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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

HOWARD JARVIS TAXPAYERS ASSOCIATION, APARTMENT ASSOCIATION OF GREATER LOS ANGELES, INC., NEWCASTLE COURTYARDS, LLC, a California limited liability company; JONATHAN BENABOU, as Trustee on behalf of THE MANI BENABOU FAMILY TRUST; and ROES 1 through 500 Plaintiffs, vs. CITY OF LOS ANGELES, COUNTY OF LOS ANGELES, COUNTY OF LOS ANGELES RECORDER'S OFFICE, DOES 1 through 500, and ALL PERSONS INTERESTED IN THE MATTER OF MEASURE ULA, Defendants.	Case No. 22STCV39662 (Consolidated with Case No. 22STCV00352) DEFENDANTS SCANPH, KIWA, AND SEIU LOCAL 2015's REPLY TO NEWCASTLE COURTYARD, LLC ET AL.'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS; JOINDER IN CITY'S REPLY Honorable Barbara Scheper Reservation ID: 760338369080 Date: September 26, 2023 Time: 8:30 a.m. Place: Stanley Mosk Courthouse, 111 N. Hill St., Dept. 72 Los Angeles, California 9001 Complaints Filed: December 21, 2022

TABLE OF CONTENTS

		Page
I.	Introduction	1
II.	Measure ULA is Not Unconstitutional Retroactive Legislation (Eighth Cause of Action)	2
III.	Measure ULA Does Not Violate the First Amendment (Ninth Cause of Action)	4
	A. Measure ULA does not primarily target protected speech	4
	B. Measure ULA is not a content-based regulation	5
IV.	Measure ULA Is Not Unconstitutionally Vague (Sixteenth Cause of Action)	6
V.	Measure ULA is Not Preempted by State Law (Third and Fourth Causes of Action)	7
	A. Measure ULA is not preempted because it does not actually conflict with any state statute addressing homelessness	7
	B. The Legislature has not preempted Measure ULA by expressly or impliedly fully occupying the field of homelessness reduction	9
	C. Measure ULA does not duplicate Health and Safety Code Section 50000, *et seq.*	11
	D. Measure ULA is not preempted by the Documentary Transfer Tax Act and the County's role in collecting the tax is proper	12
	E. The issue of preemption can be resolved on the facts as pleaded, and amendment would be futile	13
VI.	Newcastle Is Not Entitled to Relief Under 42 U.S.C. § 1983 (Tenth Cause of Action)	14
VII.	Newcastle's Writ of Mandate, Declaratory Relief, and Determination of Invalidity Claims Fail (Eleventh, Twelfth, and Thirteenth Causes of Action)	15
VIII.	Conclusion	15

TABLE OF AUTHORITIES

Page(s)

Cases

Airbnb, Inc. v. City & Cnty. of San. Francisco
(N.D. Cal. 2016) 217 F.Supp.3d 1066 4

Alfaro v. Terhune
(2002) 98 Cal.App.4th 492....7

Am. Fin. Servs. Ass'n v. City of Oakland
(2005) 34 Cal.4th 1239....11

Arcara v. Cloud Books, Inc.
(1986) 478 U.S. 697 5

Arce v. Childrens Hosp. Los Angeles
(2012) 211 Cal.App.4th 1455....14

Cal. Fed. Sav. & Loan Ass'n v. City of L.A.
(1991) 54 Cal.3d 1....8, 14

Chevron U.S.A. Inc. v. Cty. of Monterey
(2023) 532 P.3d 1120 14

Chin v. Advanced Fresh Concepts Franchise Corp.
(2011) 194 Cal.App.4th 704....2

CIM Urban REIT 211 Main St. v. City and County of San Francisco
(2022) 75 Cal.App.5th 939....12

Cohn v. City of Oakland
(1990) 223 Cal.App.3d 261 13

Covey v. Hollydale Mobilehome Estates
(9th Cir. 1997) 116 F.3d 830....2, 3

Davis v. Fresno Unified School Dist.
(2023) 14 Cal.5th 671, 685-86 15

Evangelatos v. Superior Court
(1988) 44 Cal.3d 1188....3

Fielder v. City of Los Angeles
(1993) 14 Cal.App.4th 137....13

Fisher v. County of Alameda
(1993) 20 Cal.App.4th 120....13

Fratessa v. Roffy
(1919) 40 Cal.App.179 2

Galland v. City of Clovis
(2001) 24 Cal.4th 1003 [as modified Mar. 21, 2001] 14

Gen. Motors Corp. v. City & Cnty. of San Francisco
(1999) 69 Cal.App.4th 448 14

Home Building & Loan Ass'n v. Blaisdell
(1934) 290 U.S. 398 3

Hotel & Motel Ass'n of Oakland v. City of Oakland
(9th Cir. 2003) 344 F.3d 959 6

Keystone Bituminous Coal Ass'n v. DeBenedictis
(1987) 480 U.S. 470 3

Linmark Associates., Inc. v. Willingboro Tp.
(1977) 431 U.S. 85 4

Manigault v. Springs
(1905) 199 U.S. 473 3

Nisei Farmers League v. Labor and Workforce Development Agency
(2019) 30 Cal.App.5th 997 6

