Buffy Wicks, as told in an interview with Jefferson Public Radio.

AB 2469 is now her fourth attempt to institute a statewide rent registry that would ask landlords to peel back the books and cough up reams of information about their rental business.

For owners who are not transparent and fail to register, they would be banned from increasing the rent or terminating a tenancy.

These types of schemes present a nightmare from an IT perspective, are very costly to taxpayers, and require a great deal of extra work for rental housing providers.

There are, as well, privacy concerns. Landlords and tenants' advocates have become odd bedfellows in opposing vast databases because it turns out, nobody wants their personal information on display for the rest of the world to see on a website.

Although past initiatives have failed, Assemblywoman Wicks has advanced her professional career by becoming the chair of the California Assembly Housing and Community Development Committee.

This new title certainly bestows more clout to overcome legislative obstacles, so this measure should not be somehow discounted or assumed to fail. Maybe the fourth time is the charm.

Regardless of the outcomes of the proposed legislation, one thing we can say about tenants’ advocates is that they are a resilient bunch. They don’t quit.

When it’s time to leave, it’s time to leave.

Unlawful detainers are the trade word for eviction - the tenant is unlawfully detaining the premises. The operative term is “the tenant.”

But when there is no tenancy established, Bornstein Law can file a forcible detainer action found in Code of Civil Procedure Section 1160. Think of guests who have overstayed their welcome or trespassers.

The quintessential difference between unlawful detainers and forcible detainers

The typical unlawful detainer action arises from disputes when the defendant is a tenant who signed a rental agreement, whereas a forcible detainer is commenced when the occupant remains on the premises when asked to leave.

We’ll give you an analogy.

You invite some guests over to watch a Warriors or Giants game for food and drinks. You have a good time, maybe even continue to revel after the post-game show. But at some point, the guests have to leave.

These guests on your property are considered “licensees”.

That is, they have been given a limited license to use your property, but that license can be revoked at any time. The guests certainly can't legally stay without your permission, camp out and claim that a tenancy is established. When the game is over, the pizza is gone and you want to go to sleep, they must leave the premises.

So while unlawful detainers and forcible detainers are both summary actions, the difference lies in whether a tenancy exists.

Forcible detainer actions can be boiled down to four different scenarios.

Guests who are "free-loaders"

One set of circumstances can be characterized as "tough love." A relative or close friend is allowed a place to stay and they become a burden. Rather than helping with bills or doing chores, they make themselves at home without paying rent or adding any value to the household.

Taking food, creating messes without cleaning up, using their host's laundry detergent to do wash, etc. You get the picture. The guest is not carrying his or her weight.

Caregivers who are not tenants

It is not uncommon that as a tenant ages, becomes disabled, or experiences some sort of affliction, they require the watchful care of someone else. These caregivers might stay in the rental unit even though he or she is not named in the lease.

One of our cardinal rules at Bornstein Law is that landlords need to keep track of and document who is living in the rental unit. Most of the time, the caregiver's stay is well-intentioned, but we need to know who is occupying the premises and codify where this caregiver stands in the rental relationship.

We need to know who we are dealing with when problems or disputes arise.

Another set of circumstances that is particularly sad is when a caregiver takes advantage of someone in need. A trusted provider who is tasked with taking care of an elderly person or some other vulnerable individual seizes control over the residence and perhaps, the personal affairs of the person who they are supposed to help. Our office has encountered this all too often and we have taken solace in halting extended stays, if not averting abuse.

Squatters

When a property is vacant, it can attract unwanted occupants who have no relationship with the owner. It is not beyond the stretch of the imagination that the police will shrug this off as a civil matter.

Occupying the premises through force or intimidation

Some possessive partners - husband, wife, boyfriend, girlfriend - will just help themselves to the property, whether they have permission to occupy it or not. In some instances, this is indicative of domestic abuse, which carries a whole host of other concerns and legal issues.

This coercion is not limited to domestic partners. Any bad actor can oust the legal occupant through physical or verbal force.

For those landlords who are drowning in Alameda County, help may be on the way. Until then, we have to follow protocols in place.

Alameda County has the most stringent eviction moratoriums in place anywhere, with the possible exception of Los Angeles. The eviction bans in both Alameda County and Oakland are being challenged in a lawsuit, but we know that this type of litigation takes quite a bit of time to unfold. We are encouraged that lawmakers have indicated a willingness to revisit the moratoriums, but there are no guarantees.

Landlord cannot file an unlawful detainer action prior to July 1, 2022, if all of the following criteria exist:

- Unlawful detainer is based on amounts due prior to April 1, 2022
- Tenant moved in prior to October 1, 2021
- Rental assistance application is pending
- Application was filed on or prior to March 31, 2022

Landlord is able to file an unlawful detainer action if:

Any of the following is correct:

- Unlawful detainer is based on rent amounts due on or after April 2022
- The tenant moved in on or after October 1, 2021
- There is no rental assistance application in the queue

AND

Proper notice to pay is served on the tenant

AND

The tenant fails to cure the notice

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