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OPINION	:	No. 86-304
of	:	OCTOBER 15, 1986
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THE HONORABLE DAVID ROBERTI, MEMBER, CALIFORNIA SENATE, has requested an opinion on the following question:

Are cities and counties required to comply with the 30-year use restriction provisions of Government Code sections 37364 and 65916 when they use federal community development block grant funds to provide housing affordable to persons of low and moderate income by (1) purchasing property from a private developer and reconveying it to him for a nominal sum or (2) purchasing an interest in the property allowing them to restrict use of the property to affordable housing?

CONCLUSION

Cities and counties are required to comply with the 30-year use restriction provisions of Government Code sections 37364 and 65916 when they use federal

community development block grant funds to provide housing affordable to persons of low and moderate income by (1) purchasing property from a private developer and reconveying it to him for a nominal sum or (2) purchasing an interest in the property allowing them to restrict use of the property to affordable housing.

ANALYSIS

Under the community development block grant program (42 U.S.C. § 5301, *et seq.;* 24 C.F.R. § 570.1, *et seq.* (1985)), federal funds are given by the United States Department of Housing and Urban Development to local communities for various purposes. Among the approved activities is the construction of housing for persons of low and moderate income. (See *Dixon v. United States* (1983) 465 U.S. 482, 486-487; 63 Ops.Cal.Atty.Gen. 445, 446 (1980).)

The question presented for analysis is whether a city or county must comply with certain state laws, specifically Government Code sections 37364 and 65916,[1] when using these federal funds for the purpose of providing affordable housing constructed and owned by a private developer. We conclude that the two state laws would be applicable in such circumstances.

Section 37364 states:

> "The Legislature reaffirms its finding that the provision of housing for all Californians is a concern of vital statewide importance. The Legislature recognizes that real property of cities can be utilized, in accordance with a city's best interests, to provide housing affordable to persons and families of low or moderate income. Therefore, notwithstanding any provision of a city's charter, or any other provision of law, whenever the legislative body of a city determines that any real property or interest therein owned by the city can be used to provide housing affordable to persons and families of low or moderate income, as defined by Section 50093 of the Health and Safety Code or as defined by the United States Department of Housing and Urban Development or its successors, and that such use is in the city's best interests, the city may sell, lease, exchange, quitclaim, convey, or otherwise dispose of such real property or interest therein at less than fair market value to provide such affordable housing under whatever terms and conditions the city deems best suited to the provision of such housing. Not less than 80 percent of the area of any parcel of property disposed of pursuant to this section shall be used for development of housing. Not less than 40 percent of the total

[1] All references hereafter to the Government Code are by section number only.

number of such housing units developed on any parcel transferred pursuant to this section shall be affordable to persons or families of low or moderate income, at least half of which shall be affordable to persons of low income. *Dwelling units produced for persons and families of low or moderate income under this section shall be restricted to remain continually affordable to such persons and families for a period of not less than 30, nor more than 40, years pursuant to a method prescribed by the city.* Such a restriction shall be contained in the instrument of conveyance of the real property subject to such restriction. The provisions of this section shall apply to all cities, including charter cities." (Emphasis added.)[2]

Section 65916 states:

"Where there is a direct financial contribution to a housing development pursuant to Section 65915 through participation in cost of infrastructure, write-down of land costs, or subsidizing the cost of

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[2] By its terms section 37364 applies only to cities. It has, however, a counterpart applicable to counties. Section 25539.4 provides:

"The Legislature recognizes that real property of counties can be utilized, in accordance with a county's best interests, to provide housing affordable to persons or families of low or moderate income. Therefore, notwithstanding any other provision of law, whenever the board of supervisors determines that any real property or interest therein owned by the county can be used to provide housing affordable to persons and families of low or moderate income, as defined by Section 50093 of the Health and Safety Code or as defined by the United States Department of Housing and Urban Development or its successors, and that such use is in the county's best interests, the county may sell, lease, exchange, quitclaim, convey, or otherwise dispose of such real property or interest therein at less than fair market value to provide such affordable housing without complying with other provisions of this article. Not less than 80 percent of the area of any parcel of property disposed of pursuant to the provisions of this section shall be used for the development of housing. Not less than 40 percent of the total number of such housing units developed on any parcel transferred pursuant to this section shall be affordable to persons or families of low or moderate income, at least half of which shall be affordable to persons of low income. *Dwelling units produced for persons and families of low or moderate income under this section shall be restricted to remain continually affordable to such persons and families for a period of not less than 30, nor more than 40, years pursuant to a method prescribed by the county.* Such a restriction shall be contained in the instrument of conveyance of the real property subject to the restriction." (Emphasis added.)

