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REPORT TO THE HONORABLE MAYOR AND COUNCILMEMBERS

TENANT INCOME NON-DISCRIMINATION ORDINANCE: PREEMPTION ISSUES

INTRODUCTION

On July 31, 2018, the San Diego City Council (Council) will consider an ordinance that would prohibit landlords from discriminating against tenants solely because they receive federal Housing Choice Voucher Program (Section 8) benefits or similar rental assistance (San Diego Source of Income Discrimination Ordinance).The proposed San Diego Source of Income Discrimination Ordinance is modeled after an ordinance that was adopted by the City and County of San Francisco in 1998. Since the proposed ordinance is based on both state and federal law, we reviewed whether it is preempted.The ordinance would be preempted, and therefore void, if it conflicts with state or federal law. Based on a recent court decision regarding the San Francisco ordinance and federal law, this Office believes the proposed ordinance would survive a preemption challenge.[1]

BACKGROUND

The proposed ordinance is intended to prohibit discrimination based on a tenant's Section 8 status. Congress created the Section 8 program to "aid[ ] low-income families in obtaining a decent place to live" and to "promot[e] economically mixed housing." 42 U.S.C. § 1437f, subd. (a). The Program is funded by the United States Department of Housing and Urban Development (HUD) and administered by state and local public housing authorities (PHAs) in accordance with HUD regulations. Families or individuals who wish to receive Section 8 housing vouchers must apply through their local PHA, which screens prospective participants for eligibility, issues vouchers, and contracts with landlords to pay directly to the landlord a portion of the tenant's rent each month. In San Diego, the PHA is the San Diego Housing Commission.

[1] This Report to Council is specifically intended to address potential preemption challenges, and is not intended to as a comprehensive analysis of all possible legal challenges.We would be happy to provide further analysis if the Council has other legal questions.

DISCUSSION

I. THE ORDINANCE WOULD LIKELY SURVIVE A STATE PREEMPTION CHALLENGE

Local legislation may be preempted, and therefore void, if it conflicts with state law. *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 (1993). "A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. [Citations.]" *Id*. (internal quotation marks omitted). Because California law already regulates tenant discrimination based on "source of income" to some degree, it is possible that a party could bring a legal challenge against the proposed ordinance on preemption grounds.However, we believe the proposed ordinance would survive such a challenge based on a recent court decision in San Francisco, discussed below.

In 1998, the San Francisco Board of Supervisors passed an ordinance that outlawed housing discrimination based on a person's "source of income," a term defined broadly by the Board of Supervisors to include government rent subsidies such as Section 8 and similar housing voucher programs. In 1999, the California Legislature also expanded the state's Fair Employment and Housing Act (FEHA) to prohibit discrimination based on a tenant's "source of income," but the Legislature defined the term narrowly, so that it does not reach government rent subsidies such as Section 8.[2]

In October 2015, the San Francisco City Attorney filed a lawsuit alleging that a landlord's actions violated the San Francisco ordinance because the landlord advertised multiple apartments online and each advertisement stated that the landlord would not accept Section 8 vouchers. The landlord demurred on the ground that FEHA preempts San Francisco's source-of-income provision, but the trial court overruled the demurrer.In May 2016, the trial court granted San Francisco an injunction to prevent the landlord from continuing to discriminate against participants in the Section 8 program, finding that San Francisco was likely to succeed on the merits and that a preliminary injunction was necessary to prevent irreparable harm while the case was pending. The landlord appealed. *City & Cnty. of San Francisco v. Post*, 22 Cal. App. 5th 121 (2018), review denied (July 11, 2018). The appellate court found that San Francisco's ordinance does not overlap with FEHA's anti-discrimination provision, has a different purpose than the FEHA, and therefore is neither expressly nor impliedly preempted by the FEHA. *Id.* at 136-37.

The San Diego Source of Income Discrimination Ordinance is modeled closely after San Francisco's ordinance.While the ordinances are not identical, they are very similar in language and intent. We therefore believe that the San Diego Source of Income Discrimination Ordinance is defensible against a claim of state preemption.[3]

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[2] FEHA defines "source of income" as "lawful, verifiable income paid directly to a tenant or paid to a representative of a tenant. For the purposes of this section, a landlord is not considered a representative of a tenant." Cal. Gov't Code § 12955, subd. (p)(1).

[3] The City of Santa Monica Municipal Code contains a similar ordinance prohibiting landlords from discriminating against a person's source of income.The trial court found that the ordinance was not preempted by state or federal law.

II. THE ORDINANCE WOULD LIKELY SURVIVE A FEDERAL PREEMPTION CHALLENGE

Section 8 is a federal program and many cities throughout the country have adopted local ordinances similar to the San Diego Source of Income Discrimination Ordinance.A number of those local ordinances have been challenged on federal preemption grounds.However, HUD regulations implementing Section 8 specifically provide that the federal statutes creating it are not intended "to pre-empt operation of State and local laws that prohibit discrimination against a Section 8 voucher-holder because of status as a Section 8 voucher-holder." 24 C.F.R. § 982.53(d).Furthermore, courts have routinely rejected arguments alleging federal preemption of such local ordinances. *See Bourbeau v. Jonathan Woodner Co.*, 549 F. Supp. 2d 78, 88–89 (2008); *Montgomery Cnty. v. Glenmont Hills Assocs. Privacy World*, 402 Md. 250, 936 A. 2d 325, 336 (2007); *Franklin Tower One, L.L.C. v. N.M.*, 157 N.J. 602, 725 A. 2d 1104, 1113 (1999); *Comm'n on Human Rights & Opportunities v. Sullivan Assocs.*, 250 Conn. 763, 739 A. 2d 238, 246 (1999).

Based on HUD regulations and the relevant case law, we believe that the San Diego Source of Income Discrimination Ordinance is defensible against a claim of federal preemption.

CONCLUSION

Based on recent court decisions regarding local ordinances similar to the proposed San Diego Source of Income Discrimination Ordinance, we believe a challenge based on state or federal preemption grounds is defensible.

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