O'Connell v. City of Stockton
(2007) 41 Cal.4th 1061 ..... 10, 11

In re Portnoy
(1942) 21 Cal.2d 237 12

Reed v. Town of Gilbert
(2015) 576 U.S. 155 ..... 5, 6

Sherwin-Williams Co. v. City of Los Angeles
(1993) 4 Cal.4th 893 ..... 9, 10, 12

Shuler v. City of Los Angeles
(2021) 62 Cal.App.5th 793 15

Sorrell v. IMS Health Inc.
(2011) 564 U.S. 552 5

T-Mobile W. LLC v. City & Cty. of S.F.
(2019) 6 Cal.5th 1107 9

The Pines v. Santa Monica
(1981) 29 Cal.3d 656 ..... 7, 9, 10

U.S. v. Locke
(1985) 471 U.S. 84 3

United States v. Carlton
(1994) 512 U.S. 26 3

United States v. Darusmont
(1981) 449 U.S. 292 3

United States v. Hemme
(1986) 476 U.S. 558 3

Usery v. Turner Elkhorn Mining Co.
(1976) 428 U.S. 1 3

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.
(1982) 455 U.S. 489 6

Wheeler v. Appellate Div. of Superior Court
(2021) 72 Cal.App.5th 824 9

Statutes

42 U.S.C. § 1983 ..... 14, 15

Documentary Transfer Tax Act 12, 13

Gov. Code, § 6502 13

Gov. Code, § 51330 13

Gov. Code § 65581 8

Gov. Code, § 65581(a) 8, 10

Gov. Code, § 65581(c) 8, 10

Health and Safety Code, § 50199.4 *et seq.* 8

LAMC § 21.9.10 12

Rev. & Tax Code § 11911(3) 13

Rev. & Tax. Code § 11931(3) 13

Rev. & Tax. Code § 11933 12

Rev. and Tax. Code, § 11911, subd. (c) 12

Zenovich-Moscone-Chacon Housing and Home Finance Act 11, 12

Rules

Cal Rules of Court, Rule 3.1113(g).....1

Other Authorities

4 CCR, § 10325(c)(9)(A) 8, 10

United States Constitution Article 1, Section 10.....2

Defendants Southern California Association of Non-Profit Housing, Inc., et al. ("Defendants") hereby reply to Plaintiffs Newcastle Courtyards, LLC et al.'s (collectively, "Newcastle") two-volume Opposition to the City's and Defendants' Motion for Judgment on the Pleadings ("Opp. Vol. I" and "Opp. Vol. II"), and join the contemporaneously-filed Reply by Defendant City of Los Angeles ("City"). In order to efficiently address Newcastle's overlong, two-volume Opposition, the City and Defendants have divided up responses in their respective Reply Briefs to Newcastle's opposition arguments. This Reply Brief addresses Newcastle's Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Sixteenth causes of action, as well as Newcastle's preemption arguments related to its Third and Fourth causes of action.[1]

I. Introduction

Newcastle seeks to attack Measure ULA, a lawful exercise of Los Angeles City voters' constitutionally enshrined power of initiative, through a bevy of frivolous and poorly pled constitutional and statutory claims. As Defendants and the City have demonstrated in their opening briefs, these claims fail as a matter of law. Rather than respond substantively to Defendants' legal arguments, Newcastle's Opposition recycles the inadequate allegations in its Complaint while also attempting to raise various new arguments it never pled. None of these assertions save Newcastle's ill-considered attempt to overturn the will of Los Angeles voters.

Defendants ask that this Court grant their Motion for Judgment on the Pleadings, without leave to amend.

[1] Following the June 6, 2023 Case Management Conference, Judge Rolf M. Treu issued an order authorizing 35-page oppositions to the parties' respective Motions for Judgment on the Pleadings. In addition to its two-volume Opposition, which exceeds that page limit, Newcastle filed a 29-page "Joinder" to Plaintiffs Howard Jarvis Taxpayers Association and Apartment Association of Greater Los Angeles' ("HJTA") Cross-Motion for Judgment on the Pleadings. Newcastle's Joinder, which simply rehashes arguments made in its Opposition and was filed nearly two months after the Cross-Motion it purports to join, must be stricken, as it exceeds the page limits set by Judge Treu. *See* Cal Rules of Court, Rule 3.1113(g) (Effect of filing an oversized memorandum). Moreover, the Joinder improperly attempts to interject issues that were not raised in HJTA's Complaint. Because Newcastle's improper Joinder is substantively duplicative of its Opposition, Defendants address only the latter in this Reply.