References herein to section 37364 may thus be viewed as referring to section 25539.4 with respect to a county's duties and responsibilities.

construction, *the city, county, or city and county shall assure continued availability for low and moderate-income units for 30 years.* When appropriate, the agreement provided for in Section 65915 shall specify the mechanisms and procedures necessary to carry out this section." (Emphasis added.)[3]

Are the 30-year use restrictions of the two statutes applicable to property acquired with federal funds, or may the local government and the private developer agree, for example, to a 10-year use restriction?[4] The situations given are: (1) the local government purchases the property from the developer and reconveys it for a nominal sum and (2) the local government purchases an interest in the property allowing it to restrict

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[3] Section 65915 states:

"(a) When a developer of housing agrees to construct at least (1) 25 percent of the total units of a housing development for persons and families of low or moderate income, as defined in Section 50093 of the Health and Safety Code, or (2) 10 percent of the total units of a housing development for lower-income households, as defined in Section 50079.5 of the Health and Safety Code, or (3) 50 percent of the total dwelling units of a housing development for qualifying residents, as defined in Section 51.2 of the Civil Code, a city, county, or city and county shall either (1) grant a density bonus or (2) provide other incentives of equivalent financial value.

"(b) A developer may submit to a city, county, or city and county a preliminary proposal for the development of housing pursuant to this section prior to the submittal of any formal requests for general plan amendments, zoning amendments, or subdivision map approvals. The city, county, or city and county shall, within 90 days of receipt of a written proposal, notify the housing developer in writing of the manner in which it will comply with this section. The city, county, or city and county shall establish procedures for carrying out this section, which shall include legislative body approval of the means of compliance with this section.

"(c) For the purposes of this chapter, 'density bonus' means a density increase of at least 25 percent over the otherwise maximum allowable residential density under the applicable zoning ordinance and land use element of the general plan. The density bonus shall not be included when determining the number of housing units which is equal to 10 or 25 percent of the total. The density bonus shall apply to housing developments consisting of five or more dwelling units.

"(d) If a developer agrees to construct both 25 percent of the total units for persons and families of low or moderate income and 10 percent of the total units for lower-income households, the developer is entitled to only one density bonus under this section although the city, city and county, or county may, at its discretion, grant more than one density bonus."

[4] We assume for purposes of our analysis that the proposal would comply with all federal laws and regulations.

the use of the property to affordable housing.[5] In each case, only federal funds are used to acquire the property interest in furtherance of the federal program.

A. Section 37364

Section 37364 was enacted in 1980 (Stats. 1980, ch. 861, § 2) as part of a legislative program authorizing cities and counties to sell, lease, or otherwise transfer property for the development of affordable housing (see Legis. Counsel's Dig., Assem. Bill No. 3150 (1980 Reg. Sess.)). Although the statute is basically a grant of authority, the grant is conditioned upon, among other requirements, the property being restricted to affordable housing for a minimum of 30 years.

The legislative history of section 37364 makes it clear that the statute was intended to cover the property of cities and counties acquired with federal funds. The Enrolled Bill Report prepared by the Department of Housing and Community Development (Assem. Bill No. 3150, Aug. 21, 1980) states:

> "This bill was written by Renee Franken, Consultant to the Assembly Housing Committee, at the request of Orange County. The County Counsel wanted a direct authorization to sell county lands for low income housing that could override existing conflicting provisions of law."

Orange County was the sponsor of the proposed legislation based upon the following specified need:

> "State law is currently ambiguous as to whether cities and counties, as opposed to housing authorities and redevelopment agencies, may dispose of real property without following bidding procedures established by the Government Code. This uncertainty has hampered agency efforts *to utilize Community Development Block Grant funds to write down land* to allow private developers to construct affordable housing." (H. G. Osborne, memorandum, Jan. 7, 1980, emphasis added.)

Hence, the genesis of section 37364 was the desire to use federal funds to "write down" the cost of a private developer's property through a buy and sell-back transaction in order to construct affordable housing.

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[5] For our purposes, we need not decide what type of "interest" may be obtained. (See Civ. Code, §§ 885.010-885.070; 2 Miller & Starr, Current Law of Cal. Real Estate (1977) § 15.1 *et seq*.; 10 Hagman & Maxwell, Cal. Real Estate Practice (1986) § 340.01 *et seq*.)

We find nothing in the legislative history of section 37364 to suggest that property sold by a city is to be excluded from the statutory requirements merely because the property was initially purchased with federal funds. Such exclusion would be contrary to the expressed need for the statute as well as its plain language. We must construe section 37364 in a reasonable and rational manner, avoiding absurdities and effectuating its purpose. (See *Moore v. Panish* (1982) 32 Cal. 3d 535, 541; *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal. 3d 836, 844; *Fields v. Eu* (1976) 18 Cal. 3d 322, 328.)

