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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)** **JOINT BRIEF ON ISSUE OF PREEMPTION** Hearing Date: Time: Courtroom: Judge: The Honorable George H. King

INTRODUCTION

Before the issue of preemption can be reached, plaintiff must first prove that it has a right of action to bring this lawsuit:

- A plaintiff may bring suit to enforce the provisions of federal legislation only if that legislation grants to plaintiff an express or implied right of action. Did Congress intend to grant a right of action to property owners to sue regarding the preemptive effect of section 232 of LIHPRHA upon a local rent control

ordinance despite the fact that LIHPRHA's purpose is to protect tenants, not property owners?

Even if plaintiff can pass the right of action hurdle, the issue of preemption must be addressed:

- Does section 232 of LIHPRHA preempt the City's local rent control ordinance despite the fact that subsection(b) of section 232 expressly allows local rent control ordinances to remain in force so long as they are laws of general application?
- Congress terminated funding for LIHPRA's implementation in 1996 and authorized prepayment of housing program loans without following the criteria and procedures set forth in LIHPRA. In making LIHPRHA inoperable, did Congress intend for a lone provision of that Act -- section 232 -- to remain in force for the purpose of preempting the exercise of local police powers?

In addition, plaintiff's complaint raises a statute of limitations issue:

- Is plaintiff's challenge to a local rent control ordinance based on a federal preemption argument barred by the one-year section statute of limitations that applies to suits to redress constitutional wrongs?

FACTS

In 1979, plaintiff entered into a regulatory agreement to develop much needed affordable housing under the auspices of HUD, as authorized by the National Housing Act. Complaint, p.4, lines 9-16. In connection with that program, plaintiffs received a low-interest, HUD-backed, 40-year loan and used the money to develop the Morton Gardens apartment complex. Complaint p. 4, lines 17-22. As a condition of receiving that favorable loan, plaintiff agreed to maintain rents in its apartment complex at HUD-approved rates sufficient to cover the subsidized debt service and operating expenses during the life of the loan. Complaint p. 4, lines 9-16. Under the terms of the form contracts and federal regulations in effect at the time, most property owners participating in the program were allowed to prepay their loans after the loans' 20th anniversary and leave the program, along with its rental restrictions. Complaint p. 4-5, lines 28-7.

Starting in the mid 1980's, a sizable number of property owners sought to pay off their loans early so that they could leave the housing program. To help protect tenants who would be unduly affected by such action, Congress adopted the "Emergency Low Income Housing Preservation Act of 1987 ("ELIHPA"), 12 U.S.C. 1715l (1987) and, later, the "Low Income Housing Preservation and Resident Homeownership Act of 1990" ("LIHPRHA"), 12 U.S.C. 1401 *et seq*. These Acts created a process for either of the following to occur: (1) HUD would provide financial incentives for property owners to keep their property in the HUD housing program or (2) HUD would oversee an owner's application for prepayment of the owner's loan under strict procedures

and criteria set forth in the Acts.

LIHPRHA's process required property owners to submit a plan of action that requested additional financial incentives to stay in the housing program or permission to prepay the loan and leave the program. Each plan of action had to be reviewed and approved by HUD.

In 1997 and 1998, Congress cut off funding for the LIHPRHA implementation program and passed new statutes that allowed owners to prepay their loans without having to submit a plan of action. Pub. L. No. 105-65, 111 Stat. 1343, 1355-56 (Oct. 27, 1997); Pub. L. No. 105-276, Sec. 219, 112 Stat. 246 (Oct. 21, 1998). Plaintiff paid off its loan in 1998, which freed the Morton Gardens apartment complex from HUD's rental caps. Complaint, p. 9, lines 15-16.

But plaintiff now argues that its apartment complex should be exempt from local rent control due to the preemptive effect of section 232 of LIHPRHA. This argument is insupportable because of express language in subsection(b) of section 232 to the contrary. This argument also defies common sense. Once plaintiff's apartment complex was freed from the constraints of the HUD housing program, fairness dictates that the apartment complex be subject to the same local rent control law as all other similarly situated properties.

ARGUMENT

1. Plaintiffs Complaint Is Barred Because Plaintiff Has No Right Of Action To Challenge The Low Income Housing Preservation And Resident Homeownership Act Of 1990.

