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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

TOPA EQUITIES, LTD.,

Plaintiff,

v.

CITY OF LOS ANGELES, a municipal corporation,

Defendant.

CASE NO. **CV 00-10455 GHK (RNBx)**

REPLY BRIEF ON THE ISSUE OF PREEMPTION

Hearing Date: August 6, 2001
Time: 9:30 a.m.
Courtroom: Room 660
Judge: The Honorable George H. King

I.

INTRODUCTION

Plaintiff turns the preemption analysis on its head and starts with a desired result: to be able to flaunt the local rent control ordinance so that plaintiff can raise rents to market while other landlords must comply with rental caps. Working backwards, plaintiff then engages in a flawed preemption analysis that stands on a distorted view of the statute as well as self-serving statements made during the legislative process by industry representatives.

To cut through plaintiff's obfuscation of the legislative history and mis-characterization of the federal statute's mechanics, this Reply Brief responds to the pertinent points raised by plaintiff and weaves them into a comprehensive discussion of the implied preemption analysis.

II.

FACTS

Plaintiff's portion of the Joint Brief contains an eight-page Factual Statement which relies heavily on a declaration by Gary Clopp, the Vice President of TOPA Management Company. In response to that Factual Statement, this Reply Brief presents those facts to which it takes issue at this time and reserves the right to challenge other statements made by Mr. Clopp as additional evidence becomes available to the City.

The first statement with which the City takes issue is: ". . . Congress noted that restricting owners to low rents or prohibiting prepayment would preclude the returns necessary to make such capital improvements and hurt the tenants in the long run." (Plaintiff's Brief on Issue of Preemption at p. 4, lines 7-9 ("Plaintiff's Brief")). This statement implies that the only monies available to repair and maintain housing in federal programs come from rental revenues. This is untrue. Most federal housing programs, including the National Housing Program, give a generous allowance to owners for the repair and maintenance of buildings in the program. In addition, the federal programs usually require the maintenance of reserve funds for the express purpose of funding capital repairs and improvements. Because the funding for such repairs and maintenance is made available separately from the net profits that owners are permitted to receive, it is misleading for plaintiff to state that restricting the rents that they can charge will preclude the returns necessary to properly repair and maintain the housing. (Declaration of Sally Richman at ¶ _____).

The second statement with which the City takes issue is the characterization of verbal advice

concerning allowable rents that was given by Housing Department employee Phil Dickerson as binding on the City. (Plaintiff's Brief at p. 6, lines 4-6). Advice given by city employees does *not* bind a city. *County of Sonoma v. Rex*, 231 Cal. App. 3d 1289, 282 Cal. Rptr. 796 (1991).

Other statements in plaintiff's Statement of Facts with which the City disagrees are discussed throughout the remainder of this Reply Brief. In addition, Sally Richman of the Policy and Planning Section of the City's Housing Department has signed a declaration that refutes many of the points raised in Mr. Clopp's declaration.

III.

SUMMARY OF ARGUMENTS

A. Summary Of Plaintiff's Position On Conflict Preemption

Plaintiff argues that the following variant of the conflict preemption test should apply: Does the state law serve as an "obstacle" to a paramount purpose of the federal law? Using this test, plaintiff asserts that the 1990 Amendments to LARSO are subject to preemption by three subsections of Section 4122[1]: (1) Section 4122(a)(1), which preempts state and local laws that "restrict or interfere with" owners prepayment rights; (2) Section 4122(a)(3), which prohibits states from establishing laws that are "inconsistent with any provision of this subchapter"; and (3) Section 4122(a)(4), which prohibits states from enforcing any law that "in its applicability to low income housing is limited only to eligible low-income housing for which the owner has prepaid the mortgage . . . ."

Plaintiff argues that each of these subsections reflects a paramount purpose of Congress to protect the rights of owners of low-income housing projects in federal programs, and that the paramount purpose has been impeded by the 1990 Amendments to LARSO.

