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June 21, 2001

The Honorable Lawrence K. Karlton
Chief Judge, Emeritus
United States District Court
501 I Street, Suite 15-200
Sacramento, CA 95814


Re: Kenneth Arms, et al. v. HUD, et al.
CIV-S-01-832 LKK/JFM

Dear Judge Karlton:

Pursuant to the Court's request, attached is the letter brief addressing LIHPRHA and its preemption provision. This letter is also to advise the Court and counsel that I will be on vacation from June 23, 2001 through July 8, 2001. If during that time period the Court has any questions or needs additional information, please contact Clare Harrigan at HUD's Office of General Counsel (202-708-0300 x. 5102), or contact Edmund Brennan in the U.S. Attorney's Office at 916-554-2766.

Sincerely,

JOHN K. VINCENT
United States Attorney


KENDALL J. NEWMAN
Assistant U.S. Attorney

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U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-0500

OFFICE OF THE GENERAL COUNSEL

June 21, 2001

The Honorable Lawrence K. Karlton
Chief Judge, Emeritus
United States District Court
501 I Street, Suite 15-200
Sacramento, CA 95814

Re: Kenneth Arma, et al. v. HUD, et al.
CIV-S-01-832 LKK/JFM

Dear Judge Karlton:

As requested by the Court, this letter provides background on: the history of the LIHPRHA statute; the Preservation Program LIHPRHA created to safeguard the affordable housing stock; the current status of the Preservation Program; and the applicability of the preemption section of LIHPRHA, 12 U.S.C. § 4122. In 1934, Congress enacted the National Housing Act ("NHA") "[t]o encourage improvement in housing standards and conditions, to provide a system of mutual mortgage insurance, and for other purposes." Ch. 847, preamble, 48 Stat. 1246 (1934). Under the NHA, Congress authorized creation of the Federal Housing Administration ("FHA") and established a national housing program supported by federal mortgage insurance.

The NHA has been amended frequently due to changes in national housing needs and policy. During the 1950s and 1960s, Congress amended the NHA to encourage private developers to construct, own, and manage housing projects for low- and moderate-income families. To implement that legislation, Congress authorized first the FHA and later HUD¹ to provide mortgage insurance to enable private lending institutions to provide low-interest mortgages to housing developers. As detailed in HUD's Opposition Brief, the four properties involved in this litigation have insured mortgages under Section 236 of the NHA, 12 U.S.C. § 1715z-1(c). Historically, the repayment term on 236 mortgages was generally forty years, however, owners were permitted to prepay the loan in full, without HUD approval, after twenty years.

¹ In 1965, the functions of the FHA, headed by the Federal Housing Commissioner, were transferred to, and subsumed by, HUD, which is headed by the Secretary of Housing and Urban Development. See 42 U.S.C. § 3534(a) (1994); 24 C.F.R. §§ 200.1-200.4 (2000).

In the late 1980s, concerned that owners of many housing projects might soon choose to prepay HUD-insured loans, potentially resulting in a shortage of low-income rental housing, Congress enacted the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1877 (1988) (pertinent parts reprinted at 12 U.S.C. § 17151 note (1989)) ("ELIHPA"). ELIHPA temporarily prohibited prepayment of certain mortgage loans without HUD approval. It provided that owners of "eligible low income housing" "may prepay, and a mortgagee may accept prepayment of a mortgage on such housing only in accordance with a plan of action approved by the Secretary." *Id.*, at § 221(a).

Under ELIHPA, an owner of "eligible low income housing" seeking to prepay a HUD-insured mortgage initially was required to file with HUD a "notice of intent" and, after receiving certain information from HUD, a "plan of action." *Id.*, at §§ 222, 223. Before approving a plan of action that involved termination of "low income affordability restrictions,"² ELIHPA required that HUD make findings that implementation of the plan of action would not adversely affect current tenants and that the supply of vacant, comparable housing would be sufficient to ensure that prepayment would not materially affect the availability of decent, safe, and sanitary housing affordable to low-income persons in the housing market served by the owner's project. *Id.* at § 225(a).

Effective on November 28, 1990, Congress replaced ELIHPA with the Low-Income Housing Preservation and Resident Homeownership Act of 1990, Pub. L. No. 101-625, 104 Stat. 4249 (1990) (codified at 12 U.S.C. §§ 4101, *et seq.*) ("LIHPRHA"), enacted as title VI of the Cranston-Gonzalez National Affordable Housing Act. One of the purposes of this legislation was "to retain wherever feasible as housing affordable to low-income families those dwelling units produced for such purpose with Federal assistance." *Id.*, at § 103(2).