If LIHPRHA provides no right of action in favor of plaintiff, plaintiff's case can go no further. Nothing in the text of LIHPRHA creates an express right of action to enforce its mandates, so plaintiff has the burden of establishing an implied right of action.

Whether to imply a private right of action is purely a matter of statutory construction, which requires consideration of four factors:

1. Is the plaintiff one of the class for whose special benefit the statute was enacted, that is, does the statute create a federal right in favor of the plaintiff?
2. Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one?
3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?
4. Is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L.Ed. 2d. 26 (1975).

If the first two factors do not support implying a private right of action, the court's inquiry ends there. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979). Those two factors thus become of paramount importance.

The first factor, whether the legislation was intended to provide a right of action in favor of plaintiff, is not met. The purpose of LIHPRHA was to provide direction to HUD in reviewing withdrawals of rental properties from HUD-sponsored loan programs. The underlying purpose of the Act and the review program it set in place was to protect **tenants** of such rental properties from overly rapid increases in their rental rates, and, in many cases, economic-based eviction. The Act nowhere states as its purpose the protection of **owners** of rental properties. Thus, plaintiff -- an owner of rental property -- was not in a class for whose benefit the Act was adopted.

The second factor, whether there is any legislative intent to create a remedy in favor of plaintiff, is also not met. This test has been applied in a long line of federal cases, the most recent being an April 24, 2001, decision handed down by the Supreme Court: *Alexander v. Sandoval*, Lexsee 2001 US Lexis 3367. In *Alexander*, the Court emphasized that the determination of legislative intent rests upon careful review of the statute: "The search for Congress's intent in this case begins and ends with Title VI's text and structure." *Alexander*, Lexsee 2001 US Lexis 3367 at *1.

The language of LIHPRHA indicates no intent on Congress's part to provide a remedy for aggrieved owners of rental property. As explained above, the Act sets up a process whereby HUD officials can require property owners to submit a plan of action requesting financial incentives to stay in the housing program or requesting permission to prepay the loan and leave the housing program. In determining whether a plan of action conforms with these criteria, HUD is empowered by the Act to promulgate regulations developing internal procedures for making this determination.

If Congress has provided a "remedy" for property owners, it is only the ability to submit a plan of action for approval by HUD.

Moreover, plaintiff does not challenge the enforcement of LIHPRHA itself, but instead attempts to use a provision of LIHPRHA to invalidate a local rent control ordinance. Congress did not intend to grant a right of

action to property owners to enforce LIHPRHA, and most certainly did not intend to grant a right of action to property owners to challenge local law based on preemption by a provision of LIHPRHA.

Any preemptive effect of LIHPRHA must be kept in its proper perspective. LIHPRHA is a comprehensive piece of legislation that was designed for the sole purpose of protecting tenants of properties in HUD housing programs. At first blush it might appear that the language in section 232 -- that preempts local laws specifically targeted at preventing owners from prepaying their loans -- was intended to benefit property owners. But this is not the case. Protecting property owners from these local laws provided them with incentive to participate in the LIHPRHA process and keep as many eligible properties as possible from leaving the housing programs. By preserving affordable housing stock, the ultimate benefit from the Act thus accrued to tenants.

The *Alexander* Court also reminds us that no affirmative evidence is necessary to support a court's decision against an implied right of action, rather the burden is on plaintiff to provide affirmative evidence in support of such a right. *Alexander*, Lexsee 2001 US Lexis 3367 at *9, n. 8. As discussed above, plaintiff will be unable to provide affirmative evidence of this nature due to the fact that, as discussed above, nothing in the text or structure of LIHPRHA evidences Congressional intent to provide a private right of action in that Act.

Even if plaintiff were able to satisfy the first two factors of the right of action test, the final two factors would still not be met. The third factor – whether an implied remedy is consistent with the underlying purpose of the Act – is not met. As explained earlier, the primary underlying purpose of LIHPRA was to protect tenants from negative impacts resulting from a rush of property owners exiting the HUD housing program. Allowing property owners an implied right of action to enforce section 232 would thus run counter to the Act's carefully balanced program to preserve the supply of affordable housing by providing additional financial incentives to owners.