B. Summary Of City's Position On Conflict Preemption.

It is not necessary for the Court to reach the conflict preemption analysis due to the fact that the LIHPHRA statute has been impliedly repealed through stoppage of funding for the LIHPRHA program and, thus, is no longer effective to preempt local laws. If the Court does proceed to the conflict preemption analysis, there

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[1]Low Income Housing Preservation and Resident Homeownership Act of 1990,12 U.S.C. § 4122. Section 4122 is commonly referred to as "Section 232", which was the original designation given to it in the LIHPRHA bill.

are two primary reasons why the 1990 Amendments to LARSO are not preempted. First, Section 4122(b) specifically exempts local rent control laws of general application from the scope of LIHPRHA's preemption clause. Second -- applying the conflict preemption analysis -- the paramount purpose of LIHPRHA was to preserve affordable housing units. Any benefit given by LIHPRHA to owners of housing projects was merely a tool used to facilitate the overall goal of preserving housing. The 1990 Amendments to LARSO do not interfere with that goal.

IV.

ARGUMENT

A. Because LIHPRHA Was Impliedly Repealed Due to Congress' Failure to Fund the LIHPRHA Program, Plaintiff Cannot Invoke The Preemption Powers Of Section 4122.

Congress never intended to preempt state and local laws in circumstances where the federal LIHPRHA program is no longer regulating or funding preservation of low-income housing. Section 4122 is but one small part of the comprehensive LIHPRHA program enacted in 1990 to address the threat of the large-scale loss of HUD-subsidized multifamily developments throughout the country. LIHPRHA sought to balance the goals of preserving housing and providing fair compensation to owners. Recognizing that prepayments would rarely be approvable, Congress provided owners with additional financial incentives to preserve the affordability of the developments, through HUD-approved plans of action based upon market-value appraisals. Thus, the federal government both regulated the exit or preservation of these developments with HUD-subsidized mortgages, and provided the funding necessary to operate the program.

One part of the comprehensive program was the preemption provision, Section 4122, which rendered ineffective certain state and local laws restricting prepayments if such laws were targeted exclusively at LIHPRHA-eligible buildings, defined as "eligible low-income housing". The purpose of this provision was to prevent state and local governments from adopting restrictions on prepayment that would unfairly target only LIHPRHA-eligible properties, thereby reducing their value and the level of incentives which LIHPRHA might otherwise provide.

Beginning in 1996, however, Congress adopted a series of funding and policy decisions that rendered LIHPRHA inoperable. Congress began to short-fund the program in 1996, and starting in 1998,

Congress has provided no funding to implement LIHPRHA.[2] Thus, although LIHPRHA has never been formally repealed, these subsequent Congressional enactments have rendered the LIHPRHA program inoperable and impliedly repealed. In the absence of a functional and federally funded LIHPRHA program, there is no reason for a solitary component, Section 4122, to remain operative.

This position was recently upheld by the district court in *Kenneth Arms Tenant Association v. Martinez*, No S-01-832 LKK/JFM (U.S. Dist. Ct., E. Dist. filed July 3, 2001) (copy of decision included in Exhibit A in Appendix of Additional Authorities). In that case, plaintiffs brought an action against HUD and various entities that owned low-income housing projects to enjoin those entities from prepaying their mortgages and selling their HUD subsidized housing projects. A key issue of the litigation was whether Section 4122 of LIHPRHA preempts a state statute that requires owners of low-income multiple family dwellings to give notice and a right of first refusal to interested parties prior to selling the property. The court focused on the fact that the owners had never been subject to an approved plan of action under LIHPRHA and for that reason could not now assert that Section 4122 preempts the local notice requirements:

> In the matter at bar, the Owners were never involved in the LIHPRHA Preservation Program, and never operated under the LIHPRHA plan of action. Rather, the prepayment scheme followed by the Owners is that embodied in HOPE, permitting mortgage prepayment without HUD approval, rather than LIHPRHA with its restrictions. Given the above, the court concludes that the preemption provision of LIHPHRA, 12 U.S.C. § 4122, does not govern and thus does not preempt the California notice and right of first refusal statutes.
>
> *Kenneth Arms Tenant Association v. Martinez*, No S-01-832 LKK/JFM, at 19 (U.S. Dist. Ct., E. Dist. filed July 3, 2001).