II. Measure ULA is Not Unconstitutional Retroactive Legislation (Eighth Cause of Action)

As an initial matter, Newcastle asserts that Defendants "attempt to mislead the Court" and are "playing dumb" by describing Newcastle's eighth cause of action as relating to the ex post facto clause, and contends that Defendants have waived any argument on this claim on reply. (Opp. Vol. I at pp. 20-21.) But Defendants simply described this claim in the same terms as Newcastle did in the Complaint, as being based upon the "ex post facto" clause of the Article 1, Section 10 of the United States Constitution. (See Newcastle Compl. ¶ 191.) Newcastle's failure to adequately plead its "contracts clause" and "retroactive impairment of property rights" claims in the Complaint[2] and its attempt to raise these claims in its Opposition cannot be used to foreclose Defendants' arguments on reply. (See *Fratessa v. Roffy* (1919) 40 Cal.App.179, 188-89 [rule that points raised for the first time on reply should be disregarded is inapplicable where contention "is in response to the claim of respondents in their brief"]; see also *Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 711 fn.2 [rule "is relaxed as to issues the respondent already has raised"].) In any event, both Defendants and the City did address the alleged retroactive application of Measure ULA in their opening briefing, and explained that Measure ULA applies only prospectively. (See Defendants' Motion at p. 27; City's Motion at p. 42.)

Newcastle goes on to assert that Measure ULA is unconstitutional retroactive legislation because it impacts "settled contract and property rights" by applying to properties acquired before its effective date of April 1, 2023. (Opp. Vol. I at p. 22.) Newcastle lays out voluminous allegations of supposed interference with unspecified "settled contract and property rights," "reasonable investment backed expectations," and "pre-existing contractual relations" (See, e.g., Opp. Vol. I at pp. 22-25), but does not explain how Measure ULA "alter[s] the ***legal consequences*** of past actions." (*Covey v. Hollydale Mobilehome Estates* (9th Cir. 1997) 116 F.3d 830, 835 [emphasis added].) Nor could it: on its face, Measure ULA plainly only applies prospectively, "starting on April 1, 2023." (Newcastle Compl., Ex. A at p. 45 [Measure ULA

[2] Indeed, the Complaint makes no mention of the Contracts Clause at any point.

§ 21.9.2, subd. (b)].) While Newcastle cites a variety of case law discussing retroactive application of statutes generally, those decisions involved the effects of statutory amendments on prior transactions or occurrences that gave rise to causes of action. (E.g., *Covey*, *supra*, 116 F.3d at p. 835 [noting that "all of the events at issue occurred before the [amended] regulations took effect," nearly two years after plaintiffs filed their complaint]; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1194 [initiative measure that modified joint and several liability doctrine did not apply retroactively to causes of action that accrued prior to its effective date].) Here, by contrast, Measure ULA applies only to conveyances of property taking place after its effective date.

Yet Newcastle asserts that Measure ULA impairs contract or property rights that property owners, lenders, builders, and others held prior to April 1, 2023 by imposing a tax that those groups did not anticipate. By Newcastle's logic, any new tax would be unconstitutional because it would impose a new burden that did not exist at the time of any past economic decision by a plaintiff, no matter how far in the past that decision was made. The United States Supreme Court has repeatedly made clear that "legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." (*Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 16; see also *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987) 480 U.S. 470, 502 ["[I]t is well settled that the prohibition against impairing the obligation of contracts is not to be read literally."]; *U.S. v. Locke* (1985) 471 U.S. 84, 104 ["Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used . . . ."]; *Manigault v. Springs* (1905) 199 U.S. 473, 480 ["[T]he interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal . . . though contracts previously entered into between individuals may thereby be affected."]; *Home Building & Loan Ass'n v. Blaisdell* (1934) 290 U.S. 398, 434-39 [collecting cases].) Moreover, the Supreme Court has repeatedly upheld even taxes that explicitly applied retroactively. (E.g., *United States v. Darusmont* (1981) 449 U.S. 292, 297-300; *United States v. Carlton* (1994) 512 U.S. 26, 30; *United States v. Hemme* (1986) 476 U.S. 558, 571.)

III. Measure ULA Does Not Violate the First Amendment (Ninth Cause of Action)

A. Measure ULA does not primarily target protected speech

Newcastle goes to great lengths to explain how the contents of a deed of sale constitute protected "speech" under the First Amendment. This argument misses the mark, and in fact affirms that Newcastle's First Amendment claim does not plead sufficient facts to survive a motion for judgment on the pleadings. "[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct," and "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." (*Sorrell v. IMS Health Inc.* (2011) 564 U.S. 552, 567). Newcastle's Complaint alleges no facts suggesting that Measure ULA is directed at speech, rather than commerce, nor could it. Measure ULA is not directed at regulating the communication of this information. Rather, as Newcastle explains elsewhere, "ULA seeks to address… the reduction of homelessness" by regulating the underlying transaction, i.e., the sale of land. (Opp. Vol. II at p. 23.) Newcastle does not oppose the City's argument that the sale of land is not itself an expressive activity. Thus, Measure ULA is "not motivated by a desire to suppress speech… and the ordinance does not have the effect of targeting expressive activity," and accordingly, "the First Amendment is 'not implicated' at all." (*Airbnb, Inc. v. City & Cnty. of San. Francisco* (N.D. Cal. 2016) 217 F.Supp.3d 1066, 1078).)