The fourth factor – whether the cause of action is traditionally relegated to state law – is also not met. Through the present suit, plaintiff seeks to invalidate a local rent control ordinance. The proper forum for doing this is state court. Even if Congress **had** granted to plaintiff a right of action to enforce LIHPRHA, Congress did not intend for that right of action to encompass a challenge to a local rent control of general application. As pointed out above, subsection(b) of section 232 expressly allows local rent control ordinances of general application to remain in effect despite any preemptive effect of section 232.

In short, all four factors of the implied right of action test boil down to one essential question: did

Congress intend for such a right of action to exist for the benefit of property owners such as plaintiff? The answer is, most assuredly, no. If Congress had intended for such a right of action to exist, it would have expressed this intent either in the language or the structure of the statute.

2. Section 232 Of LIHPRHA Does Not Preempt The Los Angeles Rent Control Ordinance.

To support its argument that Section 232 preempts LARSO, plaintiff conveniently cites to only section 232(a) of LIHPRHA. But this approach is disingenuous in that it completely ignores the expression of Congressional intent in section 232(b) of LIHPRHA,[1] or its legislative history. The language of section 232(b) conclusively demonstrates that Congress did not intend to preempt state and local legislation unless such legislation specifically targets LIHPRHA-eligible properties.

Plaintiff also relies heavily on *Cienega Gardens v. The United States*, 38 Fed. Cl.64 (1997) (*Cienega III*) to support its assertion that Congress intended for section 232 of LIHPRHA to preempt local rent control. But plaintiff's reliance is misplaced because *Cienega III* has been overturned and thus can no longer provide binding precedent on this point. *Cienega Gardens v. United States*, 194 F.3d 1231 (1998). Even if *Cienega III* had not been overturned, plaintiff's reliance would still be misplaced due to the fact that the preemption issue was discussed only in dicta and the court never fully explored the issue by considering the language in the other half of section 232: section 232(b).

To place plaintiff's preemption claim in context, it should also be noted that lawsuits similar to the present suit have already been brought in other states and that the outcome of this litigation has the potential to impact the lives of hundreds, if not thousands, of persons who live in jurisdictions subject to local rent control and stabilization laws. Examples of other pending suits involving similar preemption issues are included in Exhibit 1.

A. Read In Its Entirety, The Language Of LIHPRHA Does Not Preempt State Or Local Laws Of General Applicability Such As LARSO.

As required by the Supremacy Clause of the United States Constitution, federal law preempts inconsistent state or local law. Const. art VI, sec. 2, cl. 2. Preemption applies in the following circumstances:

C "Explicit preemption" where the language of a federal statute expressly provides, or the federal scheme is

[1] 12 U.S.C. § 4122(b).

so pervasive as to foreclose any inference of room left for state supplementation. *See e.g. Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 120 L. Ed. 2d 73, 112 S. Ct. 2374 (1992).

- "Field preemption" where the federal interest is deemed so dominant as to preclude supplemental state regulation. *See e.g. Gade*, 505 U.S. 98-99.
- "Conflict preemption" where state legislation or regulation presents a serious obstacle to the fulfillment of the purposes and objectives of a federal program. *See e.g. Gade*, 505 U.S. at 98.

The third test is the most appropriate to apply in the present instance. Plaintiff contends that the Los Angeles Rent Stabilization Ordinance ("LARSO") is preempted by section 232(a)(1) of LIHPRHA. Section 232(a)(1) prohibits a city from establishing any law that restricts or inhibits the prepayment of mortgages that fall under LIHPRHA:

> "[n]o State or political subdivision of a State may establish, continue in effect, or enforce any law or regulation that-- (1) restricts or inhibits the prepayment of any mortgage described in section 4119(1) of this title (or the voluntary termination of any insurance contract pursuant to section 1715t of this title) on eligible low income housing..."
>
> 12 U.S.C. § 4122(a)(1)(Exhibit 2).

This reading of section 232, however, deceptively overlooks key language in the statute: Section 232(b), which explicitly addresses the question of preemption of local rent control.

Section 232(a)(1) was originally included in the House version of the bill described in the June 21, 1990, Report of the Committee on Banking, Finance and Urban Affairs, H.R.Rep. No. 101-559, 101st Cong., 2d Sess., at 78 (1990).

