Rent Stabilization Board
Legal Department

MEMORANDUM

DATE: September 13, 2011

TO: Honorable Members of the Eviction/Section 8/Foreclosure Committee

FROM: Chanee Franklin Minor

SUBJECT: Tenant Anti-Harassment Ordinance

Background

San Francisco voters passed Proposition M (Prop. M) in November 2008 (San Francisco Rent Ordinance §37.10B) in order to prevent tenant harassment. Prop. M augmented the anti-harassment provisions of the existing ordinance by expanding the definition of "decrease in housing services" to include a list of "bad faith" acts by landlords and their agents – ranging from failure to exercise due diligence in making repairs, to failing to cash a rent check within 30 days, to interfering with a tenant's right to privacy. Prop. M granted the San Francisco Rent Board the authority to award tenants a reduction in rent as damages for Prop. M violations. The new law also included a provision whereby all tenants prevailing in unlawful detainer actions would be awarded attorney's fees against the landlord. (Section 37.10B(c)(6).)

Shortly after it was voted into law, San Francisco landlords challenged Prop. M in court. In February 2011, the California Court of Appeal in *Larson v. City and County of San Francisco*, 192 Cal.App. 4th 1263 (2011), held that many provisions in Prop. M were unconstitutional. Specifically, the court ruled that the tenant-only attorney's fee provision was unconstitutional in violation of equal protection rights and held that certain provisions authorizing the Rent Board to award tenants rent reductions as damages for Prop. M violations were invalid under the judicial powers clause. The Court of Appeal also held unconstitutional as violative of free speech rights a provision which prohibited landlords from continuing to offer tenants payment to vacate after tenants provide written notification that they do not wish to receive further offers. After *Larson*, the Rent Board's jurisdiction was essentially limited to the domain it already occupied before the proposition was enacted.

In light of the new law, the Commissioners of this committee requested that legal staff prepare a memorandum examining the consequences of the court's decision in *Larson.* Additionally, the commissioners requested information on various anti-discrimination ordinances throughout the state and a detailed explanation of the anti-harassment protections already present in the Berkeley Rent Ordinance.

Issues

1. In light of the *Larson* decision, how have the courts limited anti-harassment provisions as they relate to rent board jurisdiction to grant relief for violations of a city's anti-harassment legislation?

2. What provisions, if any, currently exist in the Berkeley Rent Ordinance to protect tenants against landlord harassment?

Conclusions

1. The *Larson* decision limited the power of the rent board to matters which were already within its authority. While the Rent Board may award a rent reduction on the grounds of habitability defects and other quantifiable restitutive damages; after *Larson,* it may not award damages in the form of a rent reduction for tenant harassment claims. This is within the sole power of the courts.

2. The Board adopted Regulation 1013 to implement Costa Hawkins and regulate vacancy rent adjustments. Under Berkeley Law, tenant harassment is discussed only within this context. Board Regulation 1013(G) specifically prohibits harassing behavior that forces tenants from their homes; thus removing the monetary incentive to create new vacancies. Berkeley law does not provide a private cause of action for tenant harassment claims.

Analysis

1. The Effects of *Larson v. City and County of San Francisco* on the Rent Board's Ability to Adjudicate Issues Concerning Tenant Anti-Harassment

The first inquiry concerns the effects of the California Court of Appeal decision in *Larson v. City and County of San Francisco* on the Rent Board's authority to grant relief to victims of tenant harassment. San Francisco is not the only rent control jurisdiction to enact tenant anti-harassment provisions. Santa Monica and West Hollywood both have passed similar ordinances. In Berkeley, tenant anti-harassment provisions are included in the Rent Board Regulations. However, the approach taken by San Francisco in Prop. M was a marked contrast to the approach taken by other municipalities.

While the other rent control jurisdictions have prohibited certain actions by landlords aimed at dislodging tenants in order to increase rents to market rates, only San Francisco deems such conduct to constitute a "decrease in housing service" for which the Rent Board can order a

reduction in rent. In Berkeley, for example, the Board only has the authority to prohibit a landlord from raising the rent of a controlled unit if the tenant vacated due to harassment. (Board Regulation 1013.) In West Hollywood, anti-harassment provisions are included in the rent ordinance but enforcement and the imposition of penalties are within the sole authority of the court. (W. Hollywood Mun. Code. §17.52.090.) Santa Monica's prohibitions against tenant harassment are incorporated in the Public Welfare, Morals and Policy provisions of the municipal code. (Santa Monica Mun. Code §4.56.) The City Attorney, not the Rent Board, oversees its enforcement and is empowered to seek injunctive relief. (Santa Monica Mun. Code §4.56.040.)