LIHPRHA extended the prohibition upon prepayment without HUD approval. It provided that owners of "eligible low-income housing," "may prepay, and a mortgagee may accept prepayment of, a mortgage on such housing only in accordance with a plan of action approved by the Secretary under [LIHPRHA] or in accordance with [12 U.S.C. § 4114]." 12 U.S.C. § 4101(a) (1994). LIHPRHA provided that "[a]ny prepayment of a mortgage on eligible low-income housing or termination of the mortgage insurance on such housing not in compliance with the provisions of [LIHPRHA] shall be null and void and any low-income affordability restrictions on the housing shall continue to apply to the housing." *Id.*, at § 4101 (c).

² "Low income affordability restrictions" meant "limits imposed by regulation or regulatory agreement on tenant rents, rent contributions, or income eligibility in eligible low income housing." ELIHPA, § 233(2).

Under LIHPRHA, an owner of eligible low-income housing desiring to prepay the mortgage initially was required to file with HUD a "notice of intent" and, after receiving certain information from HUD, a "plan of action." 12 U.S.C. § 4102(a) (1994). The plan of action may include financial incentives to the owner, if the owner agreed to continue to operate under the low-income affordability restrictions for the remainder of the useful life of the property. 12 U.S.C. §§ 4109, 4112. As in the case of ELIHPA, before approving a plan of action that involved termination of the low-income affordability restrictions through prepayment of the mortgage, LIHPRHA required that HUD find that implementation of the plan of action would not adversely affect current tenants and that the supply of vacant, comparable housing would be sufficient to ensure that prepayment would not materially affect the availability of decent, safe, and sanitary housing affordable to low-income persons in the housing market served by the owner's project. *Id.*, at § 4108(a). LIHPRHA provided that "[a] written finding under [section 4108(a)] shall be based on an analysis of the evidence considered by the Secretary in reaching such finding and shall contain documentation of such evidence," and it required that the Secretary develop "a procedure for determining whether the conditions under paragraphs (1) and (2) of [12 U.S.C. § 4108(a)] exist" and requirements for evidence and the criteria upon which such determinations are based. *Id.*, at § 4108(b). If the Secretary could not make the necessary findings, LIHPRHA required that the Secretary disapprove a plan of action to prepay, and it provided that the owner's notice of intent to prepay would not have any legal effect. *Id.* at § 4108(c).

On March 28, 1996, the Housing Opportunity Program Extension Act of 1996 ("HOPE") was enacted.³ Although this legislation did not formally repeal LIHPRHA, it permitted mortgage prepayment without HUD's approval, and, thus, termination of affordability restrictions imposed upon the project, provided only that the owner agreed not to increase project rents for a period of 60 days after prepayment. It also provided that the "Secretary shall suspend further processing of preservation applications which do not have approved plans of action."

In addition, as detailed in the plaintiffs' Reply Brief at page 14, in 1996, Congress began to significantly reduce the funding appropriated under LIHPRHA to pay for financial incentives to owners and no funding at all has been appropriated for incentives for new plans of action since 1998. Even though LIHPRHA has never been repealed by Congress, because HUD does not have authority to accept new preservation applications or to enter into new plans of action, it has continued to implement and enforce the provisions of LIHPRHA only as to those owners who were in the program prior to the passage of HOPE in 1996.

³ Pub. L. No. 104-120, § 2, 110 Stat. 834 (referring to provisions of H.R. 2099, 104th Cong., 1st Sess. (1995), as passed by the House of Representatives on Dec. 7, 1995); 141 Cong. Rec. H14112, H14113 (daily ed. Dec. 6, 1995) (amendment numbered 16); 141 Cong. Rec. H14187-H14203 (daily ed. Dec. 7, 1995) (adopting conference report).

The presumption provision in LIHPRHA at Section 232, 12 U.S.C. § 4122, was intended to afford protection to owners of properties that were, or are, operating under the LIHPRHA Preservation Program. The owners of the four projects involved in this litigation never entered into a LIHPRHA plan of action. Section 4122 (b) states that the section "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 subchapter." Thus, a state law could not be inconsistent with the provisions of LIHPRHA for an owner who was never involved in the LIHPRHA Preservation Program and never operated under a LIHPRHA plan of action.

We hope this letter addresses all of the Court's concerns. If you have any further questions, please contact me at (202) 708-0614 ext. 5102 or Assistant United States Attorney Kendall Newman at (916) 554-2821.

Sincerely,



Clare Harrigan
Senior Trial Attorney