After the issuance of that Committee Report, however, section 232 was amended on the House floor to include a new subsection -- section 232(b). Section 232(b) explicitly **allows local rent control laws to remain in force** so long as they are not inconsistent with the provisions of the Act and are of general applicability:

> This section [section 232]shall not prevent the establishment, continuing in effect, or enforcement of any law or regulation of any State or political subdivision of a State not inconsistent with the provisions of this subtitle, such as any law or regulation relating to building standards, zoning limitations, health, safety, or

> habitability standards for housing, rent control, or conversion of rental housing to condominium or cooperative ownership, to the extent such law or regulation is of general applicability to both housing receiving Federal assistance and nonassisted housing.
>
> 12 U.S.C. § 4122(b) (emphasis added) (Exhibit 3).

Section 232(b) is a safe harbor provision designed to ensure that important state and local laws of general applicability remain in effect to protect tenants in LIHPRHA developments, notwithstanding the provisions of section 232(a).

In the July 31, 1990, House floor debates, Congressman Carper, one of the sponsors of the amendment that became section 232(b), explained that section 232(b) was intended to clarify Congress' intent in section 232, and to ensure that owners of prepayment properties did not receive any special advantages because of the preemption provisions in section 232(a):

> [W]e believe in our committee print that we have preempted too many State and local laws. We have given certain privileges and certain rights to the owners of these affected properties that they do not deserve, and our amendment simply says that the owners of these properties will face those special burdens if they prepay. By the same token, they will have no special advantages.
>
> 136 Cong. Rec. H6053-01, H6180.

Congressman Hoagland, also sponsoring the amendment that became section 232(b), described it as "narrow[ing] the State and local law preemption language in the bill so that only the State and local laws that contradict this statute will be preempted." 136 Cong. Rec. H6053-01, H6183. Congressman Price, another sponsor, explained that section 232(b) "clarifies the current preemption language in the bill to make certain that local zoning, rent control, and other laws are not overridden." 136 Cong. Rec., H6053-01, H6182 (emphasis added) (Exhibit 4).

The House-Senate Conference Committee adopted the amendment proposed by Carper, Hoagland and Price. The subsequent Conference Report language on LIHPRHA, as amended, illustrates what Congress intended in section 232(b) when it provided that state and local laws would not be preempted "to the extent such law or regulation is of general applicability to both housing receiving Federal assistance and nonassisted housing." The Conference Report explained that "[LIHPRHA] would preempt State and local laws that target only prepayment projects for special treatment. Laws applicable to both assisted and nonassisted housing would be in

full force." H.R. Conf. Rep. No. 943, 101st Cong., 2d Sess. 458, 460 (1990), reprinted in 1990 U.S.C.C.A.N. 6070, 6165 (emphasis added)(Exhibit 5). Thus, so long as a state or local law applies to more than just LIHPRHA-eligible housing, section 232(b) clarifies that the local law is not preempted.

HUD's subsequent legal interpretation of section 232(b) has been consistent with Congress' clear position to leave intact state and local laws of general applicability. In its legal opinion analyzing whether the City of Boston's Rental Housing Equity Ordinance was "generally applicable" within the meaning of section 232(b) and section 213(c) of LIHPRHA, 12 U.S.C. § 4103(c), HUD concluded that a state or local law is generally applicable--and therefore not preempted--as long as it does not specifically target LIHPRHA-eligible housing. See February 24, 1994, Memorandum from David R. Cooper, HUD Assistant General Counsel, Multifamily Mortgage Division, to Patricia P. Allen, Associate Regional Counsel (Exhibit 6).

B. The Los Angeles Rent Stabilization Ordinance Is An Ordinance Of General Applicability Within The Meaning Of Section 232(b) Of LIHPRHA.

LARSO is a local ordinance of general applicability within the meaning of section 232(b) of LIHPRHA. LARSO was added to the Los Angeles Municipal Code nearly twenty years ago in 1979 in response to a housing crisis that reached a peak in the summer of 1978. LARSO, section 151.01 ("Declaration of Purpose") (Complaint, Exh. E). The City faced "a shortage of decent, safe and sanitary housing in the City of Los Angeles... [that] had a detrimental effect on substantial numbers of tenants in the City, especially creating hardships on senior citizens, persons on fixed incomes and low and moderate income tenants." *Id*. To protect its vulnerable tenants, the City imposed controls on rents in a wide range of multifamily rental dwelling units. The maximum rent was set initially at the rent in effect in the month of April, 1979, with provision for periodic increases. LARSO section 151.02 (Complaint, Exh. E). In 1980, the Ordinance was amended to add a vacancy decontrol provision, allowing owners to increase rents when rental units were vacated voluntarily or because of an eviction based on specified grounds. LARSO, section 151.06 (Complaint, Exh. E).