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[2]Beginning in 1996, Congress began reducing funding for LIHPRHA and permitting owners of covered projects to prepay their subsidized loans. Pub. L. No. 104-120, §§ 2(b), 110 Stat. 834 (Mar. 28, 1996); Pub. L. No. 104-134, §§ 101(e), Title II, paragraph entitled Annual Contributions for Assisted Housing, 110 Stat. 1321 (Apr. 26, 1996) ($624 million); Pub. L. No. 104-204, 110 Stat. 2874 (Sept. 26, 1996) ($350 million to fund primarily transfers); Pub. L. No. 105-65, 111 Stat. 1343, 1355-56 (Oct. 27, 1997) (no preservation funding, only $10 million for transaction costs); Pub. L. No. 105-276 (Oct. 21, 1998) (no funds); Pub. L. No. 106-74, 113 Stat. 1047 (Oct. 20, 1999) (no funds); Pub. L. No. 106-377, 114 Stat. 1441 (Oct. 27, 2000) (no funds). All of these statutes are included in Exhibit B in the Appendix of Additional Authorities.

With respect to the preemption issue, the present litigation presents virtually the same facts as those in *Kenneth Arms Tenants Association*. Plaintiff applied for and received initial approval of a plan of action but due to the "de-funding" of LIHPRHA that plan of action was never carried out: "TOPA's plan of action, thus, was never funded and TOPA did not receive the increased rents and other incentives approved by HUD under LIHPRHA." (Plaintiff's Brief at p. 5, lines 25-26). Because plaintiff's plan of action was never implemented, plaintiff was not able to participate in the LIHPRHA program. Accordingly, when plaintiff prepaid its mortgage on January 22, 1998, it did not do so as part of the LIHPRHA program. Instead, it prepaid under the authority granted by HOPE:

> On March 28, 1996, Congress passed the Housing Opportunity Extension Act of 1996 ("HOPE") which completely lifted all of LIHPRHA's restrictions on prepayment. Because *Congress was unable to fund LIHPRHA incentives, including TOPA's Title VI plan of action*, TOPA gave notice and prepaid its Section 236 mortgage on January 22, 1998 under HOPE and exited the Federal program.

(Plaintiff's Brief at p. 5, line 27 to p. 6, line 3) (emphasis added).

Thus, having never operated under the LIHPRHA program, and having prepaid its mortgage under the authority granted by HOPE, plaintiff cannot now utilize preemptive powers of Section 4122.

B. Subsection (b) of Section 4122 Explicitly Exempts Local Rent Control Laws of General Applicability From The Scope of Section 4122.

By adding subsection (b) to 4122, Congress explicitly placed local rent control laws of general applicability **outside** Section 4122's scope of preemption. (12 U.S.C. § 4122(b)). The language of subsection (b) vividly illuminates the intent of Congress to shield local laws of general application from potential over extension of the preemption power of Section 4122. When the statute is read as a whole, the balance sought by Congress is evident. On one hand, state and local laws that directly target prepayment rights are preempted. But, on the other hand, state and local laws of general applicability remain in force.

Without a doubt, LARSO is a local rent control law of general applicability that falls within the Subsection (b) exemption. LARSO applies to a broad range of rental property in the City: "All dwelling units,

efficiency dwelling units, guest rooms, and suites, as defined in Section 12.03 of this Code, and all housing accommodations as defined in Government Code Section 12927, and duplexes and condominiums in the City of Los Angeles rented or offered for rent for living or dwelling purposes . . . ." (LARSO, Exh. E of Complaint, p. 62). But the ordinance also contains specific exemptions from its rent stabilization provisions for certain types of properties, including: single family dwellings (but not duplexes or condominiums), hotels, government operated or exempted, new construction, and luxury housing accomodations. In short, LARSO's rent stabilization provisions generally apply to all commercial rental units in the City that were in place when the original ordinance was adopted in 1979. In fact, if Morton Gardens had not been part of the National Housing Program at that time it too would have been subject to LARSO. (Richman Decl. at ¶5).