Newcastle's citation to *Linmark Associates., Inc. v. Township of Willingboro* affirms this point. (*Linmark Associates., Inc. v. Willingboro Tp.* (1977) 431 U.S. 85.) There, the Supreme Court invalidated an ordinance prohibiting "For Sale" signs because the ordinance was intended to "prevent its residents from obtaining certain information." (*Id.* at p. 96.) The Court explained that the Council in *Linmark* constructed this ordinance "to restrict the free flow of these data because it fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township," and thus, "[t]he Council's concern… was not with any commercial aspect of "For Sale" signs with offerors communicating offers to offerees but with the substance of the information communicated." (*Id.*) By contrast, Measure ULA is not concerned at all with the substance of information communicated in a deed of

sale – parties may communicate the nature of their property interests and descriptions of their property without incurring the tax. Measure ULA is in fact ***exclusively*** concerned with the economic aspect of the sale of property– it is the actual conveyance of the property that is taxed.

Moreover, under Newcastle's theory, nearly every tax would implicate the First Amendment. Taxes by nature implicate transactions, and transactions are generally recorded or published in an instrument that expresses information. Indeed, "[e]very civil and criminal remedy imposes some conceivable burden on First Amendment protected activities." (*Arcara v. Cloud Books, Inc.* (1986) 478 U.S. 697, 706.) It does not follow, then, that "every criminal and civil sanction imposed" is subject to First Amendment scrutiny "simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction." (*Id.* at p. 706.) Newcastle fails to allege any non-conclusory facts showing that Measure ULA imposes anything beyond a minor, incidental effect on First Amendment activities.

Newcastle's argument that "the 'incidental burden on speech' doctrine does not apply here" should be disregarded. (Opp. Vol. II at p. 16.) Newcastle argues that Measure ULA cannot be an incidental burden on speech because it is "prohibitively costly." (*Id.* at p. 15.) This is inapposite; in this context, incidental means only that any effect on speech is not the primary intent of the regulation. (*Sorrell v. IMS Health Inc.* (2011) 564 U.S. 552, 567 [cited by Newcastle at Opp. Vol. II at 16].) Since Measure ULA is not directed at regulating speech, if there is any restriction at all (which is doubtful), it is incidental to the primary purpose of the regulation.

B. <u>Measure ULA is not a content-based regulation</u>

Newcastle's argument that Measure ULA is a content-based speech regulation, which Newcastle raises for the first time in its Opposition, fails for all of the reasons discussed above.

Additionally, Newcastle's Opposition misinterprets First Amendment doctrine, then applies it to misrepresented facts. A tax is not a "content-based regulation that infringes free speech" simply because it applies to certain categories of transactions and not others. (See Opp. Vol. II at p. 11.) Taxes are triggered and applied, often at different rates, based on a number of factors, including income level, type of good or service, and type of property owned. Newcastle attempts to analogize to *Reed*, in which the Supreme Court struck down a local law which placed

more stringent restrictions on signs directing the public to nonprofit group meetings than on other signs. (*Reed v. Town of Gilbert* (2015) 576 U.S. 155, 169 [observing that content-based regulation "singles out specific subject matter for differential treatment"].) Newcastle argues that this principle applies to Measure ULA because the tax only applies to certain transactions (like all taxes), after a certain date (like all non-retroactive laws), to transactions over a certain amount (again, like many taxes), and is subject to certain exemptions (like many laws). (See *id.* at p. 163.) Not so.

The transfer of properties worth over $5,000,000 is plainly not the "specific subject matter" the *Reed* Court had in mind. As discussed above, Measure ULA does not regulate speech, but is instead tax legislation, applied based on the value of the transaction. The fact that a deed may record certain details of such a transfer does not convert a tax on said transfer to a content-based speech restriction.

IV. Measure ULA Is Not Unconstitutionally Vague (Sixteenth Cause of Action)

Newcastle fails to plead unconstitutional vagueness. Its Opposition simply regurgitates the inadequate arguments found in its Complaint. Newcastle again suggests that the fact that administrative regulations implementing Measure ULA's exemptions have not yet been promulgated means the legislation is unconstitutionally vague. The contention lacks merit.

Newcastle must demonstrate that Measure ULA "'is impermissibly vague in all of its applications.'" (*Hotel & Motel Ass'n of Oakland v. City of Oakland* (9th Cir. 2003) 344 F.3d 959, 972 [quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 495 [footnotes omitted]].) A statute is not unconstitutionally vague "if any reasonable and practical construction can be given its language or if its terms may be made reasonably certain by reference to [its legislative history or purposes]." (*Nisei Farmers League v. Labor and Workforce Development Agency* (2019) 30 Cal.App.5th 997, 1014.) Further, Newcastle must show Measure ULA "either forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to what is required." (*Id.* at p. 1013.)