From its inception, LARSO exempted from regulation "[h]ousing 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 Rental Subsidy Program')." LARSO section 151.02, subdivision 5 to

definition of "Rental Units". In addition to federally-subsidized, privately-owned multifamily developments subject to LIHPRHA, this exemption encompassed a wide range of housing for which federal regulations specifically preempted local rent control for HUD-subsidized mortgages:

- public housing;
- student housing owned by public universities;
- units with tenant-based or project-based section 8 rental subsidies;
- properties owned by HUD, the state, or city after a mortgage or tax foreclosure;
- properties with federally-insured, unsubsidized mortgages not subject to LIHPRHA, where the owner obtained a specific rent control preemption from HUD pursuant to 24 C.F.R. § 246.4-246.12. This "government owned, operated, or regulated" exemption from rent control was temporary, existing only during the period of government ownership or regulation.

In 1990, the Los Angeles City Council was faced with the prospect of up to 20,000 units of federal housing suddenly becoming subject to LARSO upon the expiration of the temporary federal moratorium on prepayments in ELIHPA,[2] if owners were to prepay their federal mortgages and the basis for the properties' exemption under section 151.02 of LARSO were to be lost. The City Council promulgated certain amendments to the Ordinance which were "not intended as substantive changes in the law...," but were intended "to clarify what has always been the intent of the City Council"--that rental units which were exempt from LARSO only because of their governmental involvement would become subject to LARSO upon termination of governmental regulation, and that "such units are not subject to 'vacancy decontrol' during the transitionary period." City of Los Angeles Ordinance No. 166320, section 4, October 17, 1990 (Complaint, Exh. E, p. 54).

The language changes brought about by the 1990 amendments applied to all units that were previously exempt from rent control under subdivision 5 of the definition of "Rental Units" in section 151.02 but had now lost that exemption. In addition to owners of LIHPRHA-eligible properties prepaying their mortgages, the 1990 amendments covered a wide range of housing circumstances. Examples of this wide range included:

- Student housing sold by a public university and converted to non-student housing.
- Public housing sold as private housing by the housing authority.
- Units sold by HUD, the state of California or the City of Los Angeles after a foreclosure.

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[2]12 U.S.C. 1715l (1987).

- Units in a development with federal insurance but without a subsidized mortgage (and thus not LIHPRHA-eligible) after prepayment of the mortgage or termination of the insurance.

- Units occupied by tenants with tenant-based or project-based section 8 subsidies after termination of the section 8 contract or other loss of the subsidy.

LARSO and its 1990 amendments thus apply to much more than just LIHPRHA-eligible housing. Because LARSO, as amended, does not target formerly HUD-financed housing for regulation, it meets the criterion for a local law of "general applicability" under LIHPRHA, and is not preempted.

C. LIHPRHA Was Impliedly Repealed When Congress Cut Off Funding For The HUD Oversight Program Set Up By LIHPRHA.

There are three categories of properties subject to affordable rent restrictions:

1. Property that is part of a “regular” HUD housing program and subject to federal affordable rent restrictions as part of that program (24 C.F.R. part 246).

2. Property that was part of a “regular” HUD housing program and is now subject to a plan of action under LIPHRA that includes federal affordable rent restrictions.

3. Property where the HUD-backed mortgage has been prepaid in full and the property is now subject to local rent control laws.

Enacted in 1990, LIHPRHA set up a comprehensive scheme for regulating the process by which property owners could prepay their HUD-backed mortgages and be freed from the rent caps that were a condition of such mortgages. LIHPRHA required, among other things, that notices be given to all involved parties and that HUD approve a plan of action to oversee the property’s exit from the HUD program.

But Congress made LIHPRHA inoperative after 1998 by ceasing to fund HUD’s implementation of the Act. **[INSERT AUTHORITY --NHLP]** This lack of funds has continued since that time. Because there are no funds to implement LIHPRHA, HUD no longer operates the program authorized by that Act, including review of plans of action submitted by exiting property owners. With the effective demise of LIHPRHA, all that is now required is for a property owner to give notice of that fact and to wait 60 days after the mortgage has been paid off before raising rents. Housing Opportunities Extension Act of 1996, Pub. L. No. 104-120.