It is troubling how plaintiff has ignored the effect of Subsection (b), as if ignoring it will make it go away. The head in the sand defense only works for ostriches.

C. Under Conflict Preemption Principles, Section 4122 of LIHPRHA Does Not Preempt Local Rent Control Ordinances Of General Application Such As LARSO.

Plaintiff concedes that only implied preemption -- as opposed to express preemption -- would be possible under the present facts. Plaintiff further concedes that of the different types of implied preemption, the only type that could conceivably apply here is the form of "conflict preemption" where "the state law would be an obstacle to the accomplishment of the full purposes and objectives of Congress." *Sayles Hydro Assoc. v. Maughan*, 985 F. 2d 451, 455 (1993); Plaintiff's Brief at p.10.

To find conflict preemption, the United States Supreme Court has devised two tests. The first test asks whether it is physically possible to simultaneously comply with both the federal law and with the state or local law. If such dual compliance is impossible, a finding of conflict preemption may be justified. Plaintiff does not argue that such is the case here: it certainly is possible for owners of low-income housing projects to pre-pay their mortgages and exit the federal housing program, while at the same time comply with local rent control laws.

This leaves the second test for conflict preemption as the only possible means for plaintiff to justify implied preemption. This second test requires a court to make two very difficult findings: (1) that Congress intended for the purpose at issue to be a paramount purpose of the federal law, *and* (2) that the local law indeed conflicts with that paramount purpose.

Applied here, this test requires plaintiff to demonstrate that the following are true:

- that a paramount purpose of LIHPRHA was to protect property owners' ability to prepay their mortgages, and
- that the 1990 amendments to LARSO actually conflict with that federal purpose.

(1) The First Part Of The Conflict Preemption Test Is Not Satisfied Because Protecting The Ability Of Owners To Prepay Was Not A Paramount Purpose Of Congress In Adopting LIHPRHA.

The threshold question thus becomes: Did Congress intend for owners' ability to prepay their mortgages to be a paramount purpose of LIHPRHA? The answer is no. This is made evident by looking at the legislative history not only of LIHPRHA, but also of its predecessor statute, ELIPHA, and at the political and social environment in which these measures were passed.

When the federal housing programs started in the 1960's, most owners of low-income housing projects took out 30 or 40 year loans with effective interest rates of 1 or 2%. Although the loan contracts and HUD provisions authorized owners to fully prepay these loans after twenty years, at the time twenty years seemed too far in the future to worry about. But by the late 1980's many of these projects were approaching the twenty year mark.

As word spread that a significant number of owners were considering prepaying their loans and leaving the housing programs, Congress put in place a stop gap measure in 1987 – ELIPHA[3] – which temporarily restricted owners' ability to prepay their mortgages. Three years later, Congress passed LIHPRHA, which was to provide financial incentives to entice owners from leaving the low-income housing programs. The financial incentives were to be distributed via "plans of action" entered into between HUD and individual owners. If HUD failed to fund an approved plan of action, the owner was allowed by the statute to prepay the owner's mortgage and leave the housing program.

Permitting owners to prepay in limited circumstances was one of the tools used to implement the low-income housing programs but was never an integral purpose of the legislation supporting those programs. Nowhere in the myriad pieces of legislation that governed plaintiff's subsidized housing project is there mention of owners' prepayment rights as a fundamental (or even subsidiary) purpose behind that legislation. Not in the National Housing Act. Not in LIHPRHA. Not even in HOPE. Furthermore, the structure of LIHPRHA itself shows that Congress' primary emphasis was on encouraging owners to enter into and comply with plans of

[3] 12 U.S.C.A. Sec. 1715l (note) § 221 (West 1989).

action. Thus, prepayment was an option of last resort. In fact, given that the original impetus for LIHPRHA was to **stop** a potentially massive number of prepayments, it would be nonsensical to now identify preservation of the right to prepay as a paramount purpose of LIHPRHA.