Newcastle cannot meet its burden by complaining that the City has not promulgated regulations exempting qualified affordable housing providers and conveyances under LAMC 21.9.14. Legislation is routinely adopted at all levels of government with an understanding that some agency will later promulgate more detailed implementing regulations. Indeed, any "person of common intelligence" will surely understand that any conveyance of property for over $5 million is subject to Measure ULA taxes, unless they meet the requisite criteria within Measure ULA itself (see LAMC 21.9.14), and the City determines the conveyance is exempt under implementing regulations – regulations which are not at issue in this suit. Thus "the terms of the Act itself are sufficiently precise that those who are subject to it can reasonably understand what is required, and the agencies charged with its execution can reasonably understand what they must do." (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505.) Newcastle cannot show that Measure ULA or its exemptions are impermissibly vague in all applications, and indeed has failed to show that Measure ULA is impermissibly vague in ***any*** application.

Because Measure ULA can be given a "reasonable and practical construction," it is not unconstitutionally vague.

V. Measure ULA is Not Preempted by State Law (Third and Fourth Causes of Action)

A. Measure ULA is not preempted because it does not actually conflict with any state statute addressing homelessness

Newcastle attempts to stretch statutory language identifying the provision of adequate housing as a matter of statewide concern into the unprecedented, unsupported, and unjustifiable conclusion that the state intends to ***prohibit*** Los Angeles or any other charter city from taking action to reduce homelessness because "its alleviation is a matter of statewide concern and not a municipal affair." (Opp. Vol. II at p. 30.) This assertion is meritless because Newcastle fails to identify any actual conflict between Measure ULA and any of the state statutes which address housing supply or homelessness.

Statewide concerns ***only*** preempt a charter city tax when the tax is "in direct and immediate conflict with a state statute or statutory scheme." (*The Pines v. Santa Monica* (1981) 29 Cal.3d 656, 660.) "[A] court asked to resolve a putative conflict between a state statute and a

charter city measure initially must satisfy itself that the case presents an actual conflict between the two. If it does not, a choice between the conclusions 'municipal affair' and 'statewide concern' is not required." (*Cal. Fed. Sav. & Loan Ass'n v. City of L.A.* (1991) 54 Cal.3d 1, 16.) The California Supreme Court has observed that,

> "[M]any opinions purportedly involving competing state and local enactments do not present a genuine conflict. To the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is in fact a genuine one, ***unresolvable short of choosing between one enactment and the other***."

(*Id.* at p. 16-17 [citing cases] [emphasis added].)

Newcastle does not demonstrate an actual conflict—let alone a direct, immediate, or unresolvable conflict—between Measure ULA and any of the state statutes on housing or homelessness that it identifies. To the contrary, numerous state statutes, including those cited by Newcastle, evince a clear intent to invite and incentivize local action to address homelessness and the housing shortage.

For example, Government Code section 65581 states the Legislature's intent that "cities recognize their responsibilities in contributing to the attainment of the state housing goal," and the recognition that "each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal." (Gov. Code, § 65581(a), (c) [cited at Opp. Vol. II at 27 fn.11].) And at least one of the state housing programs referenced by Newcastle explicitly contemplates the use of local funds; regulations enacting the Low-Income Housing Tax Credit program (Health and Safety Code, § 50199.4 *et seq.*) ***prioritize*** low-income housing projects that "leverage soft resources," including "local government funds." (4 CCR, § 10325(c)(9)(A).)

Newcastle is unable to show that any of the state laws supporting the provision of adequate housing directly and immediately conflict with Measure ULA. Accordingly, there cannot be preemption.

B. The Legislature has not preempted Measure ULA by expressly or impliedly fully occupying the field of homelessness reduction

Newcastle additionally argues—for the first time in its Opposition—that Measure ULA is preempted because state law expressly or impliedly fully occupies the field. (See Opp. Vol. II at p. 31.) "Field preemption generally exists where the Legislature has comprehensively regulated in an area, leaving no room for additional local action." (*T-Mobile W. LLC v. City & Cty. of S.F.* (2019) 6 Cal.5th 1107, 1122.) State law fully occupies a field "when the Legislature 'expressly manifest[s]' its intent to occupy the legal area or when the Legislature 'impliedly' occupies the field.'" (*Id.* at p. 1116 [citations omitted].) The three indicia of legislative intent are (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898.)

The party claiming preemption bears the burden of proof. (*T-Mobile W. LLC*, *supra*, 6 Cal.5th at p. 1116.) "[P]reemption by state law is not lightly presumed. When local government regulates in an area over which it traditionally has exercised control, . . . courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted." (*Wheeler v. Appellate Div. of Superior Court* (2021) 72 Cal.App.5th 824, 834 [emphasis in original] [citations omitted].) "The presumption against preemption is even stronger in cases involving 'home rule' or charter cities such as Los Angeles, which have the right to adopt and enforce ordinances that conflict with general state laws on subjects of municipal rather than statewide concern." (*Id.* [citations omitted].)

