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Michael Freedman

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## IN SEARCH OF CONGRESSIONAL INTENT: DOES LIHPRHA RESTRICT STATE AND LOCAL GOVERNMENTS FROM PRESERVING AFFORDABLE HOUSING?

*Michael Freedman\**

### INTRODUCTION

During the past twenty-five years, the federal government has reduced its role in maintaining the nation's affordable housing supply,<sup>1</sup> shifting the burden of housing America's poor to state and local governments.<sup>2</sup> From the New-Deal era through the 1970s, the

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\* Brooklyn Law School Class of 2006; B.A., University of California, Los Angeles, 2000. The author would like to thank his family and friends from coast-to-coast for their love, encouragement and unyielding support. Special thanks to Professor David Reiss for his guidance and insight. Many thanks to the staff of the *Journal of Law and Policy* for their assistance and patience.

<sup>1</sup> Affordable housing refers to housing intended for "low-income" or "very low-income" people. Families with incomes less than eighty percent of the area median income are considered "low-income." 42 U.S.C. § 1437(a)(b)(2) (2002). Families with incomes less than fifty percent of the area median income are considered "very low-income." *Id.*

<sup>2</sup> Roger K. Lewis, *Free-Market Housing Programs Come Up Short as Affordability Gap Widens With Age; Shaping the City*, WASH. POST, Oct. 30, 1999, at G10; Wayne Washington, *White House Starts Shift of Housing Burden to States HUD Spokesmen Cite Delays in Using U.S. Aid*, BOSTON GLOBE, Feb. 14, 2003, at A3; Glenn Thrush & Graham Rayman, *Housing Sees Cuts in Budget; Bush Administration Proposals Would Mean as Much as \$200M Less for Low-Income Vouchers, Subsidies*, NEWSDAY (New York), Feb. 9, 2005, at A07; Tim May, *Low-Income Rentals Threatened as Vote Looms in U.S. Senate; Housing: Affordability Rents and Efforts by Tenants to Own Their Buildings May Hinge on Fate of Some Federal Subsidies. Los Angeles Could Be Hit Particularly Hard*, L.A. TIMES, Sept. 25, 1995, at B1; David W. Chen, *HUD Aid*

federal government played a major role in providing affordable housing to the nation's poor and low-income communities through the creation of large, project-based subsidy programs that provided incentives to owners to build and maintain affordable housing projects.<sup>3</sup> During the 1960s and 1970s, more than two million units were built under project-based programs.<sup>4</sup> Starting with the Reagan Administration, however, federal housing policies began to reflect a preference for letting the market address housing demands by providing subsidies directly to tenants through housing vouchers, while preserving and rehabilitating the existing stock of affordable projects.<sup>5</sup> Housing policies shifted further throughout the Clinton Administration, during which the federal government eliminated funding for the development of affordable housing projects and for preservation incentives.<sup>6</sup> The current administration is attempting

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*Short by \$50 Million, City Reports*, N.Y. TIMES, Jan. 27, 2005, at B5; Hillary Stout, *Housing Subsidies in Doubt*, N.Y. TIMES, May 8, 1988, at sec. 8, 1; Ann Mariano, *Housing Policy Faces New Challenges; Low-Income Programs Seen Threatened*, WASH. POST, Nov. 24, 1985, at G1 ("Five years ago, housing the poor was high on the list of national priorities, the fastest-growing federal subsidy program of the decade. . . . But little more than a year ago, with the election of Ronald Reagan, all that began to change.").

<sup>3</sup> Alfred M. Clark, III, *Can America Afford to Abandon a National Housing Policy?*, 6 J. AFFORDABLE HOUS. & COMM. DEV. L. 185, 185 (1997) (citing the Housing Act of 1949, 42 U.S.C. § 1452b (repealed 1990)); see also Peter Salinas, *Toward a Permanent Housing Problem*, No. 95 Public Interest 22-23 (1986), reprinted in CHARLES E. DAYE ET AL., HOUSING AND COMMUNITY DEVELOPMENT 14 (3d ed. 1999). Under these programs, private owners contracted with the federal government to receive subsidies in return for keeping rents affordable for low-income income tenants. *Id.* The term "project" is sometimes used in reference to government owned and operated public housing. "Project" in this note generically refers to any affordable housing development.

In addition to federal housing efforts, virtually every state and most larger cities have agencies dedicated to the housing the poor. *Id.* State and local efforts act as both conduits for federal assistance and supplement local efforts. *Id.*

<sup>4</sup> Clark, *supra* note 3, at 187.

<sup>5</sup> Michael Grunwald, *Further Cuts Feared in Housing for the Poor; Menino Says City Needs Game Plan*, BOSTON GLOBE, Jan. 5, 1995, at 1 ("The federal government has not built much affordable housing since 1980, but it has left intact and often rehabilitated the existing stock."); see also Mariano, *supra* note 2.

<sup>6</sup> HUD's *Flawed Blueprint*, BOSTON GLOBE, Jan. 9, 1995, at 10; Grunwald,

*AFFORDABLE HOUSING PRESERVATION* 743

to completely sever any ties between the federal government and low-income tenants by providing housing funds directly to state governments through block grants, along with the responsibility for administering federal housing programs.<sup>7</sup>

The transfer to the states of responsibility for the creation and maintenance of affordable housing has occurred largely with Congress's consent.<sup>8</sup> State and local governments, however, are

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*supra* note 5 ("Clinton's plan to overhaul HUD to free cities and states from its oversight and to increase choice for low-income tenants could chip away at that stock, HUD officials conceded.") (quoting Sue Marsh, executive director of the Massachusetts Coalition for the Homeless).

<sup>7</sup> Thrush & Rayman, *supra* note 2; Steve Twedt, *The Fraying Safety Net*, PITTSBURGH POST-GAZETTE (Pennsylvania), Mar. 27, 2005, at A10; Ron Nissimov, *City Moving Quickly to Spend Block Grant Money; Funds Not Used by May 1 Are at Risk of Being Lost*, HOUS. CHRON., Mar. 25, 2005, at B5; Jocelyn Y. Stewart, *U.S. Blamed in Cuts to Rental Aid for Poor; Changes to Housing Program Will Lead to Higher Costs, Canceled Contracts, Critics Say*, L.A. TIMES, June 3, 2004, at B1. Unfortunately, federal funding of block grants for housing falls short of the amount promised to participants in current voucher programs and is insufficient to maintain the programs' effectiveness. David W. Chen, *U.S. Is Asked to Increase Housing Aid*, N.Y. TIMES, Jan. 19, 2005, at B1 ("New York City officials say their projected share of federal funds for low-income housing vouchers is more than \$61 million short of what is needed . . . . In all, 492 out of an estimated 2,500 housing agencies that issue vouchers have asked for more money.").

<sup>8</sup> See Paulette J. Williams, *Special Series: Developing Sustainable Urban Communities: The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 455 (2004).

The story of affordable housing development during the 1980s is a story of disinvestment by the federal government, devolution of the responsibility for housing upon state and local government, and an increasing sense that the private enterprise with government subsidies could do a better job of addressing the continuing crisis than government did at any level.

*Id.*; Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 907-16 (1990) (advocating a market-based approach to the availability of public housing based on the availability of maximal tenant choice and the use of vouchers to obtain private housing).

The federal government has abandoned commitments in a variety of social welfare contexts, creating new challenges for state and local governments, and also new opportunities for the private market, primarily non-for-profit

not prepared, nor are they able, to take over where the federal government left off. Budgetary challenges limit the ability of state and local governments to develop new affordable housing projects and force states to turn to their most controversial housing regulations, including rent control and eminent domain, to preserve a small but important stock of permanent affordable housing.<sup>9</sup>

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organizations. *See generally* John J. Ammann & Peter W. Salsich, Jr., *Symposium: Nonprofit Housing Providers: Can They Survive the "Devolution Revolution"?*, 16 ST. LOUIS U. PUB. L. REV. 321 (1997) (discussing a widening role for nonprofits in the development of affordable housing policy).

The "devolution revolution," as exemplified by the 1996 welfare reform legislation, has created major uncertainties for housing and homeless services providers. How the states will respond to new responsibilities that are accompanied by fewer resources is a matter of conjecture at the moment. As welfare reform begins to be implemented, it is increasingly clear that it will have major impact on housing policy. Low-income families may be able to accept "a new social contract that expects and rewards work and responsible behavior" in return for help in finding jobs, protecting children and escaping poverty.

*Id.* at 352.

<sup>9</sup> David W. Chen, *Bill on Affordable Housing Sets Up Sides for a Debate*, N.Y. TIMES, Oct. 29, 2004, at B5. *See generally* William A. Fishel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of 'Just Compensation' Law*, 17 J. LEGAL STUD. 269 (1988), reprinted in ROBERT C. ELLICKSON ET AL., PERSPECTIVES ON PROPERTY LAW 514 (2d ed. 1995).

State and local governments have used alternative means of developing efficient, low-cost solutions to the growing affordable housing crisis. *New York City's Tenant Empowerment Act: Hearing on Intro. No. 186 and Proposed Res. No. 388-A Before the Committee on Housing and Buildings of the Council of the City of New York* (Oct. 28, 2004) (statement of James Grow, Esq., National Housing Law Project) [hereinafter Grow]. These measures seek to reinstitute the key "component of the federal preservation policy for HUD-subsidized properties that the federal government abandoned since 1995—that preservation is of sufficient importance to warrant restrictions on owner conversion, so long as those restrictions are supported with market-value compensation." *Id.* at 6.

While the over the direction of American housing policy continues, this note assumes that, at the present time, the free-market is unable solve the immediate needs of the nearly two million families that will be forced to relocate if current privately-owned subsidized affordable housing projects remove affordability restrictions. *See, e.g.*, Peter Dreier, *The New Politics of Housing*, 63 J. OF THE AM. PLANNING ASS'N 5 (1997), reprinted in DAYE, *supra*

*AFFORDABLE HOUSING PRESERVATION* 745

Further, in their efforts to maintain the rapidly diminishing affordable housing stock, state and local legislatures have encountered difficulty in determining the scope of their authority with respect to housing, given the uncertain application of a single provision within a much larger federal statute—the Low Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA or the Preservation Act).<sup>10</sup>

Programs for privately owned, federally subsidized housing projects, under forty-year subsidized mortgages, originally permitted developers to free themselves of affordability restrictions after twenty years.<sup>11</sup> LIHPRHA set forth a number of federal preservation policies intended to protect low-income tenants from profit-motivated owners seeking to convert their federally subsidized housing projects to market-rate units.<sup>12</sup> The Preservation Act and its predecessor, the Emergency Low-Income Housing Preservation Act of 1987,<sup>13</sup> created a burdensome process for converting federal affordable housing projects to market-rate units (“opting out”), including a requirement that owners provide findings that low-income tenants would not be adversely impacted by the conversion of the regulated properties.<sup>14</sup> This high threshold

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note 3, at 7; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 480 (4th ed. 1992).