San Francisco Rent Ordinance Section 37.10B

Section 37.10B as originally enacted in Prop. M puts forth fifteen prohibited acts and states:

(a) No landlord, and no agent, contractor, subcontractor or employee of the landlord shall do any of the following in bad faith or with ulterior motive or without honest intent:

(1) Interrupt, terminate, or fail to provide housing services required by contract or by State, County or local housing, health, or safety laws;

(2) Fail to perform repairs and maintenance required by contract or by State, County or local housing, health or safety laws;

(3) Fail to exercise due diligence in completing repairs and maintenance once undertaken or fail to follow appropriate industry repair, containment or remediation protocols designed to minimize exposure to noise, dust, lead paint, mold, asbestos, or other building materials with potentially harmful health impacts;

(4) Abuse the landlord's right of access into a rental housing unit as that right is provided by law;

(5) Influence or attempt to influence a tenant to vacate a rental housing unit through fraud, intimidation, or coercion;

(6) Attempt to coerce the tenant to vacate with offer(s) of payment to vacate which are accompanied with threats or intimidation;

(7) Continue to offer payments to vacate after tenant has notified the landlord in writing they no longer wish to receive further offers of payment to vacate;

(8) Threaten the tenants, by word or gesture, with physical harm;

(9) Violate any law which prohibits discrimination based on actual or perceived race, gender, sexual preference, sexual orientation, ethnic background, nationality, place of birth, immigration or citizenship status, religion, age, parenthood, marriage, pregnancy,

disability, AIDS or occupancy by a minor child;

(10) Interfere with a tenant's right to quiet use and enjoyment of a rental housing unit as that right is defined by California law;

(11) Refuse to accept or acknowledge receipt of a tenant's lawful rent payment;

(12) Refuse to cash a rent check for over 30 days;

(13) Interfere with a tenant's right to privacy;

(14) Request information that violates a tenant's right to privacy; including but not limited to residence or citizenship status or social security number;

(15) Other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace, or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause, are likely to cause, or intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy." (San Francisco Rent Ordinance §37.10B(a)(1)-(15), as written prior to the *Larson* decision.)

(b) Nothing in this Section 37.10B shall be construed as to prevent the lawful eviction of a tenant by appropriate legal means.

(c) Enforcement and penalties.

(1) Rent Board. Violation of this Section 37.10B is a substantial and significant decrease in services as defined in Section 37.2(g) and tenants may file a petition with the Rent Board for a reduction in rent.

(2) Criminal Penalty. Any person who is convicted of violating this Section shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not greater than one thousand dollars or by imprisonment in the County Jail for not more than six months, or by both such fine and imprisonment.

(3) Civil Action. Any person, including the City, may enforce the provisions of this Section by means of a civil action. The burden of proof in such cases shall be preponderance of the evidence. A violation of this Chapter may be asserted as an affirmative defense in an unlawful detainer action.

(4) Injunction. Any person who commits an act, proposes to commit an act, or engages in any pattern and practice which violates this Section 37.10B may be enjoined there from by any court of competent jurisdiction. An action for injunction under this subsection may be brought by an aggrieved person, by the City Attorney, or by any person or entity who will fairly and adequately represent the interest of the protected class.

(5) Penalties and Other Monetary Awards. Any person who violates or aids or incites another person to violate the provisions of this Section is liable for each and every such offense for money damages of not less than three times actual damages suffered by an aggrieved party (including damages for mental or emotional distress), or for statutory damages in the sum of one thousand dollars, whichever is greater, and whatever other relief the court deems appropriate. In the case of an award of damages for mental or emotional distress, said award shall only be trebled if the trier of fact finds that the landlord acted in knowing violation of or in reckless disregard of Section 37.9, 37.10A, or 37.10B herein. In addition, a prevailing plaintiff shall be entitled to reasonable attorney's fees and costs pursuant to order of the court. The trier of fact may also award punitive damages to any plaintiff, including the City, in a proper case as defined by Civil Code Section 3294. The remedies available under this Section shall be in addition to any other existing remedies which may be available to the tenant or the City.

(6) Defending Eviction Lawsuits. In any action to recover possession of a rental unit subject to the Chapter, unless the sole basis of the notice to quit is Section 37.9(b), the court shall award the tenant reasonable attorney fees and costs incurred in defending the action upon a finding that the tenant is the prevailing party under Code of Civil Procedure Section 1032(a)(4).

(d) Severability. If any provision or clause of this Section 37.10B, or Section 37.2(g), or the application thereof to any person or circumstance is held to be unconstitutional or to be otherwise invalid by any court of competent jurisdiction, such invalidity shall not affect other provisions of this Section 37.10B or Section 37.2(g) and all clauses of these Sections are declared to be severable.

