

April 8, 2020

The Honorable Steve Bullock
Office of the Governor
PO Box 200801
Helena, MT 59620-0801

Re: Directive Implementing Executive Orders 2-2020 and 3-2020

Dear Governor Bullock,

I represent the Montana Landlords Association, Inc. (“MLA”) and am writing about your March 30, 2020 Directive prohibiting Landlords from taking any action to enforce tenancy agreements, or otherwise cover losses related to failure to pay rent, which has now been extended to April 24, 2020. By way of introduction, the MLA is a statewide nonprofit membership organization founded in 1976 dedicated to assisting, educating, and advocating for the rights of Landlords in the State. The MLA has 1,146 member Landlords across Montana. Many of those Landlords are our neighbors—everyday Montanans who own a second residence as income property and are attempting to pay off a mortgage by collecting rent.

The MLA recognizes the difficulties COVID-19 poses for the State and Country. To the extent their resources allow, Landlords in Montana have been empathetic partners in helping individuals and families through the challenges presented by this unique situation. Thankfully, for individuals and families who have lost employment or are otherwise experiencing financial difficulty, there are key State and Federal programs designed to help. The recently passed Federal CARES Act, for example, expands State unemployment insurance and gives direct payments to middle class and low-income individuals and families. Additionally, the Families First Coronavirus Response Act provides paid sick leave and paid emergency FMLA leave to employees impacted by COVID-19.

Unfortunately, there are no similar programs for Landlords, who must continue to meet their own financial obligations through this crisis, even when they do not receive rent payments. Accordingly, your March 30th Directive Implementing Executive Orders 2-2020 and 3-2020 providing measures to limit foreclosures, evictions, and disconnections from service (“Directive”), puts Montana Landlords in a very vulnerable position, especially after its recent extension to April 24, 2020. Under the current Directive language, individuals are authorized to skip rent payments—regardless of their employment status or their ability to pay rent—and Landlords are left with no remedy and no assistance in meeting their financial obligations, which continue unabated. The Directive does not differentiate between people impacted by COVID-19 and those who are not, and, as it stands, tenants who are fully employed are not paying rent. Moreover, and contrary to well-established

principles of fundamental fairness, separation of powers, and constitutional standards, the Directive deprives Landlords of many of their statutory and contractual remedies established by the Montana Landlord Tenant Act (the “Act”) and/or individual rental agreements. *See* Mont. Code Ann. § 70-24-101, *et seq.* Landlords, however, presumably still must satisfy all obligations imposed on them by the Act and those rental agreements.

The MLA understands the goals of your initial Directive, and, as I mentioned, Landlords have volunteered to assist tenants where they are financially able. But with expanded Federal and State assistance now available, we request you revoke the extension of the Directive issued April 7, 2020 and allow at least the Landlord-related provisions to expire by the Directive’s own terms on April 10, 2020. In its place it would certainly be appropriate for the State to provide additional emergency financial relief for individuals who need more assistance. It would also be appropriate for you to request that Landlords continue to be flexible and work to find solutions for tenants unable to pay rent. Alternatively, and short of revoking the Directive, you could establish a fund to assist Landlords impacted by the Directive.

If the Directive continues and no economic assistance is available for Landlords, it could be economically disastrous for many Montana Landlords who are not receiving rent. In that case, Landlords will have little recourse short of filing a lawsuit challenging the Directive’s legality. MLA acknowledges Montana Code Annotated § 10-3-313 permits the Governor to “provide temporary housing for disaster victims” by taking certain narrow actions, including by purchasing or leasing housing. But the Directive’s “Limitation on Evictions” is not supported by § 10-3-313, MCA, nor any other Montana statute. Instead of enforcing or applying existing Montana laws, the Directive usurps powers held exclusively by the Montana Legislature, contrary to Article III, § 1 of the Montana Constitution. *See Powder River Cty. v. State*, 2002 MT 259, ¶¶ 113-115, 312 Mont. 198, 60 P.3d 357 (“It is the exclusive power of the Legislature to enact the laws of this state, and it is the exclusive power of the executive branch to enforce the laws as enacted”). In the absence of any statutory support for the Directive, it is *ultra vires*. *See Sibert v. Cmty. Coll. of Flathead Cty.*, 179 Mont. 188, 191, 587 P.2d 26, 28 (1978).

The Directive also violates fundamental rights protected by Article II of the Montana Constitution. As you know, those fundamental rights are “significant components of liberty, any infringement of which will trigger the highest level of scrutiny, and, thus, the highest level of protection by the courts.” *Walker v. State*, 2003 MT 134, ¶ 74, 316 Mont. 103, 68 P.3d 872.

For example, the Directive prohibits Landlords from initiating any action terminating a residential tenancy, seeking unpaid rent, or continuing to litigate any active lawsuits. On its face, that prohibition unlawfully restricts Landlords’ fundamental rights of access to Montana’s courts. Article II, § 16 of the Montana Constitution guarantees that “Courts of justice shall be open to every person,” including Landlords. The Montana Supreme Court recently reaffirmed that the “Legislature cannot pass legislation that limits this fundamental right.” *See Ramsbacher v. Jim Palmer Trucking*, 2018 MT 118, ¶ 16, 391 Mont. 298, 417 P.3d 313.

Similarly, the Directive's limitation on evictions significantly interferes with Landlords' real property rights. Accordingly, the Directive amounts to an unlawful inverse condemnation of Landlords' private property rights for a public purpose, without providing them any compensation. But Article II, § 29 of the Montana Constitution prohibits such an act by requiring the State to "make the landowner whole after the State takes his property." *State By & Through Dep't of Highways of State of Mont. v. McGuckin*, 242 Mont. 81, 84, 788 P.2d 926, 928 (1990). Interfering with Landlords' private property rights in this manner also implicates Landlords' due process rights protected by Article II, § 17 of the Montana Constitution. See *City of Missoula v. Mountain Water Co.*, 2016 MT 183, ¶¶ 80-81, 384 Mont. 193, 378 P.3d 1113.

Finally, the Directive's Limitation on Evictions retroactively prohibits Landlords from enforcing various contractual provisions in their rental agreements, even though both Landlords and their tenants previously agreed to be bound by those contract terms. The Directive's interference with private contract rights violates Article II, § 31 of the Montana Constitution and Article I, § 10 of the United States Constitution. See *Seven Up Pete Venture v. State*, 2005 MT 146, ¶¶ 40-41, 327 Mont. 306, 114 P.3d 1009.

For these reasons, the MLA requests that you cancel the Directive as applied to Montana Landlords. As an alternative to revoking the Directive, MLA requests that you establish a fund to assist Landlords experiencing financial distress because they are not receiving rent under the Directive. The MLA welcomes a meeting with your staff to discuss other creative solutions for individuals and families who may need additional help. But because the Directive will continue to pose an extreme hardship for Landlords across the State, the MLA may have no choice but to consider an emergency constitutional challenge if it is not revoked or Landlords do not receive financial assistance to ameliorate its consequences.

The MLA remains committed to working through this situation in a cooperative way and looks forward to discussing this issue with you or your staff. We would appreciate a prompt response.

Sincerely,



Dale Schowengerdt

cc: Raph Graybill, Chief Legal Counsel (email)