Further, "[t]hat the state has preempted a field of statewide concern for purposes of regulation does not itself prevent local taxation of the persons or activities regulated." (*The Pines*,

supra, 29 Cal.3d at p. 660.) "Because the tax power is so fundamental, state intent to preempt it must be clear." (*Id.* at p. 662.)

Newcastle does not demonstrate express field preemption because it did not identify any statute which explicitly states that the Legislature intends to fully occupy the relevant legal area. Accordingly, the only possible form of field preemption is implied.

However, none of the indicia of implied field preemption are present, let alone clear. First, it is apparent that the subject of reducing homelessness and providing adequate housing has not been so fully and completely covered as to become "exclusively a matter of state concern." (*Sherwin-Williams Co.*, *supra*, 4 Cal.4th at p. 898.) As noted above, numerous state statutes contemplate local action to address homelessness and the housing shortage. Second, Newcastle identifies no language that shows an intent that the Legislature "will not tolerate further or additional local action." In fact, the opposite is true: state law explicitly identifies that cities have a responsibility to ensure the provision of adequate housing and prioritizes the use of local government funds when approving low-income housing projects. (See Gov. Code, § 65581(a), (c); 4 CCR § 10325(c)(9)(A).)

Finally, Newcastle does not demonstrate an adverse effect of the local ordinance on the transient citizens of the state that outweighs its "possible benefit to the locality." (*Sherwin-Williams Co.*, *supra*, 4 Cal.4th at p. 898.) Newcastle contends that Measure ULA has "essentially stopp[ed] dead" sales of $5 million or more in Los Angeles, depriving the County of property tax revenue it would have had if the properties were sold and reassessed at a higher value. (Opp. Vol. II at p. 32.) It is inconceivable that, with the enactment of Measure ULA, sales of properties over $5 million in Los Angeles will stop for good. Thus, this temporary and highly speculative adverse effect does not outweigh the clear benefits to Los Angeles from this "new and powerful opportunity to actually move people off of the streets and into housing." (Newcastle Compl., Ex. A at p. 32.)

It is instructive to contrast Newcastle's arguments with the types of statutory schemes that *have* been held to preempt an entire field. In *O'Connell v. City of Stockton*, the Court determined that the Legislature's enactment of a "comprehensive scheme defining and setting the penalties for

crimes involving controlled substances," preempted a local ordinance permitting forfeiture of a vehicle used in certain crimes. (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1069.) The *O'Connell* court concluded that "the comprehensive nature of the UCSA in defining drug crimes and specifying penalties (including forfeiture) is so thorough and detailed as to manifest the Legislature's intent to preclude local regulation." (*Id.* at p. 1071; see also *Am. Fin. Servs. Ass'n v. City of Oakland* (2005) 34 Cal.4th 1239 [striking down local predatory lending ordinance because state had adopted a general scheme for regulation of predatory lending in home mortgages].)

The first lesson of *O'Connell* and cases like it is that field preemption involves a narrow and specific field—such as the penalties for certain drug crimes or predatory mortgage lending—not issues as vast as housing or homelessness. Despite Newcastle's unsupported assertion that "[t]he state has pre-empted the field of that matter of statewide concern, the reduction of homelessness," the Legislature has not in fact covered "every conceivable aspect of homelessness." (Opp. Vol. II at p. 31.) Given the scale of the current housing and homelessness crisis, it is difficult to imagine a state program or scheme that could occupy this field so comprehensively as to preclude local action. Second, unlike in *O'Connell* and *Am. Fin. Servs. Ass'n*, the statutes Newcastle cites do not amount to a "comprehensive," "thorough[,] and detailed" scheme for providing adequate housing or reducing homelessness. In fact, the existing state law and regulations in the areas of housing and homelessness make clear that the Legislature intends to encourage—not preclude—local action to tackle this urgent and pressing challenge.

Because Newcastle fails to carry its burden to demonstrate a clear state intent to preempt the fundamental local tax power, there is no field preemption of Measure ULA.

C. Measure ULA does not duplicate Health and Safety Code Section 50000, *et seq.*

Newcastle contends—also for the first time in its opposition—that Measure ULA conflicts with Health and Safety Code section 50000, *et seq.* (the Zenovich-Moscone-Chacon Housing and Home Finance Act or "Zenovich Act").[3] "Local legislation is 'duplicative' of general law when it

[3] Newcastle attempts to shoehorn in additional argument on this point by citing to its improper "Joinder." (See Opp. Vol. II at 33 fn.13.) For the reasons discussed above, that filing was improper, and Newcastle's efforts to incorporate by reference its "Joinder" arguments in its

is coextensive therewith." (*Sherwin-Williams Co.*, *supra*, 4 Cal.4th at pp. 897-98 [citing *In re Portnoy* (1942) 21 Cal.2d 237, 240-41 [striking down local ordinance where "[s]ubstantially the entire text" of the ordinance was also found in the state law, and the requirement was "identical under both the statute and the ordinance with respect to an essential element of the crime."].)