Now that LIPHRA is inoperable, any need for the preemption language in section 232 of the Act has disappeared. When the Act was adopted in 1990, that preemption language was necessary to ensure that no state or local law interfered with the Act's program for providing additional market value incentives to property owners or authorizing prepayments of mortgages under limited circumstances. Without an operable LIPHRA program in place, Congress could not have intended for any part of LIPHRA to have remained in place, including section 232.

Even assuming a need for LIHPRHA to preempt local rent control, this need would exist with respect to a particular property only during the time the property remained sought to utilize LIHPRHA's plan of action process. Once LIHPHRA became inoperable, there was no need for preemption and, thus, local rent control would apply to the newly released property – just as it does towards all other property in the city.

3. The Complaint Does Not State A Claim Upon Which Relief Can Be Granted In That It Is Barred By The Statute Of Limitations.

A. There Is No Direct Cause Of Action Under Article VI, Clause 2 Of The Constitution When A Direct Remedy Is Available Under 42 U.S.C. § 1983.

In the present instance, plaintiff challenges the validity of a local rent control ordinace based upon alleged preemption by federal legislation. Complaint, p. 1, lines 18-19. The Supreme Court and the Ninth Circuit have stated that a direct cause of action to redress a constitutional wrong is **not** available if a plaintiff has a statutory remedy. *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d. 846 (1979); *Ward v. Caulk*, 650 F.2d 1144 (9th Cir. 1981).

A statutory remedy was provided to plaintiff by 42 U.S.C. § 1983. Section 1983 redresses all forms of constitutional violations as torts, including a local ordinance challenged on the basis that it is preempted by federal law. The Ninth Circuit in *Azul-Pacifico, Inc., v. City of Los Angeles*, 973 F.2d 704 (9th Cir. 1992), involving a "takings" challenge to the City's mobilehome park rent control ordinance, held that:

> "[p]laintiff has no cause of action directly under the United States Constitution. We have previously held that a litigant complaining of a violation of a constitutional right must utilize 42 U.S.C. § 1983. [citations omitted.]" 973 F.2d at 705.

Section 1983 provides the exclusive remedy for challenging the alleged deprivation of rights, and

plaintiff's claim will be subject to Section 1983's applicable statute of limitations.

B. The Statute Of Limitations For A 42 U.S.C. § 1983 Cause Of Action Is Applicable To All Constitutional Torts.

Constitutional violations are torts. The Court in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d. 254 (1985), determined that state law governs the length of the limitations period and that a standard "broad characterization" of all § 1983 claims best fits the statute's remedial interests and furthers the "federal interest in uniformity". *Id.* at 270, 105 S.Ct. at 1944, 85 L.Ed.d. at 263. The Court concluded that all constitutional wrongs should indeed be characterized in the same way and acknowledged that "injuries to property" fall within the panoply of "potential tort analogies." *Id.* at 277, 105 S.Ct. at 1947, 85 L.Ed.d. at 267.

Wilson teaches that the nature of the claim is the same whether it is filed directly under a particular provision of the federal Constitution – in this case, the Supremacy Clause -- or asserted under 42 U.S.C. § 1983, based on the Supremacy Clause. In either case, the claim is based upon a violation of the Constitution. For this reason, the statute of limitations applicable to 42 U.S.C. § 1983 actions is applicable to plaintiff's claims.

C. The statute of limitations for plaintiff's claims accrued in 1990 when a clarifying amendment was made to LARSO and LIHPRHA was adopted.

Having established that the statute of limitations applicable to 42 U.S.C. § 1983 claims is the proper one to apply here, the issue becomes: when did the statute of limitations begin to run? *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d. 1084 (9th Cir. 1991) is instructive. *De Anza* dealt with a challenge to the county's mobilehome park rent control ordinance. There the court held that the statute of limitations began to run when the challenged ordinance was adopted. The plaintiffs tried to avoid the statute of limitations by saying that their cause of action accrued when the ordinance was amended. The court responded:

> "[t]he flaw in this theory is that the provision of the ordinance which they challenge has remained exactly the same since [its enactment]. The conduct of the county has thus remained exactly the same at all times material to this case, and the effect of the ordinance upon the plaintiffs has not altered. . . . They were on notice that their property interests would be affected by the ordinance at the time it was enacted."
>
> 936 F.d. at 1086.