Normally a city or county would be required to offer its property for sale to certain governmental entities specified in section 54222. An exception is provided where the transfer is to a "housing corporation, limited dividend corporation or nonprofit corporation" for the development of low and moderate income housing. (§ 50570.) We know of no authority for a city or county to transfer property at below market value to a private (for profit) developer for the development of affordable housing without complying with the 30-year use restrictions of sections 25539.4 and 37364. Such statutory language controls the manner of disposition. (See *People v. Zamora* (1980) 28 Cal.3d 88, 98; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 242-243; 66 Ops.Cal.Atty.Gen. 120, 122-123 (1983); 57 Ops.Cal.Atty.Gen. 307, 310 (1974).)[6]

Section 37364 would thus be applicable where a city purchases real property exclusively with federal funds and reconveys it to the owner to provide housing for low and moderate income persons. Since the statute applies only to the disposition of city property and not its acquisition, section 37364 would be inapplicable in the second part of the question where a property interest is being acquired and restricted but not transferred by the city. The same would be true with respect to counties under section 25539.4.

B. Section 65916

Section 65916 was enacted in 1979 (Stats. 1979, ch. 1207, § 10) as part of a legislative program to "contribute significantly to the economic feasibility of low and moderate-income housing in proposed housing developments." (§ 65917; see Stats. 1982. ch. 1263, § 6; 63 Ops.Cal.Atty.Gen. 445, 448 (1980).) As with section 37364, this statutory scheme is basically a grant of authority—but again, with certain conditions, such as the 30-year use restriction. Is this legislation intended to cover the use of federal funds by a city or county to produce affordable housing?

[6] Cities and counties may sell residential property at below market value to low and moderate income persons on condition that the property be rehabilitated. (§§ 25539.1- 25539.2, 37362-37363.)

The 30-year use restriction of section 65916 applies where the local government has made "a direct financial contribution" to produce affordable housing. Such "contribution" is defined as "participation in cost of infrastructure, write-down of land costs, or subsidizing the cost of construction."

These financial "incentives" may be given to a developer in lieu of the "density bonus" of section 65915 (where the developer receives at least a 25 percent increase in unit density). Either the financial incentive or the density bonus must be given by the city or county when the developer produces the required number of affordable housing units specified in subdivision (a) of section 65915.

When this legislative scheme was first enacted, section 65915 stated in part:

> "When a developer of housing agrees to construct at least 25 percent of the total units of a housing development for persons and families of low or moderate income, as defined by Section 50093 of the Health and Safety Code, a city, county, or city and county shall enter into an agreement with the developer to either grant a density bonus or provide not less than two other bonus incentives for the project.
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> "For the purposes of this chapter, 'density bonus' means a density increase of at least 25 percent over the otherwise allowable residential density under the applicable zoning ordinance. The density bonus shall not be included when determining the otherwise allowable density. The density bonus shall apply to housing developments consisting of five or more dwelling units. Other bonus incentives which a city, county or city and county may agree to provide under this section include the following:
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> "(a) Exemption of the development from the requirements of Section 66477 and any local ordinance adopted pursuant thereto.
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> "(b) Construction of public improvements appurtenant to the proposed housing development, which may include, but shall not be limited to, streets, sewers and sidewalks.
>
> "(c) *Utilization of federal or state grant moneys or local revenues to provide the land on which the housing development will be constructed at a reduced cost.*
>
> "(d) Exemption of the development from any provision of local ordinances which may cause an indirect increase in the cost of the housing

units to be developed." (Emphasis added.)

Hence, in 1979, the Legislature expressly referred to the use of federal funds as an example of a "bonus incentive" given to a developer for constructing affordable housing under section 65915. The statute was amended in 1982 (Stats. 1982, ch. 1263, § 2) to remove the specific examples and substitute for them the simplified language of "other incentives of equivalent financial value."

In 63 Ops.Cal.Atty.Gen. 445 (1980), we examined whether a county could use federal community block grant funds to purchase land and sell it to a private housing developer for the construction of housing for low and moderate income persons. We concluded that the county could so use the federal funds but that "[i]n such case, section 65916 requires that the local government 'assure continued availability for low and moderate-income units for 30 years.'" (Id., at p. 448, fn. 2.)