Rather, the overriding purpose of LIHPRHA was to protect **tenants** of low-income projects who would be evicted from their homes if their landlords were able to prepay their mortgages and leave the federal housing program. Any subsidiary effects of LIHPRHA -- such as restoration of owners' right to prepay -- flowed from the overarching purpose to preserve housing stock and protect tenants.

With respect to the conflict preemption test, the Supreme Court has been reluctant to find that a federal law's paramount purpose is disturbed by state law to the extent that the state law interferes with the "full purposes and objectives of Congress". This reluctance is exemplified in *CTS Corporation v. Dynamics Corp*., 481 U.S. 69, 107 S. Ct. 1637, 95 L. Ed. 2d 67 (1987). In that case, the Court upheld an Indiana law which had the effect of severely limiting hostile corporate takeovers. Applying a conflict preemption test, the Supreme Court considered whether the state statute was preempted because it was an obstacle to theWilliams Act's purpose: to strike a balance between the interests of offerors and target companies. Despite the apparent conflict between state and federal law, the Court refused to rule in favor of preemption. The Court concluded that the purpose of the state law was to "protect the independent shareholder against both contending parties." The Court further concluded that this state purpose would not upset the balance sought in the Williams Act and thus there was no need for preemption.

Another example of the Court's reluctance to find conflict preemption appears in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), *rehearing denied* 439 U.S. 884, 99 S. Ct. 232, 58 L. Ed. 2d 200 (1978). In *Exxon Corp.*, a Maryland statute prohibited oil producers from operating retail gas service stations within the state and required them to give temporary price reductions uniformly to all stations they supplied. Holding that the Congressional expression of policy favoring vigorous competition found in the Clayton Act and the Robinson-Patman Act did not preempt the Maryland law, the Court explained that it would take more than a generalized conflict of this type to preempt the state statute:

> This is merely another way of stating that the Maryland statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act -- our "charter of economic liberty."

> Nevertheless, this sort of conflict cannot itself constitute a sufficient reason for invalidating the Maryland statute. For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the State's power to engage in economic regulation would be effectively destroyed.

437 U.S. at 133, 98 S.Ct. at 2218-19 (internal citation omitted).

Plaintiff relies on *Gade v. National Solid Wastes Management Association*, 505 U.S. 88 (1992). In *Gade*, the Court was asked whether OSHA regulations that specified detailed training requirements for employees engaged in hazardous waste operations preempted Illinois law which required licensing of hazardous waste operators and laborers working at hazardous waste sites.

While the *Gade* Court did find conflict preemption under the facts before it, the Court was also quick to note that state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and nonworkers alike would not be preempted. According to the Court, although some laws of general applicability may have a "direct and substantial" effect on worker safety, they cannot fairly be characterized as "occupational" standards, because they regulate workers simply as members of the public. 505 U.S. at 107.

There is a key difference between *Gade* and the facts here. In *Gade*, the structure and language of the federal statute made it apparent that the federal statute's purpose was to exclude a broad range of concurrent state regulation -- thus, preemption was upheld. By stark contrast, LIHPRHA was intended to invalidate only a tiny group of state and local laws. Therefore, preemption through LIHPRHA is to be generally disallowed.

As proof that the Congressional purpose of LIHPRHA was to protect owner's prepayment rights, plaintiff repeatedly cites to statements made by Charles Edson and Steve Bartlett. Mr. Edson's statements, in particular, are simply biased comments made on behalf of a property owners' group for which he served as legal counsel. There is no additional evidence offered to show that individual legislators, or Congress as a whole, took note of Edson's statements in drafting and amending Section 4122. For example, plaintiff used this Edson quote to support its argument that local laws should be preempted: "Once a Federal solution is arrived at we should then preempt specifically the State laws that are coming into this area that are putting greater

restrictions on owners." (Plaintiff's Brief at p. 5, lines 8-9). This quote sheds no light on the Congressional intent behind Section 4122. Even if the statement had been made by one of the legislators, the only meaning that could fairly be attributed to it would be that Congress intended for Section 4122 to preempt certain state laws that are enacted to put greater restrictions on owners. But the quote would still offer no insight into the deeper issue of what types of state laws are to be prohibited.