<sup>10</sup> Low-Income Housing Preservation and Resident Homeownership Act of 1990, 12 U.S.C. §§ 4101-4125 (1996) [hereinafter LIHPRHA]. *See also New York City’s Tenant Empowerment Act: Hearing on Intro. No. 186 and Proposed Res. No. 388-A Before the Committee on Housing and Buildings of the Council of the City of New York* (Oct. 28, 2004) (statement of Prof. Paula Franzese, Esq., Seton Hall School of Law) (examining federal preemption of a proposed New York City preservation law) [hereinafter *Franzese*] (on file with author).

<sup>11</sup> *See infra* notes 37-41 and accompanying text.

<sup>12</sup> 12 U.S.C. §§ 4101-4125. David Etezadi & Peter Manzo, *LIHPRHA: Great Opportunity for Community Control*, 4 J. AFFORDABLE HOUS. & COMM. DEV. L. 67 (1994-1995).

<sup>13</sup> Emergency Low-Income Housing Preservation Act of 1987, 12 U.S.C. § 17151 (1989 & Supp. 1995).

<sup>14</sup> *See* LIHPRHA, 12 U.S.C. §§ 4101, 4102(a), 4107, 4108. Under LIHPRHA’s prepayment procedures, an owner first had to file with HUD, tenants, and others a “notice of intent” to prepay. *Id.* § 4102(a). The owner then was required to submit a plan of action (POA) setting forth information relating to the proposed prepayment. *Id.* § 4107. HUD would then evaluate the owner’s

essentially prohibited owners from prepaying forty-year mortgages and from opting out of their respective federal housing programs after the twenty years.<sup>15</sup> Owners were protected under LIHPRHA, however, from additional burdens imposed by state or local governments through a preemption provision that prohibited states from further restricting the prepayment of mortgages subsidized by the U.S. Department of Housing and Urban Development (HUD).<sup>16</sup> This provision is codified in section 4122 of Title 12 of the United States Code (Section 4122).

Facing budget concerns, Congress began to remove the preservation restrictions in 1996 through various appropriations acts. The first of these, the Housing Opportunity Program Extension Act (HOPE),<sup>17</sup> provided owners seeking to opt out an alternative to LIHPRHA.<sup>18</sup> Under HOPE, owners were able to opt out of federal housing programs without HUD's consent so long as they agreed to not increase rents for sixty days.<sup>19</sup> The question remained, however, whether LIHPRHA's preemption provision would protect buildings opting out under HOPE's terms from state or local preservation initiatives. HOPE contains no preemption provision, nor does it refer to LIHPRHA's preemption provision.<sup>20</sup> Indeed, there is no language in either of the respective statutes

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POA for approval. *Id.* § 4101(a). Under the Act, HUD could issue such approval for prepayment only after making certain written findings that the prepayment would not adversely affect the low-income housing supply or involuntarily displace current tenants. *Id.* §§ 4101(a), 4108.

<sup>15</sup> Arthur R. Hessel & Susan Sturman, *Heard From HUD: LIHPRHA Comes Full Circle*, 5 J. AFFORDABLE HOUS. & COMM. DEV. L. 316, 318 (1996).

<sup>16</sup> 12 U.S.C. § 4122.

<sup>17</sup> Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 2(b), 110 Stat. 834 (1996) (codified at 12 U.S.C.A. § 4101 note (1996)) [hereinafter HOPE].

<sup>18</sup> See *Kenneth Arms Tenant Ass'n v. Martinez*, No. CIV. S-01-832, 2001 U.S. Dist. LEXIS 11470, at \*13 (E.D. Cal. 2001) ("The Housing Opportunity Program Extension Act of 1996 . . . permitted mortgage prepayment without HUD's approval.").

<sup>19</sup> See *infra* note 74.

<sup>20</sup> *Kenneth Arms*, 2001 U.S. Dis. LEXIS 11470, at \*26 (holding that HOPE does not contain a preemption provision and when owners are involved with the HOPE prepayment scheme, LIHPRHA's preemption provision does not apply).

*AFFORDABLE HOUSING PRESERVATION* 747

directly discussing the relationship between and interplay of HOPE and LIHPRHA.

Two recent cases considering the applicability of LIHPRHA's preemption provision to HOPE's prepayment provisions demonstrate the confusion surrounding this issue. The Eighth Circuit, in *Forest Park II v. Hadley*,<sup>21</sup> and the Ninth Circuit, in *Topa Equities v. City of Los Angeles*,<sup>22</sup> examined two principal questions: (1) whether the LIHPRHA preemption provision applies to buildings opting out under HOPE's prepayment schedule; and (2) whether the LIHPRHA provision preempts the respective Minnesota and California preservation statute challenged in the cases.<sup>23</sup> Both courts agreed that, despite the defunding of LIHPRHA, the Act's preemption provision is applicable to HOPE's prepayment schedule because of the plain meaning of LIHPRHA's preemption provision and the state laws' apparent effect of regulating HUD.<sup>24</sup> The Eighth and Ninth Circuits reached conflicting holdings with respect to the second issue.<sup>25</sup> The Eighth Circuit employed a "practical effects" analysis, under which all state or local preservation laws that have the effect of limiting or delaying owners' *expectations* of converting their affordable housing projects to market rates are preempted.<sup>26</sup> By contrast, the Ninth Circuit employed a "legal consequences" test, under which laws that "restrict or inhibit" the prepayment of federally subsidized mortgages are preempted.<sup>27</sup> The result is that state or local laws (e.g., rent control regulations) in the Eighth Circuit that restrict owners from realizing the potential gains from market-rate rents following opt out are preempted, while those in the Ninth Circuit, according to the court in *Topa Equities*, are not.

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<sup>21</sup> *Forest Park II v. Hadley*, 336 F.3d 724 (8th Cir. 2003), *reh'g* and *reh'g en banc* denied (2003).

<sup>22</sup> *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065 (9th Cir. 2003).

<sup>23</sup> *Id.* at 1067; *Forest Park*, 336 F.3d at 727.

<sup>24</sup> *Topa Equities*, 342 F.3d at 1069; *Forest Park*, 336 F.3d at 732.

<sup>25</sup> *Topa Equities*, 342 F.3d at 1070; *Forest Park*, 336 F.3d at 733. *See also* *Independence Park Apts. v. United States*, 61 Fed. Cl. 692, 704 (2004).

<sup>26</sup> *Forest Park*, 336 F.3d at 733.

<sup>27</sup> *Topa Equities*, 342 F.3d at 1070.

The courts' holdings in *Forest Park* and *Topa Equities* will have direct consequences for whether current programs, which increasingly are being administered by states, can continue to meet "the critical and growing needs of lower-income Americans for decent and affordable housing."<sup>28</sup> Nationwide, more than four and a half million seniors, people with disabilities, and families with low incomes live in federally subsidized affordable housing rental units.<sup>29</sup>

In examining the application of LIHPRHA's preemption provision to buildings opting out under HOPE and other alternative prepayment provisions, this note argues that the circuit courts incorrectly adopted a plain meaning approach to the interpretation of LIHPRHA's preemption provision. In this case, preemption jurisprudence dictates that ambiguous statutory language should be interpreted in light of the relevant legislative history and the underlying purpose and structure of the statutes. Indeed, a review of the legislative purpose and history of LIHPRHA and the past practice of HUD lead to the conclusion that LIHPRHA's preemption provision should not apply to buildings opting out under HOPE.

Part I of this note examines the background of federal policies regarding the development and preservation of affordable housing projects. Part II discusses current state and local affordable housing preservation policies. Part III examines Supreme Court jurisprudence regarding constitutional preemption standards. Part IV analyzes the holdings of *Forest Park*<sup>30</sup> and *Topa Equities*.<sup>31</sup> Part V.A examines the debate about whether LIHPRHA's preemption provision should be applied to alternative prepayment processes such as HOPE. This part highlights the circuit courts'

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<sup>28</sup> Grow, *supra* note 9, at 3. These units represent more than one-third of our country's subsidized housing inventory. *Id.*

<sup>29</sup> U.S. DEP'T OF HOUS. AND URBAN DEV., RENTAL HOUSING DYNAMICS: IS AFFORDABLE HOUSING FOR THE POOR AND ENDANGERED SPECIES? (2003), available at <http://www.huduser.org/datasets/ahs/ahsReports.html#2>. U.S. DEP'T OF HOUS. AND URBAN DEV., THE WIDENING GAP: NEW FINDINGS ON HOUSING AFFORDABILITY IN AMERICA (1997).

<sup>30</sup> *Forest Park*, 336 F.3d at 733.

<sup>31</sup> *Topa Equities*, 342 F.3d at 1070.

*AFFORDABLE HOUSING PRESERVATION* 749

reliance on a plain meaning approach to the interpretation of the LIHPRHA preemption provision, as compared to the broad approach suggested by affordable housing advocates, who argue that the interpretation of LIHPRHA requires the use of a range of sources, including legislative history, and agency policy and practice. Part V.B proposes that if courts continue to apply the LIHPRHA preemption provision to HOPE or other prepayment statutes, then constitutional preemption jurisprudence and congressional history support the use of the Ninth Circuit's legal consequences test rather than the Eighth Circuit's practical effects approach. Part VI recommends that state and local governments interested in preserving their privately owned, federally subsidized affordable housing should enact preservation laws that enable and aid the transfer of such properties to non-speculative preservation owners following the current owners' opting-out of federal affordable housing programs.

#### I. BACKGROUND OF FEDERAL HOUSING DEVELOPMENT AND PRESERVATION POLICIES

Since 1949, the priority of U.S. housing policy has been to achieve "a decent home and suitable living environment for every American family."<sup>32</sup> The National Housing Act of 1949<sup>33</sup> employed an approach that was unique among New Deal-era policies in enticing private industry to aid the implementation of a government initiative.<sup>34</sup> Through below-market interest rate loans

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<sup>32</sup> Salinas, *supra* note 3, at 22-23. In pursuit of the objectives of the Housing Act of 1949, the national government subsidized construction of 1.2 million new low-income apartments, 800,000 new apartments for moderate-income families, and 700,000 new apartments for the elderly. *Id.* Adding more than 1.5 million rent supplements per year and other subsidy programs, the federal government has subsidized more than 5 million households with new or rehabilitated housing units since 1950. *Id.*

<sup>33</sup> 42 U.S.C. § 1441 (1949) [hereinafter National Housing Act of 1949].