Even a cursory glance at Measure ULA and the Zenovich Act makes it clear that there is no duplication or conflict. Measure ULA is a municipal transfer tax on the sale of properties over $5 million in Los Angeles. Not one of the dozens of code sections included in the Zenovich Act imposes a transfer tax on the sale of properties over $5 million. Newcastle does not carry its burden of demonstrating preemption on grounds of duplication.[4]

D. Measure ULA is not preempted by the Documentary Transfer Tax Act and the County's role in collecting the tax is proper

Newcastle argues for the first time in its Opposition that "ULA has illegally delegated … to the County of Los Angeles the authority to collect and remit the ULA assessments to the City" in violation of the Documentary Transfer Tax Act ("DTTA"). (Opp. Vol. II at p. 18.) Newcastle argues that the DTTA requires the County to retain the entire amount collected. This misreads the statute.

The DTTA empowers counties to enact documentary transfer taxes and requires city documentary transfer taxes adopted under the Act to be credited against the county tax. (Rev. and Tax. Code, § 11911, subd. (c).) The Act also requires counties to collect taxes imposed pursuant to the Act. (*Id.* at § 11931.) An uncodified section of the Act expressly allows charter cities to impose transfer taxes *not* in conformity with the Act's requirements.[5] (*CIM Urban REIT 211 Main*

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opposition brief (which is already double the length authorized by the Court) should be disregarded entirely. (See footnote 1, *supra.*)

[4] To the extent Newcastle also argues that the Zenovich Act preempts Measure ULA because it is evidence of field preemption or that reduction of homelessness is matter of statewide concern, these arguments fail for the reasons set forth in Sections V.A and V.B, *supra*.

[5] Newcastle also argues that ULA's refund procedure and administrative appeals process "directly conflicts with" the DTTA without explaining the claimed conflict. (Opp. Vol. II at 19.) Measure ULA was enacted under the City's home rule authority as a charter city and need not follow the refund and administrative appeals process in the DTTA. Nonetheless, the refund provision for the City's transfer tax is identical to that in the DTTA. Compare LAMC § 21.9.10 and Rev. & Tax. Code § 11933.

St. v. City and County of San Francisco (2022) 75 Cal.App.5th 939, 957 ["Thus, unlike a general law city, a chartered city … may impose a transfer tax that is *not* in conformity with [the Documentary Transfer Tax Act]."].) Courts have routinely upheld charter city transfer taxes at rates exceeding the twenty-seven and a half cents ($0.275) per five hundred dollars authorized by the Act. (E.g., *Fielder v. City of Los Angeles* (1993) 14 Cal.App.4th 137 [upholding Los Angeles's preexisting real estate transfer tax of $2.25 per $500 of value]; *Fisher v. County of Alameda* (1993) 20 Cal.App.4th 120 [upholding Berkeley's transfer tax of 1 percent, or $5 per $500 of value]; *Cohn v. City of Oakland* (1990) 223 Cal.App.3d 261 [upholding Oakland's transfer tax of 0.9 percent, or $4.50 per $500 of value].)

Newcastle reads section 11931 paragraph (3) out of context to argue that the county is required to retain the "entire amount collected" from Measure ULA.[6] Section 11931 requires the County to "collect all taxes imposed pursuant to [the DTTA]." Reading the Act as a whole, and harmonizing section 11931 with the uncodified provision referenced above, as we must, the "entire amount collected" reference in paragraph (3) means the amount collected by city and county taxes pursuant to the DTTA and does not include taxes enacted under a charter city's home rule authority.

Further, the County may collect the Measure ULA tax for of the City. State law allows a charter city to transfer any of its functions to the county in which the city is situated. (Gov. Code, § 51330.) And cities and counties may enter into joint powers agreements where the entities jointly exercise a power common to both parties, including the power to collect taxes. (Gov. Code, § 6502.) The DTTA does not preempt Measure ULA, and the County's role in collecting the tax is proper.

E. <u>The issue of preemption can be resolved on the facts as pleaded, and amendment would be futile</u>

Finally, Newcastle erroneously suggests that the question of preemption cannot be resolved on a motion for judgment on the pleadings because whether an activity is of statewide

[6] Newcastle's Opposition includes a typo incorrectly attributing this excerpt to "Rev. & Tax Code § 11911(3)" instead of "Rev. & Tax. Code § 11931(3)." (Opp. Vol. II at p. 18.)

concern is an "'ad hoc' inquiry that poses a question of fact for trial." (Opp. Vol. II at pp. 23-26.) Newcastle cites to California Supreme Court precedent which actually refutes its assertion: "As applied to state and charter city enactments in actual conflict, 'municipal affair' and 'statewide concern' represent, Janus-like, ***ultimate legal conclusions*** rather than factual descriptions." (*Cal. Fed. Sav. & Loan*, *supra*, 54 Cal. 3d at p. 17 [emphasis added].) Indeed, it is well-established that, "[w]hether state law preempts a local ordinance is a question of law." (*Chevron U.S.A. Inc. v. Cty. of Monterey* (2023) 532 P.3d 1120, 1124 [citation omitted].)

