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San Francisco's Vacant Residential Units to Remain Untaxed

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The First District's ruling that San Francisco's Empty Homes Tax is preempted by the Ellis Act reinforces an owner's right to remain out of the rental market and signals caution for other cities considering vacancy taxes.

The First District Court of Appeal has ruled that San Francisco's Empty Homes Tax Ordinance, approved by voters as Proposition M on Nov. 8, 2022, is preempted by the Ellis Act, which guarantees property owners the right not to participate in the rental market.

On Sept. 11, 2026, the First District issued a published opinion in *Debbane, et al. v. City and County of San Francisco, et al.* (172067, San Francisco City & County Super. Ct. No. CGC-23-604600), affirming a trial court judgment enjoining the city from enforcing Prop. M.

The case involves Prop. M, approved by San Francisco voters at the November 2022 general election by a 54.51% majority, amid growing concern over the city's housing shortage. The measure added article 29A to the San Francisco Business and Tax Regulations Code, imposing an annual tax on owners of residential units in buildings with more than two units that sit vacant for more than 182 days in a tax year, whether or not those days are consecutive.

The tax increases the longer a unit stays empty. In the first year it applies, rates range from \$2,500 to \$5,000, depending on square footage; a unit vacant into a second year faces \$5,000 to \$10,000; a third year of vacancy brings rates of \$10,000 to \$20,000, all adjusted annually for inflation. Revenue was earmarked for the city's Housing Activation Fund to subsidize rent for seniors and low-income households and to acquire and rehabilitate buildings for affordable housing.

Several individual and organizational plaintiffs, including the San Francisco Apartment Association, sued the city in 2023. The operative complaint alleged five causes of action: an unconstitutional taking under the Fifth Amendment; preemption by the Ellis Act (Gov. Code, § 7060 et seq.); violation of a fundamental liberty interest in familial

relations under the due process and equal protection clauses, arising from Prop. M's exclusion of family-member tenants from its "Lease Period" exemption; and violation of the right to privacy under the California Constitution.

Individual plaintiffs submitted declarations averting that the tax would effectively evict them from their own homes. On cross-motions for summary judgment, the trial court sided with plaintiffs on every cause of action and enjoined the city from enforcing the ordinance.

On appeal, the First District issued a published decision on Sept. 11, 2026, holding that Prop. M is preempted by the Ellis Act, which bars any local ordinance from compelling a property owner "to offer, or to continue to offer," residential accommodations for rent. The ruling does not reach any of the constitutional claims.

The city argued that Prop. M was a valid exercise of its "home rule" taxing authority under article XI, section 5 of the California Constitution. The tentative ruling agrees that the measure concerns "municipal affairs," but declares that characterization does not immunize it from a state law that presents an "actual conflict", i.e., the Ellis Act.

Applying the "prohibitive price" standard from *Coyne v. City and County of San Francisco* (2017) 9 Cal.App.5th 1215, *Bullock v. City and County of San Francisco* (1990) 221 Cal. App.3d 1072, and *Reidy v. City and County of San Francisco* (2004) 123 Cal.App.4th 580, the final ruling holds that conditioning an owner's right not to rent on payment of a significant tax is preempted unless the Ellis Act itself authorizes the condition. The city tried to distinguish those cases as addressing only an owner's right to exit the rental market, whereas Prop. M concerns owners who have never entered or who wish to remain out of that market. The final ruling rejects the distinction, holding that the Ellis Act's text protects both the right not to "offer" and the right not to "continue to offer" rental housing, and there is, in the court's words, no difference between the right to exit and "the right to remain exited"

The final ruling also rejects the city's fallback position that owners can live on the property, or use it non-residentially as an office, gym or studio. That argument was forfeited for not having been raised below, and the panel held that it conflicts with San Francisco Planning Code section 102, which designates residential use as the "Principal" permitted use of a residential unit. Under *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, the panel further concluded the Ellis Act addresses a matter of statewide concern, is reasonably related to that concern and is narrowly tailored-satisfying every element required for state law to override a charter city's local ordinance.

At oral argument on Sept. 1, 2026, the city argued that assuming Measure M to be a “tax” means the measure cannot be viewed as “compelling” a property owner to remain in the residential rental market, citing *National Federation of Independent Business v. Sebelius* (2012) 567 U.S. 519. Again, the argument was forfeited for not having been raised below, and the panel further concluded in a footnote that *Sebelius* has no bearing on the application of the Ellis Act and does not undermine *the Bullock, Reidy and Coyne* cases in any respect.

Notably, the decision does not resolve whether Prop. M is properly a “tax,” as the city maintains, or a “penalty,” as plaintiffs contend—an issue the court did not decide. In a footnote, however, the panel observed that Prop. M was pitched to voters not as revenue measure but as a means of pressuring owners to rent out vacant units.

Separately, during the pendency of the appeal, the San Francisco Board of Supervisors passed Ordinance No. 41-25, amending portions of Prop. M to suspend the Empty Homes Tax pending a final decision.

The decision marks the fourth time in recent years that a First District panel has invoked the “prohibitive price” standard to strike down a San Francisco ordinance conditioning an owner’s Ellis Act rights. A cautionary signal for other California cities eyeing vacancy taxes to address housing supply.