<sup>34</sup> Peter W. Salsich, Jr., *Will the "Free Market" Solve the Affordable Housing Crisis?*, J. OF POVERTY L. AND POL'Y, Jan.-Feb. 2002, at 573 (explaining how the U.S. Housing Act of 1937, which created the federal public housing program, created programs designed to construct and manage housing projects in order to provide homes but also in major part to help the country

and general subsidies, federal housing programs provided incentives to private developers to build inexpensive housing.<sup>35</sup>

In 1961, Congress enacted a below-market interest rate program (Section 221(d)(3)),<sup>36</sup> which was later replaced in 1968 by an interest subsidy program (Section 236).<sup>37</sup> Under Section 221(d)(3) and Section 236, HUD was authorized to insure loans made by private lending institutions and to subsidize interest payments on loans extended to profit-motivated developers.<sup>38</sup> Through subsidies, HUD reduced the interest rates of private market mortgages (usually about eight to ten percent) to between one and three percent, and offered developers the option of extending mortgage loans for the construction period plus forty years.<sup>39</sup> Owners were expected to share the benefits of the program with tenants through lower rents.<sup>40</sup>

In exchange for favorable financing terms, owners of Section 221(d)(3) and 236 housing projects were required to comply with certain minimum property standards and to maintain the housing for occupancy by low-income families.<sup>41</sup> Mortgage documents for projects under these sections prohibited project owners from prepaying their forty-year mortgages for a period of twenty years without HUD's prior consent.<sup>42</sup> This restriction prevented owners

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come out of the Great Depression by creating new construction jobs); Angela D. Chatman, *Housing Cuts; Restructuring HUD Will Shred the Safety Net for the Poor. But the Pain Will Be Shared by All*, PLAIN DEALER (Cleveland, Ohio), Mar. 26, 1995, at 1C.

<sup>35</sup> Salsich, *supra* note 34, at 576.

<sup>36</sup> National Housing Act, 12 U.S.C. § 17151(d)(3) (1961).

<sup>37</sup> *Id.* § 1715z-1 (1968).

<sup>38</sup> Sheldon Winkelman, *Low Income Housing Preservation and Resident Homeownership Act of 1990*, 73 MICH. B.J. 1160, 1160 (1994).

<sup>39</sup> *Id.*

<sup>40</sup> See *Cienega Gardens v. United States*, 194 F.3d 1231, 1234 (Fed. Cir. 1998), *cert. denied sub nom. Sherman Park Apartments v. United States*, 528 U.S. 820 (1999).

<sup>41</sup> Winkelman, *supra* note 38, at 1160.

<sup>42</sup> *Cienega Gardens*, 194 F.3d at 1234-35.

Generally, when obtaining a HUD-insured mortgage under either of the above programs, an owner executed a deed of trust note payable to a private lending institution. The note evidenced a loan made to the

*AFFORDABLE HOUSING PRESERVATION* 751

from escaping the low-income housing limitations and use restrictions during this period.<sup>43</sup>

Despite the government's efforts to generate and maintain affordable housing through the Section 221(d)(3), Section 236, and Section 8 project-based programs, America's affordable housing needs remained substantially unmet.<sup>44</sup> Many of the projects built

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owner pursuant to a loan agreement between the owner and the lending institution that contemplated advances to the owner. Payment of the indebtedness evidenced by the note was secured by a deed of trust, or a mortgage, on the subject property. The note and deed of trust were printed on forms approved by HUD, and HUD endorsed the note as part of its mortgage insurance. The repayment term of the loan was generally forty years. Simultaneously, in exchange for HUD's endorsement for insurance (pursuant to a commitment for insurance), the owner entered into a regulatory agreement with HUD, under which the owner agreed, among other things, to certain "affordability restrictions," including restrictions on the income levels of tenants, restrictions on allowable rental rates, and restrictions on the rate of return the owner could receive from the housing project. The regulatory agreement and the mortgage insurance provided by HUD were to remain in effect so long as the loan remained outstanding.

While the regulatory agreement made no mention of the right to prepay the outstanding loan, a rider to the deed of trust note permitted the owner to prepay the loan in full, without HUD approval, after twenty years. Developers could not prepay their loans prior to twenty years, except under certain conditions, including HUD approval. The prepayment rules in the riders reflected contemporaneous HUD regulations governing the Section 221(d)(3) and Section 236 programs. By prepaying the outstanding loan, an owner could terminate HUD's affordability restrictions on the property. The owner then could convert the property into a conventional rental property and charge market rental rates, thereby obtaining a greater return on the investment.

*Id.* (internal quotations and citations omitted).

<sup>43</sup> *Id.* at 1235.

<sup>44</sup> Grow, *supra* note 9, at 2. Throughout the 1970s, projects under Sections 221(d)(3) and 236 suffered large operating losses, as rents remained static despite increasing maintenance costs. *Id.* In response, Congress supplied additional subsidies in the form of Section 8 Loan Management Set-Aside contracts, commonly known as Section 8 Housing Assistance Payment (HAP) contracts. See Henry A. Herrman, Comment, *Privity: How HUD Avoided Contract Liability under ELIHPA and LIHPRHA*, 30 SW. U. L. REV. 323, 329 (2001). Section 8 subsidies originally provided direct payments to owners of

under these programs quickly fell into disrepair due to the projects' failure to generate sufficient "revenue to keep pace with rising operating, management, and maintenance costs."<sup>45</sup> Attempting to address the deficiencies of its project-based tenant subsidy programs, Congress subsequently developed a tenant-based Section 8 voucher program that largely replaced project-based subsidy programs.<sup>46</sup> As a result, appropriations under Sections 221(d)(3) and 236 stopped.<sup>47</sup> However, the approximately 800,000 units built under these programs continued in operation pursuant to the twenty-year prepayment restriction.<sup>48</sup>

In the mid-1980s, more than 800,000 units built under Sections 221(d)(3) and 236 were still held under federal rent prohibitions and remained an important part of the nation's affordable housing stock. Congress became concerned that a significant portion of this pool could be lost through conversion to market-rate units because the twenty-year restriction on prepayment for most of the properties would soon expire.<sup>49</sup> Upon prepayment, "the units would no longer be restricted to low-income occupancy."<sup>50</sup> Because in most cases local rents for comparable properties exceeded the rents earned by assisted housing units, the owners of these units could increase their profits by converting properties to market-rate rents or condominium status.<sup>51</sup> Conversions of both types threatened the same result—the removal from the market of affordable housing for low-income tenants.

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section 236 projects to supplement the rent payable by low-income tenants and to offset operating costs for the projects. Clark, *supra* note 3, at 187-88.

<sup>45</sup> Herrman, *supra* note 44, at 329.

<sup>46</sup> *Id.* at 187-88. For a discussion of section 8 subsidies, see DAYE, *supra* note 3, at 210-20; *see also* Brian Maney & Sheila Cowley, *Scarcity and Success: Perspectives on Assisted Housing*, 9 J. AFFORDABLE HOUS. & COMM. DEV. L. 319 (2000).

<sup>47</sup> Clark, *supra* note 3, at 187.

<sup>48</sup> *Id.*

<sup>49</sup> C. Theodore Koebel & Cara L. Bailey, *State Policies and Program to Preserve Federally Assisted Low-Income Housing*, 3 HOUSING POL'Y DEBATE, 995, 995-96 (1990) (citing John Moore, *Expiring Uses*, NAT'L J., Aug. 2, 1986, at 1184-88).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* *See also* Grow, *supra* note 9, at 4.

*AFFORDABLE HOUSING PRESERVATION* 753

The prospect that nearly one million units of low-income housing built during the 1960s would soon become eligible to be released from rent restrictions prompted Congress to enact the Emergency Low-Income Housing Preservation Act of 1987 (Emergency Act).<sup>52</sup> The Emergency Act prohibited owners of projects eligible for prepayment from converting these properties to market-rate units unless they first complied with cumbersome provisions.<sup>53</sup> The Emergency Act effectively placed a moratorium on prepayment by owners of their Section 221(d)(3) and 236 housing development loans at the end of the original twenty-year period.<sup>54</sup> Owners, outraged at the sudden abrogation of their contractual rights, filed lawsuits challenging the constitutionality of the Emergency Act.<sup>55</sup>

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<sup>52</sup> Emergency Low-Income Housing Preservation Act of 1987, 12 U.S.C. § 17151 (1989 & Supp. 1995) [hereinafter ELIHPA]. *See also* Johnson v. United States Dep't of Housing & Urban Dev., 911 F.2d 1302, 1305 (8th Cir. 1990) (citing H.R.CONF.REP. No. 426, 100th Cong., *reprinted in* 1987 U.S. Code Cong. & Admin. News 3458, 3489-3790).

The Preservation Act was prompted by the prospect that nearly one million units of low income housing built in the 1960s would soon be eligible to be released from rent restrictions because of the expiration of the twenty-year moratorium on unilateral mortgage prepayment and the expiration of Section 8 rental assistance contracts. To prevent a national crisis in the availability of low income housing, Congress passed a temporary measure making it more difficult for owners of § 221(d)(3) housing to release themselves from the terms of the regulatory agreement.

*Id.* (internal citations omitted).

<sup>53</sup> Koebel & Bailey, *supra* note 49, at 996.

<sup>54</sup> Winkelman, *supra* note 38, 1160. *See also* Clark, *supra* note 3, at 189 (explaining that Congress passed ELIHPA as emergency legislation, intending government and private industry to work together in developing permanent solutions to the impending disaster of losing nearly 800,000 affordable housing units).

<sup>55</sup> ELIHPA was controversial because many owners believed that the terms of the Act breached the federal government's agreement to free the owners from rent and land use restrictions. Howard Cohen & Taylor Mattis, *Prepayment Rights: Abrogation by the Low Income Housing Preservation and Resident Homeownership Act of 1990*, 28 REAL PROP. & TR. J. 1 (1993). Under federal project-based subsidy programs of the National Housing Act, the private

While these suits were pending, Congress repealed the Emergency Act and enacted the National Affordable Housing Act, including the Low-Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA or Preservation Act).<sup>56</sup> LIHPRHA established a comprehensive program to recapitalize privately-owned assisted housing and to commit these properties for use as low-income housing for their “remaining useful life” of fifty years.<sup>57</sup> To effectuate this goal, LIHPRHA encouraged owners to refinance their units under the program<sup>58</sup> or to sell their

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developer secured a loan from a private lender, evidenced by a deed of trust note payable to a private lending institution (the “Note”). *Cienega Gardens v. United States*, 33 Fed. Cl. 196, 196-203 (1995). HUD endorsed the Note as part of its process of insuring the mortgage. *Id.* The Note contained a rider, which expressly permitted the owner to prepay the loan in full, without HUD approval, after twenty years. *Cienega Gardens*, 194 F.3d at 1235. The rider was the only document that expressly mentioned the borrower’s right to prepay. *Id.* Pursuant to the rider, developers were not permitted to prepay their HUD-insured loans prior to twenty years except under certain conditions. *Id.* Owners argued that Congress had interfered with their contractual right of prepayment. *See Herrman, supra* note 44, at 330 n.66 (*citing* *Orrego v. 833 W. Buena Joint Ventura*, 943 F.2d 730 (7th Cir. 1991) (holding ELIHPA not retroactive without reaching the constitutional question); *Thetford Properties v. U.S. Dep’t of Hous. & Urban Dev.*, 907 F.2d 445, 450 (4th Cir. 1990) (dismissing appellant’s constitutional claim for failure to exhaust administrative remedies); *Johnson v. U.S. Dept. of Hous. & Urban Dev.*, 911 F.2d 1302 (8th Cir. 1990) (dismissing plaintiffs’ claim for failure to exhaust administrative remedies); *Orrego v. U.S. Dep’t of Hous. & Urban Dev.*, 701 F. Supp. 1384 (N.D. Ill. 1988)).