The Constitutionality of Prop. M: *Larson v. City and County of San Francisco*

In *Larson v. City and County of San Francisco*, 192 Cal.App. 4th 1263 (2011), San Francisco landlords and real estate agents challenged provisions of Prop. M on numerous grounds, arguing that the expanded decrease in housing services provisions violated the judicial powers clause of the California Constitution and infringed on constitutionally protected speech rights. Further, they claimed that the tenant-only attorney fees provision was a violation of equal protection rights.

The trial court upheld the decrease in services provision of Prop. M, but invalidated the attorney's fees provision. On appeal, the First District Court of Appeal affirmed the trial court's ruling that tenant-only attorney's fees provision was unconstitutional in violation of equal protection rights, but reversed the trial court's decision that had affirmed Prop. M's granting of authority to the Rent Board to award tenants reduction in rent as damages for Prop. M violations. (37.10(c)(1).) Specifically, the court held that subdivisions (a)(4) through (15) were facially invalid. Finally, the Court of Appeal held unconstitutional as a violation of free speech rights, section 37.10B(a)(7) in its entirety, which had prohibited landlords from continuing to offer tenants payments to vacate after tenants provide written notification that they do not wish to receive further offers.

A. The Judicial Powers Clause: Standard of Review

Opponents of Prop. M argued that the proposition unlawfully invested the San Francisco Rent Board with judicial power in violation of the judicial powers clause of the Constitution. Specifically, they argued that the expanded definition of decrease in housing services combined with the authority of the Board to order reduction in rent of an unspecified amount and an unspecified duration invests the Board with the power reserved to the judiciary to adjudicate tortuous conduct and award general damages. The *Larson* Court agreed in part, holding that while the Rent Board may award quantifiable damages for violations of section 37.10B subdivisions (a)(1)-(3), it may not award damages for harassment claims for violations of section 37.10B subdivisions (a)(4)-(15). (Larson v. City and County of San Francisco, (2011) 192 Cal.App.4th 1263, 1283.)

Article VI, section 1 of the California Constitution provides: "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts..." (Cal. Const., art. VI, § 1.) "Agencies not vested by the Constitution with judicial powers may not exercise such powers." (McHugh v. Santa Monica Rent Control Board (1989), 49 Cal.3d 348, 356.)

In *McHugh,* the Supreme Court set out the standard for evaluating judicial powers challenges to challenges to adjudicatory administrative action. "An administrative agency may hold hearings, determine facts, apply the law to those facts, and order relief - including certain types of monetary relief – so long as (i) such activities are authorized by statute or legislation and are reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes, and (ii) the essential judicial power (i.e., the power to make enforceable, binding judgments) remains ultimately in the courts, through review of agency determinations." (*Id.* at p. 372.)

Under the judicial powers clause, administrative agencies may award restitutive damages to an injured claimant. (Walnut Creek Manor v. Fair Employment and Housing Commission (1991) 54 Cal.3d 245, 284.) Restitutive damages are quantifiable amounts of money due to an injured private party from another party to compensate for monetary loss resulting directly from the second party's violation of the law. (*Id.* at p. 263.) For example, rent decreases based on a decrease in housing service is a form of restitutive damages. Since these services were used in the first instance to justify the rent charged, their removal for an extended period of time warrants a reduction in the rent. (Ocean Park Associates v. Santa Monica Rent Control Bd. (2004) 114 Cal.App.4th 1050, 1069.) The financial loss is easy to quantify and an award of damages for the loss is within the permissible purview of the Rent Board. (*Ibid.*)

Prop. M however, granted the San Francisco Rent Board the power to award compensatory damages for violations of the ordinance. Courts do not require proof of financial loss when awarding general compensatory damage for emotional distress. (Walnut Creek Manor v. Fair Employment and Housing Commission, *supra* at p. 263) The courts have generally prohibited administrative agencies form awarding compensatory damages. Because administrative agencies have little guidance in placing a dollar value on a complainant's mental and emotional injuries, the award of such damages is a judicial function and not within the power

of a board or commission. (*Ibid.*)

B. Section 37.10B subdivision a(1)-(3)

Subdivisions (a)(1), (2), and (3) concern "bad faith" interruption, termination or failure to "provide housing services," and failure to perform maintenance and repairs. (Sec. 37.10B subds. (a)(1)-(3).) Prop. M authorized the San Francisco Rent Board to award rent reductions for violations of these provisions. In essence, this was not a marked change from the existing law. Under the original rent ordinance, tenants could file a decrease in services petition with the Rent Board for habitability defects. Essentially, this portion of the Prop. M legislation enumerated powers already within the Board's jurisdiction. The *Larson* court upheld subdivisions (a)(1) through (3) stating that they concerned "matters which ordinarily would produce a quantifiable, pecuniary loss and, thus, a rent reduction that is 'restitutive.'" (Larson v. City and County of San Francisco, (2011) 192 Cal.App.4th 1263, 1281.) In effect, the Court recognized that such matters were "already within the ambit of the other decrease in services provisions of the Rent Ordinance." (*Ibid.*)