The statute of limitations began to run in late 1990, when LIHPRHA was enacted. During that same time period, LARSO was amended to clarify that it applied to all properties in the City, even those that had formerly been subject to HUD-imposed rent restrictions. Complaint, p. 6, lines 14-19. At this juncture, it should have been apparent to plaintiff that there was potential conflict between section 232 of LIHPRHA -- which proscribes

local laws that interfere with the prepayment process -- and LARSO.

Even assuming that constructive notice of the conflict cannot be ascribed to plaintiff, plaintiff was given actual notice of the conflict by a letter addressed to it from the City Housing Department dated December 29, 1997 (Exhibit 7).

Having established that the cause of action in the instant case accrued when LARSO was enacted, the next inquiry is: what is the length of the limitations period? In this regard, the *De Anza* court stated:

> "Under *Wilson v. Garcia* [citation omitted], the statute of limitations for all section 1983 claims in California is now one year. Prior to *Wilson v. Garcia*, we held that the statute of limitations for California for section 1983 suits was three years." 936 F.2d. at 1085.

Under *Wilson*, a one-year statute of limitations would apply to the 1990 date.[3] Thus, the applicable statute of limitations in 1991.

Plaintiff did not, however, file its complaint until last year – approximately 9 years after expiration of the limitations period applicable to the 1990 amendment. Therefore, the complaint is barred by the statute of limitations.

CONCLUSION

- LIHPRHA does not provide plaintiff with an implied right of action.
- The express language of section 232(b) shows that Congress did not intend for the Act to preempt local rent control ordinances of general application, such as LARSO.
- Because LIHPRHA has been impliedly repealed, it can have no preemptive effect upon LARSO.
- The one-year statute of limitations applicable to plaintiff's constitutionally-based claims has expired.

Dated: June 1, 2001 Respectfully submitted,

JAMES K. HAHN, City Attorney
CLAUDIA McGEE HENRY,
Senior Assistant City Attorney
SHARON SIEDORF CARDENAS,
Assistant City Attorney
CARMEN D. HAWKINS,
Deputy City Attorney

[3]". . .[T]he applicable statute of limitations is 'either three years from the time the cause of action arises or one year from *Wilson*, depending upon which period expires first.'" *Usher v. City of Los Angeles*, 828 F.2d. 556, 561 (9th Cir. 1987).

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By _____
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Attorneys for Defendant
CITY OF LOS ANGELES

(139416)

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PROOF OF SERVICE BY MAIL

I, the Undersigned, say:

I am over the age of eighteen (18) years and not a party to the within action or proceeding. My business address is 1800 City Hall East, 200 North Main Street, Los Angeles, California 90012-4130.

On June 1, 2001, I served the within:

JOINT BRIEF ON ISSUE OF PREEMPTION

[CV 00-10455 GHK (RNBx)]

on the person(s) indicated below, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid and addressed as follows:

Susan S. Azad, Esq.
Kathryn Davis, Esq.
Latham & Watkins
633 West Fifth Street, Suite 4000
Los Angeles, California 90071-2007
[Attorneys for Plaintiff]

[XX] - Federal - I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

On June 1, 2001, at my office at the address stated above, I placed such envelope(s) for collection and mailing on such date following the ordinary business practices for the Office of the City Attorney and the City of Los Angeles. I am "readily familiar" with the practice of my office for collection and processing of correspondence for mailing with the United States Postal Service. Under that practice, such correspondence would be deposited with the United States Postal Service on the same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 1st day of June 2001, at Los Angeles, California.

_____
ZENIA RIVERA ALMOZARA

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RUSH ____

U.S. DISTRICT COURT CASE NO. CV 00-10455 GHK (RNBx)

DUE DATE: June 1, 2001

TOPA EQUITIES LTD. vs. CITY OF L.A. FEE DUE ___ FEE PAID ____

FILE THE ATTACHED DOCUMENTS, DESCRIBED BELOW:
JOINT BRIEF ON ISSUE OF PREEMPTION

SPECIAL INSTRUCTIONS:

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Full Name:	AGE:
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Home Address:	Home Phone:
Description of Case:	Date:

Date: June 1, 2001	Attorney's Name/Secretary's Initials: KENNETH FONG/Zenia	Extension: X52025

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