<sup>56</sup> LIHPRHA, 12 U.S.C. §§ 4101-4147. LIHPRHA was part of a more comprehensive housing law called the Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. §§ 12701-12898 (1996). *See generally* Winkelman, *supra* note 38, at 1161.

<sup>57</sup> LIHPRHA, 12 U.S.C. § 4112(c). “[T]he term ‘remaining useful life’ means . . . the period during which the physical characteristics of the housing remain in a condition suitable for occupancy, assuming normal maintenance and repairs are made and major systems and capital components are replaced as becomes necessary.” *Id.* Fifty years after the commencement of the POA, the owner may petition HUD for a hearing to determine whether the useful life of the project has expired. *Id.*

<sup>58</sup> Koebel & Bailey, *supra* note 49, at 997 (“LIHPRHA preservation incentives include insured or direct capital improvement financing, an equity takeout loan, an 8 percent return on preservation equity, access to reserves, increased Section 8 and non-Section 8 rents, and insured acquisition loans and

*AFFORDABLE HOUSING PRESERVATION* 755

properties to “qualified purchasers.”<sup>59</sup> With the hope of attracting willing owners, LIHPRHA offered a range of incentives, including increased rent ceilings, increased allowable rates of return on investments, and equity loan funds for capital improvements.<sup>60</sup>

LIHPRHA specifically addressed the contested contractual issues raised by the Emergency Act by permitting owners to prepay their mortgage loans; however, the Act discouraged the widespread exercise of this option through the creation of a burdensome approval process.<sup>61</sup> Under the Act’s prepayment procedures, an owner first had to file with HUD, tenants, and others a “notice of intent” to prepay.<sup>62</sup> The owner then was required to submit a “plan of action” (POA) setting forth information relating to the proposed prepayment.<sup>63</sup> HUD would then evaluate the owner’s POA for approval.<sup>64</sup> Under the Preservation Act, HUD could issue approval for prepayment only after making certain written findings that the prepayment would not adversely affect the low-income housing supply or involuntarily displace current tenants.<sup>65</sup> In the event that HUD could not make the necessary findings, LIHPRHA required that the agency disapprove the owner’s POA and deny the owner’s request for prepayment approval.<sup>66</sup>

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grants to qualified purchasers.”).

<sup>59</sup> *Id.*

“Qualified purchaser” is a technical term in the act identifying either a priority purchaser as previously defined or another purchaser committing to continuation of the units as assisted housing. Priority purchasers include a local or state government agency, a nonprofit housing corporation, or a tenant organization. For-profit buyers are eligible as qualified purchasers if they are willing to commit to the use restriction.

*Id.*

<sup>60</sup> *Cienega Gardens*, 194 F.3d at 1235.

<sup>61</sup> *See* LIHPRHA, 12 U.S.C. §§ 4101-4147.

<sup>62</sup> *Id.* § 4102(a).

<sup>63</sup> *Id.* § 4107.

<sup>64</sup> *Id.* § 4101(a).

<sup>65</sup> *Id.* §§ 4101(a), 4108. *See also Forest Park*, 203 F. Supp. 2d at 1074.

<sup>66</sup> *Id.* § 4108(c). Under LIHPRHA’s stringent procedures, the prepayment option was effectively limited to situations in which (1) there was no bona fide

Under the market conditions of the mid-1990s, few owners could reasonably satisfy the Preservation Act's requirements for prepayment.<sup>67</sup> Further, the properties of many owners were insufficiently valuable to qualify for additional financial incentives under the Act. Therefore, most "eligible" owners did not to participate in LIHPRHA at all.<sup>68</sup> Of the owners that did participate, virtually all filed POAs seeking preservation incentives to remain in the affordable housing program.<sup>69</sup>

While Congress intended to burden owners with additional federal restrictions through the Preservation Act, it also sought to protect them from additional burdens imposed by state or local governments. Section 4122 of LIHPRHA expressly preempted state and local governments from establishing or enforcing laws or regulations that would "restrict or prohibit" the prepayment of loans on LIHPRHA-eligible housing projects.<sup>70</sup> By its terms,

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purchaser for the owner's property, (2) there was insufficient public funding to implement preservation, or (3) the owner's POA was supported by sufficient negative impact findings by HUD. Winkelman, *supra* note 38, at 1161-62.

An owner who wishes to prepay must file a notice of intent to do so, simultaneously with HUD as well as with the appropriate state or local government officer, the holder of the existing mortgage and the tenants. HUD's permission to prepay is only granted if the project fits into one of two categories, namely: The project must be located in an area where there is no need for low-income housing and where there will be no substantial economic effect on the tenants; or the project must have a value so high that the amount of federal incentives which must be offered ("Federal Cost Limits") cannot support the appraised value of the property. It is generally felt that it would require an extremely unique set of facts and circumstances to lead to HUD's granting permission for prepayment; that is, all areas arguably need low-income housing and very few projects have a value greater than the Federal Cost Limits. Therefore, the option of prepayment is probably a fiction.

*Id.*

<sup>67</sup> Winkelman, *supra* note 38 (citing *Thetford Properties*, 907 F.2d at 450) ("[T]he option of prepayment is probably a fiction . . .").

<sup>68</sup> *Id.* See also Grow, *supra* note 9, at 3.

<sup>69</sup> LIHPRHA, 12 U.S.C. § 4109.

<sup>70</sup> *Id.* § 4122. In relevant part, the statute reads:

(a) In general. No State or political subdivision of a State may establish, continue in effect, or enforce any law or regulation that . . .

*AFFORDABLE HOUSING PRESERVATION* 757

Section 4122 did not apply to local laws of general applicability.<sup>71</sup> The Preservation Act, along with its express preemption provision, ensured affordable housing for the most at-risk low-income Americans, while providing equitable treatment of federally funded incentives among the states.<sup>72</sup>

In the late 1990s, an emerging interest in balancing the national budget, coupled with HUD's promotion of its "Reinvention Blueprint"—a radical proposal to substitute vouchers for all project-based assistance—led to Congress's defunding of the Preservation Act and the creation of a series of new programs to address the low-income housing shortage.<sup>73</sup> Congress mandated

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(1) restricts or inhibits the prepayment of any mortgage described in section 4119(1) of this title . . . on eligible low income housing; (2) restricts or inhibits an owner of such housing from receiving the authorized annual return provided under section 4101 of this title; (3) is inconsistent with any provision of this subchapter, including any law, regulation, or other restriction that limits or impairs the ability of any owner of eligible low income housing to receive incentives authorized under this subchapter . . . or (4) in its applicability to low income housing is limited only to eligible low income housing for which the owner has prepaid the mortgage or terminated the insurance contract . . .

(b) Effect. This section shall not prevent the establishment, continuing in effect, or enforcement of any law or regulation of any State or political subdivision of a State not inconsistent with the provisions of this subchapter, such as any law or regulation relating to building standards, zoning limitations, health, safety, or habitability standards for housing, rent control, or conversion or rental housing to condominium or cooperative ownership, to the extent such law or regulation is of general applicability to both housing receiving Federal assistance and nonassisted housing . . .

*Id.* (emphasis added).

<sup>71</sup> *Id.*

<sup>72</sup> H.R.CONF.REP. No. 101-943, at 458, 460 (1990), reprinted in 1990 U.S.C.C.A.N. 6070, 6165 [hereinafter *House LIHPRHA Report*] ("Preemption: The [LIHPRHA] solution would recognize that a fair Federal preservation policy must apply uniformly to all affected properties regardless of location. For that reason, the solution would preempt State and Local laws that target only prepayment projects for special treatment.").

<sup>73</sup> *Forest Park II*, 336 F.3d at 729. See *Grow*, *supra* note 9, at 3. While not endorsing HUD's proposal, in 1996, Congress reduced funding for the

that, effective October 1, 1996, HUD suspend processing of any unapproved POAs under LIHPRHA.<sup>74</sup> As a practical matter, LIHPRHA's restrictive prepayment requirements have not been

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LIHPRHA preservation program. *Id.* See Pub. L. No. 104-204 (FY 97 Appropriations Act); see also H.R.Cong.Rep. No. 812, 104th Cong. (1996).

The preservation program has been redesigned to reduce excessive costs. . . . To assist the Congress in making a determination of whether this program is the most cost-effective way to provide affordable housing opportunities to low-income families, the conferees request the General Accounting Office (GAO) to evaluate and review the program.

*Id.*, available at <http://thomas.loc.gov>.

<sup>74</sup> HOPE authorized the HUD secretary to limit LIHPRHA funding to certain developments meeting specified criteria and permitted prepayment so long as the owners held off on rent increases for sixty days. HOPE § 2(b). The Quality Housing and Work Responsibility Act § 219, permanently defunded LIHPRHA and authorized prepayments notwithstanding its terms. Pub. L. No. 105-276, 112 Stat. 2461 (1998).

Sec. 219. (a) Prepayment Right.—Notwithstanding prior acts:

(1) the owner of the project may prepay, and the mortgagee may accept prepayment of, the mortgage on the project, and

(2) the owner may request voluntary termination of a mortgage insurance contract with respect to such project and the contract may be terminated notwithstanding any requirements under sections 229 and 250 of the National Housing Act.

(b) Conditions.—Any prepayment of a mortgage or termination of an insurance contract authorized under subsection (a) may be made—

(1) only to the extent that such prepayment or termination is consistent with the terms and conditions of the mortgage on or mortgage insurance contract for the project;

(2) only if the owner of the project involved agrees not to increase the rent charges for any dwelling unit in the project during the 60-day period beginning upon such prepayment or termination; and

(3) only if the owner of the project provides notice of intent to prepay or terminate, in such form as the Secretary of Housing and Urban Development may prescribe, to each tenant of the housing, the Secretary, and the chief executive officer of the appropriate State or local government for the jurisdiction within which the housing is located, not less than 150 days, but not more than 270 days, before such prepayment or termination.