We reaffirm our conclusion reached in 1980. Use of federal funds by a city or county to purchase property from a private developer, with reconveyance at a nominal sum, or where the interest acquired by the local government allows it to restrict use of the property to affordable housing, comes within the terms of sections 65915 and 65916 as a "financial contribution" and "other incentive[] of equivalent financial value."[7]

We reject the argument that a city or county could furnish a financial incentive to a private developer for the construction of affordable housing without reaching an "agreement" subject to the 30-year use restriction. Such an argument would thwart the intent and purpose of section 65916; the language of the statute may not be so easily circumvented. (See *People v. Davis* (1981) 29 Cal.3d 814, 828; *Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788; *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd*. (1981) 29 Cal.3d 101, 114.) Cities and counties are not free to grant money in such circumstances; section 65916 circumscribes the authority conferred. (See *People v. Zamora*, *supra*, 28 Cal.3d 88, 98; *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, *supra*, 22 Cal.3d 208, 242-243; 66 Ops.Cal.Atty.Gen. 120, *supra*, 122- 123; 57 Ops.Cal.Atty.Gen. 307, *supra*, 310.)

[7] The essence of either transaction is that the city or county is "contributing" the federal funds to the development of housing for low and moderate income persons. The federal money acts as an incentive to construct the project for such purpose. In 64 Ops.Cal.Atty.Gen. 370 (1981), we concluded that the granting of a density bonus or an exemption from a local ordinance provision did not trigger the 30-year use restriction since such incentives were not "direct financial contributions" for purposes of section 65916.

Finally, we note that nothing in federal law precludes the application of sections 37364 and 65915 to the use of federal housing funds by cities and counties. The principles to be applied in determining when a state law is preempted by federal legislation were noted by the *Supreme Court in Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 317:

> "Pre-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). See *De Canas v. Bica*, 242 U.S. 351, 356 (1976). The underlying rationale of the preemption doctrine, as stated more than a century and a half ago, is that the Supremacy Clause invalidates state laws that 'interfere with or are contrary to, the laws of congress . . . . *Gibbons v. Ogden*, 9 Wheat. 1, 211 (1824). The doctrine does not and could not in our federal system withdraw from the States either the 'power to regulate where the activity regulated [is] a merely peripheral concern' of federal law, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959), or the authority to legislate when Congress could have regulated 'a distinctive part of a subject which is peculiarly adapted to local regulation, . . . but did not,' *Hines v. Davidowitz*, 312 U.S. 52, 68, n. 22 (1941)." (Id., at p. 317.)

While it is often said that state laws are preempted if they stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (see *Fidelity Federal Savings & Loan Assn. v. De la Cuesta* (1982) 458 U.S. 141, 153; *Florida Lime & Avocado Growers, Inc. v. Paul* (1963) 373 U.S. 132, 142-143; *Hines v. Davidowitz* (1941) 312 U.S. 52, 67), "it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict" in order to apply this principle (*Commonwealth Edison Co. v. Montana* (1981) 453 U.S. 609, 634; see *Silkwood v. Kerr-McGee Corp*. (1984) 464 U.S. 238, 257; *Pac. Gas & Elect. v. Energy Resources Comm'n.* (1983) 461 U.S. 117, 133-134; *Exxon Corp. v. Governor of Maryland* (1978) 437 U.S. 117, 129-133).

Here Congress has not prohibited the states from applying such requirements as contained in sections 37364 and 65915 to the expenditure of federal housing funds. It is possible to comply with both federal and state requirements, and indeed the 30-year use restrictions of the latter enhance the purposes of the former. Accordingly, federal preemption is not present with respect to sections 37364 and 65915. (See *Silkwood v. Kerr-McGee Corp*., *supra*, 464 U.S. 238, 257; *Commonwealth Edison Co. v. Montana*, *supra*,

453 U.S. 609, 633-635.)[8]

Moreover, since federal law does not require that the funds be accepted at all, a state may choose not to participate in the program. (See *Pennhurst State School v. Halderman* (1981) 451 U.S. 1, 17; *Harris v. McRae* (1980) 448 U.S. 297, 301; *Oklahoma v. Civil Service Comm'n.* (1947) 330 U.S. 127, 143-144; *Steward Machine Co. v. Davis* (1937) 301 U.S. 548, 585-598.) We believe that a state could prohibit a local government under its jurisdiction from accepting these federal funds if state imposed standards were not met. (See *Hunter v. Pittsburgh* (1907) 207 U.S. 161, 178.)[9]

In answer to the question presented, therefore, we conclude that cities and counties are required to comply with the 30-year use restriction provisions of sections 37364 and 65916 when they use federal community development block grant funds to provide housing affordable to persons of low and moderate income by (1) purchasing property from a private developer and reconveying it to him for a nominal sum or (2) purchasing an interest in the property allowing them to restrict use of the property to affordable housing.

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[8] In response to our request for views concerning the questions presented, the United States Department of Housing and Urban Development stated that "because the questions solely involve the interpretation of State law, HUD takes no position on the matter." (V.R. Landau, letter, May 2, 1986.)

[9] Sections 37364 and 65915 do not require cities and counties to spend federal funds for purposes other than specified by Congress. (See *Lawrence County v. Lead-Deadwood School Dist.* (1985) 459 U.S. 256, 269-270.)