On the other hand, the intent of Congress **can** be gleaned from statements made by the principal authors and sponsors of federal legislation; in the case of LIHPRHA, these being Congressmen Carper, Hoagland, and Price. As set forth in the City's Brief, each of these legislators made comments on the House floor or in Committee that demonstrated their opinion that subsection (b) was added to Section 4122 for the purpose of protecting local laws of general application from preemption by LIHPRHA. (City's Brief at p. 11-13). The positions of individual legislators are strong evidence of Congressional intent where those legislators were authors of the bill and no other interpretation of the statutory language was offered during the legislative process. *Rudolph v. Steinhardt*, 721 F.2d 1324, 1330 (1983).

(2) The Second Part Of The Conflict Preemption Test Is Not Satisfied: The 1990 Amendments To LARSO Merely Clarify The Effect Of A Pre-Existing Statutory Scheme And Thus Are Not Subject To Preemption.

Plaintiff has put itself in a bind. It knows that the pre-1990 LARSO was without doubt a rent control law of general application. Furthermore, plaintiff knows that the pre-1990 LARSO was in force prior to the enactment of LIHPRHA and so could not have targeted any prepayment rights granted by LIHPRHA.

For these reasons, plaintiff has been forced to identify some aspect of LARSO that *does* conceivably conflict with Section 4122 of LIHPRHA. The only iteration of LARSO that plaintiff can point to for this purpose are the 1990 Amendments to LARSO. But the 1990 Amendments were not substantive in nature, nor were they targeted at owners prepayment rights. Instead, the 1990 Amendments simply clarified the meaning of the local legislative scheme already in place: that LARSO applied to all non-exempt properties in the City, including properties that have exited federal housing programs.

A look at the actual language added by the 1990 Amendments confirms their clarifying nature. The key provision of LARSO in this regard is Section 151.02 Subsection M, which is a definition of the term "Rental Units". This definition is important because any unit that falls within it is subject to LARSO's rent restrictions. But Section 151.02 Subsection M also lists several types of units that are specifically exempted from

the definition of the term "Rental Units". Even before 1990, federally subsidized housing projects such as Morton Gardens were included as number five in this list:

> 5. Housing accommodations which a government unit, agency or authority owns, operates, or manages, or which are specifically exempted from municipal rent regulation by state or federal law or administrative regulation, or as to which rental assistance is paid pursuant to 24 CFR 882 ("HUD Section 8 Federal Rent Subsidy Program").
>
> (LARSO, Exhibit C of Appendix of Additional Authorities).

Prior to the 1990 Amendments, staff of the City's Housing Department performed an administrative interpretation of this provision. Staff first noted that this provision expressly exempts government assisted housing from the rental restrictions of LARSO. Staff then reasoned that once a unit no longer fell into this category, that unit would become subject to LARSO's rental restrictions. (Richman Decl. at ¶6).

At this point, staff was of the opinion that a clarifying amendment to LARSO would be helpful in properly addressing situations involving former government-assisted units. To make clear that these types of units would become subject to LARSO as soon as government assistance ended, the 1990 Amendments added a short sentence at the end of Section 151.02 Subsection M: "This exception shall not apply once the governmental ownership, operation, management regulation or rental assistance is discontinued." (City of Los Angeles Ordinance No. 166320, Section 2, Exh. B of Appendix of Additional Authorities).

As further proof of their nature, the 1990 Amendments contain an express statement that they are meant only to clarify existing law and *not* to make substantive changes:

> Sec. 4. STATEMENT OF INTENT. The amendments to Sections 151.02 and 151.06 of the Rent Stabilization Ordinance are not intended as substantive changes in the law. The purpose of the amendments and additions is to clarify what has always been the intent of the City Council that: (1) rental units which were exempt from the provisions of the Rent Stabilization Ordinance because they were regulated unites under federal, state or local programs immediately become subject to the provisions of the Ordinance upon termination of regulatory agreements; and (2) such units are not subject to "vacancy

decontrol" during the transitionary period.