*Id.*

*AFFORDABLE HOUSING PRESERVATION* 759

applied to any HUD-subsidized mortgage prepayments since 1996, although Congress has never explicitly repealed LIHPRHA.

As part of its new housing policy, Congress passed the Housing Opportunity Program Extension Act of 1996 (HOPE),<sup>75</sup> an appropriations bill that limited LIHPRHA funding and shifted resources to tenant-based subsidy programs, such as Section 8 housing vouchers. Further, Section 219 of HOPE permitted prepayment of mortgages for subsidized projects without HUD approval, provided that owners delayed rent increases for at least sixty days.<sup>76</sup> HOPE essentially reinstated most of the owners' original rights to prepay Section 221(d)(3) and 236 mortgages, including the right to prepay their mortgages without HUD approval after twenty years.<sup>77</sup>

Following the passage of HOPE, a series of congressional enactments, as part of the Quality Housing and Work Responsibility Act, permanently defunded the Preservation Act's incentive programs and authorized the prepayment of federally subsidized mortgages.<sup>78</sup> Neither Section 219 nor any other provision in HOPE or the subsequent Acts contained a preemption clause such as that in LIHPRHA or references to LIHPRHA's express preemption provision.<sup>79</sup> Consequently, the interplay between LIHPRHA's preemption provision and subsequent federal housing acts has been the subject of various preservation battles between low-income tenants and profit-motivated owners. Only two circuit courts have addressed the relationship between LIHPRHA and HOPE—the Eighth Circuit in *Forest Park II v. Hadley* and the Ninth Circuit in *Topa Equities v. City of Los Angeles*. Both courts have found that the LIHPRHA preemption provision is still applicable law, regardless of the provision under which an owner purports to be opting out.

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<sup>75</sup> HOPE § 2(b).

<sup>76</sup> *Id.* (“[O]nly if the owner of the project involved agrees not to increase the rent charges for any dwelling unit in the project during the 60-day period beginning upon such prepayment or termination. . .”).

<sup>77</sup> Quality Housing and Work Responsibility Act § 219; *see also Cienega Gardens*, 38 Fed. Cl. at 70.

<sup>78</sup> Quality Housing and Work Responsibility Act § 219.

<sup>79</sup> *Topa Equities*, 342 F.3d at 1069; *Forest Park*, 336 F.3d at 732.

Since the 1950s, HUD has subsidized approximately 1.7 million rental units in more than 23,000 privately-owned properties.<sup>80</sup> More than 80,000 low-income apartment units were preserved through LIHPRHA and the Emergency Act.<sup>81</sup> However, between 1995 and 2003, following the enactment of HOPE and the return of the twenty-year prepayment option, more than 300,000 units have been removed from the affordable housing stock.<sup>82</sup> In 2004, 1.4 million affordable units remained; more than forty percent of the tenants are elderly.<sup>83</sup> Ever-increasing rents in most urban centers and the trend of owners opting-out of federal housing programs for larger profits have forced greater involvement by state and local governments in the provision of decent, affordable homes to American families.<sup>84</sup>

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<sup>80</sup> *Hearing on H.R. 4679 Before the House Subcommittee on Housing and Community Opportunity, House Financial Services Comm.*, 108th Cong. (2004) (Testimony of Michael Bodaken, President, National Housing) (July 20, 2004) [hereinafter *National Housing Trust Testimony*], available at [http://www.nhtinc.org/documents/072004\\_NHT\\_Testimony.pdf](http://www.nhtinc.org/documents/072004_NHT_Testimony.pdf).

<sup>81</sup> SO. CAL. ASS'N OF GOV'T, *THE AFFORDABLE HOUSING PRESERVATION CRISIS: A RISK ASSESSMENT OF THE POTENTIAL HUD-ASSISTED MULTIFAMILY HOUSING IN THE SOUTHERN CALIFORNIA REGION* (Dec. 2000) [hereinafter *RISK ASSESSMENT STUDY*], available at <http://api.ucla.edu/workshop/HousingPreservation/LinksResources/HousingPreservationReportFinal.htm>.

<sup>82</sup> NAT'L HOUS. TRUST, *CHANGES TO PROJECT-BASED MULTIFAMILY UNITS IN HUD'S INVENTORY BETWEEN 1995 AND 2003* 6 (2004), available at [http://www.nhtinc.org/documents/PB\\_Inventory.pdf](http://www.nhtinc.org/documents/PB_Inventory.pdf).

Analysis of HUD data finds that between 1995 and 2003, the number of such units dropped from 1.7 million to 1.4 million. The loss of 300,000 affordable rental units is substantially larger than previous estimates. This loss is especially concerning in light of the shortage of other available affordable housing for extremely low-income households across the country.

*Id.*

<sup>83</sup> *National Housing Trust Testimony*, *supra* note 80.

<sup>84</sup> On average, annual rent increases among American's major metropolitan centers were three percent per year from 1988-1997. JACK GOODMAN, NAT'L MULTI HOUS. COUNCIL, *PERFORMANCE ACROSS LOCAL APARTMENT MARKETS* (1999), available at <http://www.nmhc.org>. See also KALIMA ROSE ET AL., PRATT INST. CTR. FOR CMTY. & ENV. DEVELOPMENT, *INCREASING HOUSING OPPORTUNITY IN NEW YORK CITY: THE CASE FOR INCLUSIONARY ZONING* (2004) (explaining that the average income for New York renter households

*AFFORDABLE HOUSING PRESERVATION* 761

## II. STATE AND LOCAL GOVERNMENT PRESERVATION POLICIES

Prior to the enactment of the Emergency Act and LIHPRHA, state and local governments provided limited protections for federal affordable housing projects. In the wake of LIHPRHA's defunding, federal law no longer provides preservation guarantees; consequently, states and localities have assumed an even larger role in preserving affordable housing projects.<sup>85</sup> Low-income housing advocates push for increased local government involvement in preservation because preservation, as compared to programs hinging on tenant vouchers, prevents the displacement of residents from their homes and communities, maintains affordable units for future tenants in need, and provides superior housing security for tenants and communities.<sup>86</sup> In light of recent economic downturns, preservation also has proved more cost effective for local governments than the development of new affordable projects.<sup>87</sup> Aggressive state and local preservation policies have achieved marked success in limiting the conversion of low-income housing to market-rate units.<sup>88</sup> These protections come in a variety of forms, including procedural requirements for opting out, limitations on property owners' returns, and the transfer of properties to preservation owners.<sup>89</sup>

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grew just three percent from 1975 to 1999, but the average rent went up thirty-three percent), *available at* <http://www.policylink.org/Research/NYIZ/default.html>.

<sup>85</sup> Brian Galle, National Housing Law Project, *Preserving Federally Assisted Housing at the State and Local Level: A Legislative Tool Kit*, 29 HOUS. L. BULL. 183 (1999) (survey of state and local preservation initiatives), *available at* <http://www.nhlp.org/html/hlb/1099/1099toolkit.htm>.

<sup>86</sup> Grow, *supra* note 9, at 5. *See, e.g.*, S. REP. NO. 106-161(1999) (expressing that tenant-based Section 8 vouchers "do not always provide real rental choice for assisted families" noting that "in a number of cases, families with vouchers are unable to use their vouchers to obtain affordable housing"), *available at* <http://thomas.loc.gov>.

<sup>87</sup> Grow, *supra* note 9, at 5.

<sup>88</sup> *See generally Risk Assessment Study, supra* note 81.

<sup>89</sup> Galle, *supra* note 85. Numerous state and localities have also developed alternative programs aimed primarily at preserving projects through preservation incentives to current owners. *Id.* In exchange for new or extended agreements,

*A. Procedural Requirements for Opting Out*

Procedural requirements provide information to tenants or local governments in order to prepare them for the impending removal of affordability restrictions on subsidized housing projects.<sup>90</sup> Current federal law guarantees no less than six months' notice to HUD and tenants of an impending market-rate conversion.<sup>91</sup> Many states have statutes requiring that notice be provided to tenants or local governments in advance of the current 150-day federal notice period.<sup>92</sup>

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some of these programs provide: refinancing or cash-out current equity; equity takeout loans for other purposes; partial access to residual receipts or excess income accounts; and increased dividends. *See also* National Council of State Housing Agencies National Preservation Survey (1998), *available at* [www.nhlp.org/html/pres/state/index.htm](http://www.nhlp.org/html/pres/state/index.htm) (citing programs in California, Colorado, Maine, Maryland, Massachusetts, Michigan, Minnesota, Pennsylvania, and Wisconsin). These state and local incentive-based preservation programs are beyond the scope of this note and are not likely in conflict with LIHPRHA preemption. *Id.*

<sup>90</sup> Galle, *supra* note 85, at 4. Notice requirements may additionally provide sufficient time for arranging a transfer of the project to a non-profit owner or deter some owners from prepaying. *Id.*

<sup>91</sup> Quality Housing and Work Responsibility Act § 219 (requiring any owner who anticipates a termination of the Section 221(d)(3) or Section 236 mortgage to provide no less than 150 days and no more than 270 days notice to tenants and to HUD); *see also* Galle, *supra* note 85.