Under the correct standard, this Court can readily dispense with Newcastle's preemption argument and grant Defendants' Motion for Judgment on the Pleadings. Newcastle has had ample opportunity—and pages—to identify dozens of state statutes it contends conflict with Measure ULA, but has failed to demonstrate an actual conflict. Its arguments are unavailing as a matter of law, and cannot be salvaged through amendment. Because amendment would be futile, the Court should not grant leave to amend.

VI. Newcastle Is Not Entitled to Relief Under 42 U.S.C. § 1983 (Tenth Cause of Action)

42 U.S.C. § 1983 provides a remedy for "constitutional injury inflicted by those acting under color of state law." (*Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1025 [as modified Mar. 21, 2001].) "To state a claim under [section] 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." (*Arce v. Childrens Hosp. Los Angeles* (2012) 211 Cal.App.4th 1455, 1472.) The law in California is clear: a citizen, like Newcastle, "may not maintain a section 1983 action challenging municipal taxation when an adequate state remedy exists." (*Gen. Motors Corp. v. City & Cnty. of San Francisco* (1999) 69 Cal.App.4th 448, 460.) As Defendants have explained, if Measure ULA were held to be invalid, anyone who paid the tax could pursue their rights to a refund under the Municipal Code and state law. (See, e.g., Defendants' Motion at 30.) Thus, Newcastle's section 1983 claim fails.

Newcastle argues that the "adequacy of a remedy" is a question of fact that cannot be dismissed on pleadings. (Opp. Vol. I at p. 27.) But there is no dispute of fact here, as Newcastle never disputed the adequacy of a tax refund action under state law. Thus, even if the "adequacy of

a remedy" raises a factual question, the Court should treat this fact as admitted by Newcastle. (See *Shuler v. City of Los Angeles* (2021) 62 Cal.App.5th 793, 797 [treating undisputed facts properly pleaded as admitted when reviewing an order granting judgment on the pleadings].) Newcastle also faults Defendants for being "inconsistent" in arguing for and against remedies available to Newcastle. (Opp. Vol. I at p. 29.) But adequate remedies in state law are not the same as *in personam* remedies (e.g., writ, injunction and section 1983 damages), which are unavailable to Newcastle here for the reasons discussed below.

VII. Newcastle's Writ of Mandate, Declaratory Relief, and Determination of Invalidity Claims Fail (Eleventh, Twelfth, and Thirteenth Causes of Action)

Newcastle's argument that its writ of mandate, declaratory relief, and determination of invalidity claims are sufficiently pleaded is misleading. Newcastle relies on a mischaracterization of the Supreme Court's holding in *Davis v. Fresno Unified School District.* (*Davis v. Fresno Unified School Dist.* (2023) 14 Cal.5th 671, 685-86.) *Davis* does not, as Newcastle claims, confirm that any other claim may be joined to a "timely validation action." (*Id*. at p. 686.) Rather, it only notes that some courts have allowed certain claims to be joined with a validation action. (*Id*.) In fact, as the *Davis* Court observed, "[s]everal Court of Appeal decisions have held that the joined taxpayer action may *not* relate to the same subject matter as the validation action, thus making the validation remedy exclusive as to matters that are subject to validation." (*Davis*, *supra*, 14 Cal. 5th at p. 686.) *Davis*, when correctly read, does not suggest that Newcastle's numerous other claims may be joined in a reverse validation action. Here, because Newcastle's eleventh through thirteenth causes of action are predicated on state and federal challenges to Measure ULA that fail for the reasons discussed above in Sections II-VI, *supra*, these too must fail.

VIII. Conclusion

This Court should grant Defendants' Motion for Judgment on the Pleadings and enter judgment in favor of Defendants. Furthermore, the Court should deny leave to amend, as Newcastle cannot plead any set of facts that would cure the defects in its legal theories.

Dated: September 8, 2023

Respectfully submitted,
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PROOF OF SERVICE

I, Nicole Miller, am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1800 Avenue of the Stars, Suite 900, Los Angeles, California 90067-4276.

On March 21, 2023, I served the foregoing document describe as **DEFENDANTS SCANPH, KIWA, AND SEIU LOCAL 2015's REPLY TO NEWCASTLE COURTYARD, LLC ET AL.'S OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS; JOINDER IN CITY'S REPLY**, on each interested party, as stated in the attached service list, by electronic service, via email.

Executed on September 8, 2023, at Los Angeles, California.

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

Nicole Miller
(Type or print name)


(Signature)

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