C. Section 37.10B subdivision (a)(4)-(15)

The Court held that subdivisions (a)(4) through (15) are vastly different from subdivisions (a)(1) – (3) of section 37.10B. Specifically, the acts prohibited under these provisions would result in a loss that has no direct nexus to the contract rent. Here, the tenant's harm is a loss of emotional well-being, thus any rent reduction under subdivisions (a)(4) through (15) would be "nonquantifiable and nonrestitutive in character." (*Id.*) For example, it would be difficult for the rent board to measure the tenant's financial loss for claims that the landlord has "abuse[d] the landlord's right of access," or has interfered with the tenants "right to privacy" or attempted "to influence a tenant to vacate…through fraud, intimidation or coercion." (*Ibid.*)(citing, §37.10B, subds. (a)(4)-(15).) Moreover, Prop. M did not set forth any criteria for assessing such losses or translating them into a reduced rent figure. Therefore, the court held that subdivisions (a)(4) through (15) of section 37.10B were "an attempt to bypass the judicial system and impermissibly endow the Board with judicial power constitutionally reserved to the judiciary." (*Id.* at 1283.) As such, the Court held that the Rent Board could not award damages for subdivisions (a)(4) through (15) as this would violate the judicial powers clause.

Despite the *Larson* Court's decision, Section 37.10B of the Rent Ordinance remains otherwise enforceable through civil actions in superior court. After *Larson*, Section 37.10B is now much like the anti-harassment provisions in other rent controlled jurisdictions. It details the specific prohibited acts, making a clear statement to landlords that the city will not tolerate tenant harassment, but a rent board's ability to impose penalties for a violation of the section is limited. In short, the Court limited the power of the rent board to matters which were already within its authority under the original decrease in services provisions of the rent ordinance. The Court upheld the decrease in services provisions for quantifiable habitability defects but limited the Rent Board's ability to award damages in petitions for harassment based on violations of 37.10B(a)(4)-(15). Any award of a reduction in rent must be directly related to a quantifiable decrease in housing services.

2. How Berkeley Currently Deals With Tenant Harassment: Regulation 1013

A. Existing Berkeley Law

Under Berkeley Law, tenant harassment is discussed only within the context of vacancy decontrol. The Board adopted Regulation 1013 to implement Costa Hawkins and regulate vacancy rent adjustments. Regulation 1013(G) specifically prohibits harassing behavior that forces tenants from their homes; thus removing the monetary incentive to create new vacancies. If a tenant has moved as a result of being harassed by their landlord, the rent ceiling for the next tenancy will be limited to the rent of the previous tenant. The landlord will not be entitled to a Costa Hawkins rent increase.

Regulation 1013(G)(b) defines harassment as: "a knowing and willful act or course of conduct directed at a specific tenant or tenants which:

(i) would cause a reasonable person to fear the loss of use and occupancy of a residential unit or part thereof, or of any housing service...without legitimate reason or legal justification;

(ii) Materially interferes with a tenant's peaceful enjoyment of the use and occupancy of a residential rental unit."

The regulation then broadly outlines five acts of harassment:

(i) Eviction on the grounds of owner/relative occupancy which is not in good faith;

(ii) The threat or repeated threat to evict in bad faith with the intent to cause the tenant to vacate a controlled unit;

(iii) Reduction in housing services with the intent to cause the tenant to vacate a controlled unit;

(iv) Reduction in maintenance or failure to perform necessary repairs with the intent to cause the tenant to vacate a controlled unit;

(v) Abuse of landlord's right of access;

(vi) Verbal or physical abuse or intimidation. (Board Regulation 1013(G)(c).)

Unlike Santa Monica, West Hollywood, and San Francisco, Berkeley does not currently provide a state law remedy for tenant harassment.

B. The Effects of New Tenant Anti-Harassment Legislation

In light of *Larson*, the Board is somewhat limited as to what it can do to further protect tenants from harassment. The *Larson* Court made it clear that Rent Boards may not award rent

reductions or unlimited compensatory damages for harassment claims. Since the Berkeley Rent Ordinance was a voter-approved initiative, the Board has no authority to amend it – all changes must be approved by the voters in a general election. The Board may sponsor legislation that amends the ordinance to enumerate specific prohibited activities, thereby creating a vehicle for aggrieved tenants to sue in state court. As it stands, however, the Board has passed Regulation 1013(G) which already eliminates the monetary incentive for landlords to force out long-term tenants by harassment. The Board may be able to amend Regulation 1013 to expand the definition of harassment, but this will not provide any further relief to adjudicate tenant harassment claims.

Legal staff would be happy to further research this topic if the Commissioners require more information on anti-harassment legislation.