<sup>92</sup> *See* CAL. GOV'T. CODE § 65863.10, *et seq.* (2001) (requiring, upon any action that would terminate subsidy for all HUD-subsidized housing, one year's notice to tenants, state and local housing authorities, and local governments prior to termination or prepayment); 1988 Conn. Pub. Acts 88-262 (requiring one year notice); 310 ILL. COMP. STAT. § 60/3 (2004) (requiring, upon the intended sale or disposition of property for all HUD-subsidized housing, six months' notice to tenants and to the state housing authority); ME. REV. STAT. ANN. tit. 30-A, § 4973 (1993) (requiring ninety days notice to state and local housing authority triggered upon any action that would terminate subsidy for all HUD-subsidized housing); MD. CODE ANN., art. 83B, § 9-101, *et seq.* (1989) (requiring, upon intended sale or disposition of property for all HUD-subsidized housing, no less than one year or more than two years notice to locality, tenant association, state – notice is triggered by any action that may terminate subsidy); MINN. STAT. § 566.17 (1998) (requiring one year notice); R.I. GEN. LAWS § 34-45-4 *et seq.* (1988) (providing two years notice to tenant association, state, city;

*AFFORDABLE HOUSING PRESERVATION* 763

For example, a Minnesota statute requires that a landlord who seeks to opt out of federally subsidized rental housing must provide tenants with one year's written notice.<sup>93</sup> A second Minnesota statute requires that, at least twelve months prior to termination, owners seeking to opt out or prepay their mortgage loans must submit to the state housing agency, local government, and affected residents a "tenant impact statement" outlining the potential impact of the termination on residents.<sup>94</sup> These statutes were the subjects of a challenge by owners in *Forest Park II v. Hadley*, a case before the Eighth Circuit.<sup>95</sup>

Under a similar California law, an owner of an assisted housing development who seeks to terminate a project-based contract must

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and tenant access to information triggered upon sale, conversion, prepayment for all HUD-subsidized housing); TEX. GOV'T. CODE ANN. § 2306.185(f), *et seq.* (2005) (requiring one year's notice to state housing authority triggered upon any action that would terminate subsidy for all HUD-subsidized housing); WASH. REV. CODE § 59.28 (2005) (requiring one year notice); DENVER, CO., MUN. CODE § 12-106, *et seq.* (2000) (requiring, triggered upon opt out or sale for all HUD-subsidized housing, one year's notice to city, tenants for Section 8 contract expirations; 210 days for long-term contract expirations; and 150 days for one year extensions); Portland, Or., City Code § 30.01.030, *et seq.* (2005) (requiring one year notice to city, tenants for § 8 contract expirations; 210 days for long-term contract expirations; and 150 days for 1 year extensions triggered upon opt out or sale for all HUD-subsidized housing); SAN FRANCISCO, CA., ADMIN. CODE § 60.4, *et seq.* (1990) (requiring, upon the intended sale or disposition of property Section 8 contracts, eighteen months' notice to city and tenants for prepayment; twelve months' notice for Section 8 contract expirations).

<sup>93</sup> MINN. STAT. ANN. § 504B.255 (West 2002).

The landlord of federally subsidized rental housing must give residential tenants of federally subsidized rental housing a one-year written notice under the following conditions: (1) a federal section 8 contract will expire; (2) the landlord will exercise the option to terminate or not renew a federal section 8 contract and mortgage; (3) the landlord will prepay a mortgage and the prepayment will result in the termination of any federal use restrictions that apply to the housing; or (4) the landlord will terminate a housing subsidy program.

*Id.*

<sup>94</sup> MINN. STAT. ANN. § 471.9997 (West 2001). *See Forest Park*, 336 F.3d at 730.

<sup>95</sup> *Forest Park II v. Hadley*, 336 F.3d 724 (8th Cir. 2003).

provide at least nine months' notice of the proposed change to each affected tenant household in the assisted housing development.<sup>96</sup> In addition, California law provides that an owner's notice to tenants shall simultaneously be filed with a number of public entities, including the Board of Supervisors of the county, and the

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<sup>96</sup> Cal. Gov't. Code § 65863.10(b) mandates that the notices contain specific information for the purpose of explaining to the tenants the process and ramifications of the owners' decision to opt out. Cal. Gov't. Code § 65863.10(b). Cal Gov't Code § 65863.10 provides:

(b) At least nine months prior to the anticipated date of termination of a subsidy contract or prepayment on an assisted housing development, the owner proposing the termination or prepayment of governmental assistance shall provide a notice of the proposed change to each affected tenant household residing in the assisted housing development at the time the notice is provided.

*Id.* § 65863.10. The amended Cal. Gov't Code § 65863.10(b)(1) requires twelve months notice. Cal. Gov't. Code § 65863.10(b)(1)-(6) provides:

- (1) The anticipated date of the termination or prepayment of the federal program, and the identity of the federal program . . . .
- (2) The current rent and anticipated new rent for the unit on the date of the prepayment or termination of the federal program . . . .
- (3) A statement that a copy of the notice will be sent to the city or county, or city and county, where the assisted development is located, to the appropriate local public housing authority, if any, and to the Department of Housing and Community Redevelopment.
- (4) A statement of the possibility that the housing may remain in the federal program after the proposed date of subsidy termination or prepayment if the owner elects to do so.
- (5) A statement of the owners' intention to participate in any current replacement federal subsidy program made available to affected tenants.
- (6) The name and telephone number of the city, county, or city and county, the appropriate local public housing authority, if any, the Department of Housing and Community Development, and a legal services organization, that can be contacted to request additional written information about an owner's responsibilities and the rights and options of an affected tenant.

*Id.* § 65863.10(b)(1)-(6).

*AFFORDABLE HOUSING PRESERVATION* 765

Department of Housing and Community Development.<sup>97</sup>

*B. Limiting Property Owners' Returns*

The primary purpose of market-rate conversion is to increase an owner's rents and profits. With this in mind, states and localities have also attempted to prevent owners from opting out through regulations that increase the costs of conversion.<sup>98</sup> Governments have achieved this through either direct regulation of rent levels (i.e., rent control) or other requirements, such as so-called "statutory leases" or prepayment fees.<sup>99</sup>

The Los Angeles Rent Stabilization Ordinance (LARSO),<sup>100</sup> for example, prohibits owners of buildings previously subsidized by HUD from moving their rents to market level.<sup>101</sup> LARSO

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<sup>97</sup> CAL. GOV'T CODE § 65063.10(c)(1). These entities shall send additional notices containing supplemental information regarding the number of tenants affected, the number of units that are government assisted and the types of assistance they receive, the number of the units that are not government assisted, the number of bedrooms in each unit that is government assisted, and the ages and income of the affected tenants. *Id.* § 65863.10(c)(2).

<sup>98</sup> Galle, *supra* note 85, at 2.

<sup>99</sup> *Id.* at 3 ("Typically, [rent control] in the area involves setting the 'base rent' for any property exiting the federal subsidy or assistance program at the last rent level in effect under that program and then subsequently applying the generally applicable rent regulations on general and individual rent adjustments."). *See, e.g.*, SAN FRANCISCO, CA. CODE § 37 (1998); LOS ANGELES, CA MUNICIPAL CODE § 151.02 (1995). Massachusetts has a similar statute that applies to all projects that terminated their government "involvement" in either insurance, interest subsidies, or rental assistance. MASS. GEN. LAWS ch. 40, § 14 (2001).

States and localities have enacted legislation imposing tenant relocation costs on owners who convert their affordable housing project to market-rate. *See* R.I. GEN. LAWS § 34-45-11 (imposing moving costs); MD. ANN. CODE ART. 83B § 9-105(a) (imposing moving costs up to \$975); WASH. REV. CODE § 59.28 (imposing relocation payment level of \$2,000, half payable by the owner and half payable by the city). Seattle enacted a local relocation ordinance that applies to any displacement caused by demolition, change of use, substantial rehabilitation, or removal of use restrictions on federally assisted housing developments. SEATTLE, WA MUNICIPAL CODE §22.210 (enacted 1990).

<sup>100</sup> LOS ANGELES MUNICIPAL CODE §§ 151.01-04. (1995).

<sup>101</sup> *Id.* *See also Topa Equities*, 342 F.3d at 1067. This includes buildings

requires that, instead of entering the open market, properties exiting federal subsidy or assistance programs must enter the rent stabilization program at the rent previously charged when the buildings were under federal rent restrictions.<sup>102</sup> The ordinance also provides that rents may not be adjusted “if a rental unit is vacated as a result of the termination of the regulation of the rental unit under any local, state, or federal program,” requiring the unit to remain available to low-income tenants even though vacancy decontrol would normally free the unit.<sup>103</sup> This regulation was the subject of a challenge by owners in *Topa Equities v. City of Los Angeles*.<sup>104</sup>

Another alternative involves so-called “statutory leases,” through which tenants in converted buildings receive mandatory temporary lease renewals under terms “specified by law at rent levels roughly equal to those in effect under the federal program” prior to conversion.<sup>105</sup> Both Rhode Island and Maryland have statutes that employ this concept.<sup>106</sup>

### *C. Transfer of Properties to Preservation Owners*

Recently, several states introduced and passed laws designed to permanently preserve at-risk properties by transferring ownership of the buildings to non-speculative or not-for-profit owners.<sup>107</sup>

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that participated under Section 221(d)(3) and 236 programs. *Id.*

<sup>102</sup> Originally LARSO was Los Angeles’s general rent control regulation and applied only to standard, “free-market” rental units. *Topa Equities*, 342 F.3d at 1067. In 1990, Los Angeles amended LARSO to apply to properties that participate in federal programs under the NHA. *Id.* LARSO also contains a vacancy decontrol provision that permits owners to raise the rent for a unit to market level after the tenancy for that unit has terminated. *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> 342 F.3d 1065, 1067 (9th Cir. 2003).

<sup>105</sup> Galle, *supra* note 85, at 3.

<sup>106</sup> R.I. GEN. LAWS § 34-45-11; MD. ANN. CODE ART 83B §§ 9-101–9-114; ME. REV. STAT. ANN. tit.30-A § 4976.

<sup>107</sup> CAL. GOV’T CODE § 65863.10, *et seq.* (2001) (providing an offer to purchase to tenant associations, non-profit organizations, some for-profit organizations, and public agencies upon any action that would terminate the subsidy regarding all HUD-subsidized housing); 20 ILL. COMP. STAT. § 3805/8.1

*AFFORDABLE HOUSING PRESERVATION* 767

Many affordable housing advocates argue that such transfers are the best way to preserve at-risk housing because they are more likely to keep tenants in their homes and preserve properties as future housing sources.<sup>108</sup> Generally, these laws provide non-

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(2004) (providing the tenant association with a true right of first refusal for all HUD-subsidized housing that is triggered upon the intended sale or disposition of property); ME. REV. STAT. ANN. tit. 30-A, § 4973 (1993) (providing the state housing authority with a true right of first refusal that is triggered upon any action that would terminate the subsidy for all HUD-subsidized housing); MD. CODE ANN., art. 83B, § 9-101, *et seq.* (1989) (providing the local housing authority, groups representing tenants, and non-profit organizations with a true right of first refusal that is triggered upon the intended sale or disposition of property for all HUD-subsidized housing); R.I. GEN. LAWS § 34-45-4 *et seq.* (1988) (providing the tenant association, state housing authority, local housing authority, and locality with a true right of first refusal that is triggered for all HUD-subsidized housing upon sale, conversion, prepayment); TEX. GOV'T. CODE ANN. § 2306.185(f), *et seq.* (2005) (providing time for the state to locate a potential buyer, triggered upon any action that would terminate the subsidy for all HUD-subsidized housing); DENVER, CO., MUN. CODE § 12-106, *et seq.* (2000) (providing time for the city to negotiate for purchase, triggered upon opt out or sale for all HUD-subsidized housing); PORTLAND, OR., CITY CODE § 30.01.030, *et seq.* (2005) (providing time for the city to negotiate for purchase, triggered upon opt-out or sale for all HUD-subsidized housing); SAN FRANCISCO, CA., ADMIN. CODE § 60.4, *et seq.* (1990) (providing the city, tenant association, and non-profit organizations with a true right of first refusal triggered upon the intended sale or disposition of Section 8 properties).