(Sec. 4 of 1990 Amendments to LARSO, Exhibit E to Complaint at p. 53).

The staff report accompanying the 1990 Amendments also notes that the Amendments simply clarified existing law: "The City has always held that any units not explicitly exempted from the RSO are covered by it . . . ." (Exhibit E to Complaint at p. 45).

Plaintiff attaches exaggerated significance to the statements by City leaders in connection with the adoption of the 1990 Amendment. In general, these statements speak of why it is important to preserve the large amount of the City's affordable housing stock that may be lost as affordable housing projects leave federal housing programs. But in terms of ascribing a certain intent behind the passage of the 1990 Amendments, these statements have no significance. First, as explained earlier, the 1990 Amendments were enacted to clarify the effect of already existing law and thus the Amendments themselves have no substantive effect. This being the case, the miscellaneous statements made by council members have no meaning other than to explain why they thought it was important to clarify the existing law.

By formalizing the clarification of LARSO, the City sought uniformity and fairness in the application of the rent stabilization law. The matter could have ended with the City's Housing Department's administrative interpretation of LARSO. That approach would have been entirely defensible in light of the deference given to a city's administrative interpretation of its own ordinances. *Carson Harbor Village, Ltd. v. City of Carson Rent Control Board*, 70 Cal. App. 4th 281, 82 Cal. Rptr. 2d 569 (1999) (local rent control board's interpretation of a city's rent control law entitled to great weight).

No less deference should be given to the City's actions here simply because the City chose to formalize its administrative interpretation in the form of the 1990 Amendments. A careful look at the wording of those "amendments" makes it evident that the City Council was not making substantive changes to the statute but instead simply issuing a clarifying pronouncement that would be widely accessible to the public. Also, what better body to interpret the true meaning of an ordinance than the body that originally enacted the ordinance?

In return, plaintiff may argue that the City Council – by adopting the 1990 Amendments – in effect "re-adopted" the entire LARSO, including those provisions of it that may affect the pre-payment rights of owners. This would be a somewhat clever argument, but one that loses its force in light of the fact that there was

no need to "re-adopt" LARSO in 1990. At that time, LARSO was already fully in place and would have had the same effect on properties exiting the HUD programs, with or without the 1990 Amendments. In the end, the inevitable conclusion must be the same: the 1990 Amendments merely clarified existing law, and, for that reason, cannot be preempted by LIHPRHA.

(3) Even If The Entire LARSO Statute Had Been Adopted After The Passage Of LIHPRHA, There Would Still Be No Conflict Preemption Because LARSO Is A Local Law Of General Application Specifically Exempted From Preemption By 4122(b).

As explained in the plaintiff's Brief and touched upon above, Section 4122 would not preempt LARSO even if the entire LARSO statute had been adopted **after** the passage of LIHPHRA. The reason for this conclusion is that LARSO helps preserve affordable housing and is thus in harmony with the paramount purpose of LIHPRHA, which is also to preserve affordable housing. But even assuming for the sake of argument that the paramount purpose of LIHPRHA was to protect owners' prepayment rights, LARSO would still not be impliedly preempted due to the fact that LARSO is a local rent control law of general application that has no effect on owners' ability to prepay. 12 U.S.C. § 4122(b).

V.

CONCLUSION

Implied preemption is exceedingly rare, and for good reason. It impinges upon state sovereignty and raises separation of powers concerns. Where there is any doubt about the preemptive effect of a federal law, the proper role for courts is to defer to the legislative branch. Our elected officials can then do their job by amending the law in question to leave no doubt about its true intent.

For the foregoing reasons, the City respectfully requests that the Court find that Section 4122 of LIHPRHA does not preempt the 1990 Amendments to LARSO.

Dated: July 23, 2001

Respectfully submitted,
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