<sup>108</sup> Galle, *supra* note 85, at 6.

If cost were no object, permanent preservation of at-risk properties via transfer to non-speculative ownership would probably be the best way to preserve at-risk housing. Moving projects into the hands of entities whose purpose is providing housing rather than generating profit—such as tenant-endorsed or controlled non-profits— is more likely to keep tenants in their homes and preserve the property as a future housing resource. Obtaining both the necessary funds for transfer and site control from private owners remain difficult challenges in the ever-changing policy and budget picture. In addition, local government activities that enable nonprofit purchasers to be competitive with other options available to owners interested in converting to market-rate use (*e.g.*, identifying potential conversion candidates, contacting owners to explore transfer options, providing predevelopment support for purchasers) will continue to be especially important in preserving units.

*Id.*

speculative or not-for-profit entities either a true “right of first refusal,” which permits a designated purchaser to match another sale offer and thereby acquire title, or a “right to make an offer,” with or without an obligation on the owner’s part to sell.<sup>109</sup>

A California law requires that owners of affordable housing projects must, at least twelve months prior to prepayment, offer the property for sale to everyone on a state-maintained list of prospective purchasers who have indicated their willingness to assure the long-term affordability of the housing.<sup>110</sup> For 180 days, these prospective purchasers have an exclusive right to make an offer. For an additional 180 days thereafter, all prospective buyers who made offers but were rejected still maintain a right of first refusal. This regulation was the subject of a challenge by owners in the Eastern District of California in *Kenneth Arms v. Martinez*,<sup>111</sup> which upheld the law in the face of a preemption challenge. The federal circuit courts have yet to rule on the validity of these laws

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<sup>109</sup> See, e.g., National Housing Law Program, *Right of First Refusal in Preservation Properties: Worth a Second Look*, 32 HOUS. L. BULL. 1 (Jan. 2002); National Housing Law Program, *Illinois Establishes Tenant Purchase Option for Properties Terminating Federal Programs*, 34 HOUS. L. BULL. 150 (July 2004) (discussing the Illinois law that provides an opportunity to purchase the property and preserve it as low-income housing before an owner converts it to market rent). In combination with mechanisms to obtain site control, some localities have adopted formula(s) specifying the sale price of preservation properties. See also ME. REV. STAT. ANN. tit. 30-A, § 4973 (creating “preemptive options,” triggered by the act of prepayment or opt-out, that combine notice requirements with a right of first refusal for the state housing agency whenever the owner takes an action that would terminate a project’s subsidies); SAN FRANCISCO, CA ADMIN. CODE § 60.7(a) (setting a “Fair Return Price” based upon certain appraisal assumptions that the owner must accept as a sale price).

<sup>110</sup> CAL. GOV’T CODE § 65863.11 (2001). Under Cal. Gov’t Code § 65863.11(b)-(c), an owner may not sell or otherwise dispose of his development in a manner that would result in either discontinuance of the development’s status as an assisted housing development or the termination of any low-income use restrictions that apply to the development, unless the owner provides an opportunity to purchase the developments to specified public and private entities. *Kenneth Arms*, 2001 U.S. Dist. LEXIS 11470, at \*33 (citing CAL. GOV’T CODE § 65863.11(b)-(c) (amended 2001)).

<sup>111</sup> *Kenneth Arms*, 2001 U.S. Dist. LEXIS 11470, at \*36.

*AFFORDABLE HOUSING PRESERVATION* 769

in light of Section 4122 of LIHPRHA. Discussions regarding the effect of federal preemption on these regulations frequently arise, however, in state and city legislatures at hearings and debates about preservation policies.<sup>112</sup>

## III. CONSTITUTIONAL STANDARDS FOR PREEMPTION

Preemption is the power of the federal government to supplant state law with respect to matters the federal government has the power to regulate under the U.S. Constitution.<sup>113</sup> The Supreme Court has repeatedly held that congressional intent determines when a congressional act preempts state or local law.<sup>114</sup> Preemption of a state law by federal law may be either explicitly stated in the language of a federal statute, such as the LIHPRHA preemption provision, or read by the courts to be implicitly contained in the statute's structure or purpose; that is, preemption may be express or implied.<sup>115</sup> If a federal law expressly or

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<sup>112</sup> Grow, *supra* note 9, at 2; *see also* Galle, *supra* note 85, at 2; Chen, *supra* note 10.

<sup>113</sup> Preemption power is generally viewed as arising from the Supremacy Clause of the United States Constitution.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2. *See* Stabile, *infra* note 115, at 2, n.2; *see, e.g.*, Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (noting "that state law conflicting with federal law is without effect").

<sup>114</sup> Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 96 (1992) ("The question whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone. To discern Congress's intent we examine the explicit statutory language and the structure and purpose of the statute.") (internal citations and quotations omitted).

<sup>115</sup> Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress of the Courts?*, 40 VILL. L. REV. 1, 4-5 (1995); *see also* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152-54 (1982) (explaining how federal regulatory or

impliedly preempts a state law, then “the state law may not be used by a plaintiff to impose liability on a defendant.”<sup>116</sup> There is a legal presumption against the preemption of state or local housing laws; however, Congress may preempt both explicitly.<sup>117</sup>

Express preemption “occurs when a statute contains an explicit statement addressing the preemptive effect of the statute on state law claims, rather than leaving it to the courts to decide, in any given dispute, whether the federal statute preempts state law.”<sup>118</sup> Courts are usually called upon to interpret the precise scope of an express preemption provision, the application of which is clear, as Congress added the provision to the statute.<sup>119</sup> *Forest Park, Topa Equities*, and their progeny are distinct in requiring the court to apply LIHPRHA’s preemption provision to HOPE, a distinct statutory program. The standard express preemption inquiry does not require this additional step because a preemption provision is generally part of the statute at issue.<sup>120</sup>

In the absence of an express preemption provision, preemption may be implied.<sup>121</sup> This implication may arise from a pervasive scheme of federal regulation, in which case federal law is said to “occupy the field.”<sup>122</sup> Alternatively, implied preemption may arise

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statutory law may expressly or impliedly preempt state law).

<sup>116</sup> *Stabile*, *supra* note 115, at 3.

<sup>117</sup> For discussion on the presumption against federal preemption of local police powers, *see infra* note 133 through 136 and accompanying text.

<sup>118</sup> *Stabile*, *supra* note 115, at 2.

<sup>119</sup> *Id.*

<sup>120</sup> *See, e.g.*, Employee Retirement Income Security Act of 1974 § 1144(a), 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993) [hereinafter ERISA] (preempting all state laws that relate to employee benefit plans covered by ERISA); Hazardous Material Transportation Act, 29 U.S.C. app. 1811(a) (1988).

<sup>121</sup> *Forest Park II v. Hadley*, 336 F.3d 724, 732 (8th Cir. 2003); *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065, 1069 (9th Cir. 2003).

<sup>122</sup> *See, e.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) (concluding that the 1972 Amendments to the Federal Water Pollution Control Act “occup[y] the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency”); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), *rev’d sub nom. Rice v. Board of Trade of Chicago*, 331 U.S. 247 (1947) (stating that federal regulatory scheme may be so pervasive or federal interest so dominant that enforcement of state

*AFFORDABLE HOUSING PRESERVATION* 771

from a conflict between state law and federal law.<sup>123</sup> Such a conflict can be actual, such as where it is impossible to satisfy both federal and state law simultaneously, or indirect, when a state law stands as an obstacle to the accomplishment of Congress's objectives.<sup>124</sup>

In both express and implied preemption contexts, congressional intent is "the ultimate touchstone" in determining the extent of federal preemption.<sup>125</sup> Thus, in determining whether preemption is expressly addressed in a statute, "courts ask the question: did Congress intend its law to preempt a challenged state law?"<sup>126</sup> Since courts generally prefer to give effect to the plain and ordinary reading of statutory language, in express preemption situations, congressional intent is sought primarily in the language of the preemption provision.<sup>127</sup> That is, where a statute contains an

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laws on same subject is precluded).

<sup>123</sup> See *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 153. Preemption of state law where an actual conflict exists between a federal enactment and state law is compelled by the Supremacy Clause. For further discussion of the Supremacy Clause, see *supra* note 113.

<sup>124</sup> See *Pacific Gas & Elec. Co. v. Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (noting that state law is preempted where it is physically impossible to comply with both federal and state law); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1961) ("A holding of federal exclusion of state law is inescapable and requires no inquiry into congressional design where compliance with both federal and state regulations is a physical impossibility . . .").

<sup>125</sup> *Stabile*, *supra* note 115, at 7 (citing *Gade*, 505 U.S. at 96).

<sup>126</sup> *Id.*

<sup>127</sup> *Cipollone*, 505 U.S. at 516. In using the plain meaning approach, it is assumed that the legislature probably used the words, grammar, and punctuation in a normal way to communicate its intent, so the words, grammar, and punctuation are to be given the meaning that they would ordinarily produce when trying to determine the legislature's intent. The plain meaning statutory analysis begins with "the assumption that the ordinary meaning of [the] language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). The plain meaning rule instructs a court to give the words of a statutory provision their "natural meaning," unless doing so "would lead to a clearly unreasonable, absurd interpretation or there is otherwise clear evidence that Congress intended something other than the plain meaning of the statute." *Stabile*, *supra* note 115, at 3, n.12 (citing *Patterson v. Shumate*, 504 U.S. 753, 758-62 (1992) (noting that

express preemption provision, the issue of whether a state law is preempted is viewed as a question of statutory interpretation.<sup>128</sup>

Prior to 1992, many courts engaged in implied preemption analysis after finding that a preemption provision did not invalidate state law.<sup>129</sup> In *Cipollone v. Liggett Group, Inc.*,<sup>130</sup> a case examining the preemptive scope of the Public Health Cigarette Smoking Act of 1969, the Supreme Court stated that there is no need to examine further the substantive provisions of legislation to infer congressional intent to preempt state law when Congress has included in the legislation a provision explicitly addressing preemption and when that provision provides a “reliable indicium

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the opponent of the plain meaning bears an exceptionally heavy burden of persuasion in proving that Congress intended an alternative reading); *Garcia v. United States*, 469 U.S. 70, 75 (1984) (stating that only an extraordinary showing of contrary intentions from the statute’s legislative history would justify a limitation on the unambiguous plain meaning of the statute’s language); *see also* *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (explaining that if the language in question has a plain and unambiguous meaning, then the court should not inquire further except in rare and exceptional cases).

The Supreme Court has used the plain meaning approach in interpreting various preemption provisions. *See* *Shaw v. Delta Airlines*, 463 U.S. 85, 96-97 (1983) (“A law ‘relates to’ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.”) (citing BLACK’S LAW DICTIONARY 1158 (5th ed. 1979)); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1988) (analogously applying Black’s Law Dictionary “relates to” definition to the interpretation of ADA); *Cipollone*, 505 U.S. at 520-24 (citing *Shaw*, 463 U.S. at 97) (finding that the plain meaning of “no requirement or prohibition” sweeps broadly enough to encompass common-law obligations; thus the Court must give effect to the plain meaning unless there is clear congressional intent otherwise).

<sup>128</sup> *Stabile*, *supra* note 115, at 7.

<sup>129</sup> *Id.* at 57 n.209 (citing *Taylor v. General Motors Corp.*, 875 F.2d 816, 825-27 (11th Cir. 1989)) (holding that a common law tort action for failure to install airbags was not expressly preempted by the National Traffic and Motor Vehicle Safety Act, but was impliedly preempted by the provisions of Act), *cert. denied*, 494 U.S. 1065 (1990); *Pennington v. Vistrion Corp.*, 876 F.2d 414, 420-21 (5th Cir. 1989) (holding that claims were impliedly preempted by the Public Health Cigarette Smoking Act of 1969, but not expressly preempted).

<sup>130</sup> 505 U.S. 504 (1992). For a discussion on *Cipollone*, *see* *Stabile*, *supra* note 115, at 59.

*AFFORDABLE HOUSING PRESERVATION* 773

of congressional intent with respect to state authority.”<sup>131</sup> The Court reasoned that Congress’s enactment of an express preemption provision implies that matters beyond the reach of that provision are not preempted.<sup>132</sup>

There is a presumption against federal preemption of laws concerning “spheres traditionally occupied by the states.”<sup>133</sup> Housing regulations, land use restrictions, and zoning ordinances are within the traditional spheres of state and local police powers.<sup>134</sup> Historically, preemption of a state or local law is not

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<sup>131</sup> *Cipollone*, 505 U.S. at 517.

<sup>132</sup> *Id.*

<sup>133</sup> *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (“States traditionally have had great latitude under the police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.”); *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (citing and quoting *Rice*, 331 U.S. at 230) (noting that the exercise by a local authority of its historic police power is not to be superseded by federal statutes unless this was the clear and manifest purpose of Congress); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (explaining that preemption is not appropriate in areas in which states traditionally have enjoyed broad power to regulate).

<sup>134</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1034 (1992) (noting that property is bought and sold and investments are made subject to the State’s power to regulate); *Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (holding that the Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use of their property); *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 836 (1987).

The government’s power to forbid particular land uses in order to advance some legitimate police-power purpose includes the power to condition such use upon some concession by the owner, even a concession of property rights, so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use.

*Id.* See also *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 361 (1986).

[P]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner’s point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.

lightly presumed, and courts exercise great restraint when spheres traditionally occupied by the states are the subjects of a preemption challenge.<sup>135</sup> Therefore, even with express preemption, it is difficult to argue that a federal law was intended to broadly supplant the power of state or local governments with regard to housing or land use issues.<sup>136</sup>

#### IV. FOREST PARK AND TOPA EQUITIES

In *Forest Park*<sup>137</sup> and *Topa Equities*,<sup>138</sup> the Eighth and Ninth Circuits, respectively, held that the LIHPRHA preemption provision applies to housing projects opting out of federal programs under HOPE.<sup>139</sup> The courts reached opposite conclusions regarding federal preemption of the state preservation laws at issue because of the diverging preemption tests each court embraced.<sup>140</sup>

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*Id.* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Berman v. Parker, 348 U.S. 26 (1954) (noting that land use regulation is within the inherent police powers of the States and their political subdivisions).

<sup>135</sup> For a discussion on the presumption against preemption, see *supra* note 133. See also Chester v. Panicucci, 281 A.2d 811 (1971) (explaining that federal preemption of local police powers must be explicit).

<sup>136</sup> See Jones v. United States, 529 U.S. 848, 860 (2000) (Stevens, J., concurring) (citing U.S. v. Bass, 404 U.S. 336, 349 (1971)). Principles of federalism dictate that in the absence of a clear intent to supersede the historic police powers of the States, Congress cannot be deemed to have significantly changed the federal-state balance. *Franklin Tower*, 157 N.J. at 615; see also *N.Y. State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 654. Because the party claiming preemption bears the heavy burden of supporting that claim by “clear and manifest evidence,” the starting point for any preemption analysis dealing with housing issues is that Congress does not generally intend to supplant state law. *N.Y. State Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 654.

<sup>137</sup> *Forest Park II v. Hadley*, 336 F.3d 724 (8th Cir. 2003).

<sup>138</sup> *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065 (9th Cir. 2003).

<sup>139</sup> *Topa Equities*, 342 F.3d at 1069; *Forest Park*, 336 F.3d at 732.

<sup>140</sup> Compare *Forest Park*, 336 F.3d at 732 (holding that the Minnesota preservation statutes at issue are expressly and impliedly preempted by the applicable federal statutes) with *Topa Equities*, 342 F.3d at 1070 (holding that the Los Angeles preservation ordinance at issue is not expressly or impliedly

*AFFORDABLE HOUSING PRESERVATION* 775

In *Topa Equities*, the Ninth Circuit attempted to distinguish the Eighth Circuit's holding in *Forest Park* on the grounds that the preservation laws were fundamentally different.<sup>141</sup> However, at least one federal court has observed that the Ninth Circuit's holding concerning the applicable scope of the LIHPRHA preemption provision conflicts with the Eighth Circuit's practical effects test.<sup>142</sup>

*A. Applying the Preservation Act's Preemption Provision to HOPE's Alternative Prepayment Schedule: The Plain Reading*

In *Forest Park II v. Hadley*, the Eighth Circuit reviewed a tenant's association's attempt to delay the prepayment of a Section 236 mortgage by the owner of a low-income housing development.<sup>143</sup> The Minnesota statutes at issue require that an owner provide one year's notice in advance of prepayment, while current federal law under HOPE requires notice of no less than 150 days.<sup>144</sup> The owner complied with federal requirements, but failed to comply with the state notice requirement.<sup>145</sup> The district court found that since the building owner was opting out of the federal affordable housing program under HOPE's prepayment provisions, LIHPRHA did not apply.<sup>146</sup> The district court granted the tenant's

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preempted by the applicable federal statutes). *Topa Equities*, 342 F.3d at 1069; *Forest Park II*, 336 F.3d at 724.

<sup>141</sup> *Topa Equities*, 342 F.3d at 1069.

<sup>142</sup> *Independence Park Apts. v. United States*, 61 Fed. Cl. 692, 704 (Fed. Cl. 2004).

<sup>143</sup> *Forest Park II*, 336 F.3d at 727.

<sup>144</sup> *Id.* at 729-30.

<sup>145</sup> *Id.* at 727.

<sup>146</sup> *Forest Park II v. Hadley*, 203 F.Supp.2d 1071, 1077-78 (D. Minn. 2002).

As indicated by the language of Section 4122, the statute only preempts state law that is "inconsistent with the provisions of this subchapter"; in other words LIHPRHA. 12 U.S.C. § 4122(b) (2005). Section 4122 therefore has no applicability to state laws that may conflict with the notice provisions enacted apart from LIHPRHA. In this case, *Forest*

association injunctive relief until the owner complied with both state and federal law.<sup>147</sup>

On appeal, the Eighth Circuit observed that, “unlike cases involving a field traditionally regulated by the states, there [was] no presumption against preemption in this case” because the case did not involve a field traditionally regulated by the states.<sup>148</sup> The court determined that the central issue was not whether the statutes involved a field subject to the state’s traditional police power, but rather, whether Minnesota law was restricting HUD from administering the “entity it regulates”—the HUD-subsidized project.<sup>149</sup> The court rejected traditional preemption analysis, in which congressional intent controls, because, under the Supremacy Clause,<sup>150</sup> “state statutes may not interfere with the implementation of a federal program by a federal agency.”<sup>151</sup> Therefore, the court regarded congressional intent and legislative history as irrelevant because in the regulatory realm at issue, federal law reigned supreme.<sup>152</sup> The court effectively short-circuited the preemption analysis by determining that the issue was settled by the state statute’s frustration of a federal administrative agency’s acts.

Unlike the district court below, the Eighth Circuit was not

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Park II asserts that the relevant state laws conflict with Section 219 of the 1999 HUD Appropriations Act, Pub. L. 105-276, § 219(b)(3)(1999).

*Id.* at 1075.

<sup>147</sup> *Id.*

<sup>148</sup> *Forest Park II v. Hadley*, 336 F.3d 724, 731 (8th Cir. 2003) (citing *Buckman Co. v. Plaintiff’s Legal Comm.*, 531 U.S. 341, 347 (2001)) (“The relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law.”).

<sup>149</sup> *Forest Park II*, 336 F.3d at 731-32.

<sup>150</sup> See *Supremacy Clause*, *supra* note 113.

<sup>151</sup> *Forest Park II*, 336 F.3d at 731-32 (citing *Gade*, 505 U.S. at 96) (noting that in traditional preemption analysis, the “ultimate touchstone” is congressional intent, but that the unique federal laws and programs involved in the case make it difficult to apply a traditional preemption analysis). The court also noted that there was no presumption against preemption in this case. *Id.* (citing *Buckman*, 531 U.S. at 347).

<sup>152</sup> *Forest Park II*, 336 F.3d at 732.

## AFFORDABLE HOUSING PRESERVATION 777

persuaded by the tenants' argument that LIHPRHA was implicitly repealed because Congress ceased funding its incentive programs. The circuit court found that LIHPRHA had not been explicitly repealed, and it was still applicable because the loans at issue were described in the eligibility provision.<sup>153</sup> The LIHPRHA preemption provision, according to the court, therefore remains enforceable against state or local laws that "restrict or inhibit" prepayment.<sup>154</sup> Under this rationale, federal law, not state law, provides the appropriate notice requirements.

The Ninth Circuit heard similar arguments in the case of *Topa Equities v. City of Los Angeles*,<sup>155</sup> in which an owner of an apartment building challenged a Los Angeles ordinance prohibiting owners of low-income housing who had previously opted-out of federal housing programs from raising rents until existing low-income tenancies had terminated.<sup>156</sup> The building owner had prepaid his Section 236 mortgage in hopes of raising rents to market levels and claimed that Section 4122 preempted the city ordinance.<sup>157</sup> The city argued, and the district court agreed, that HOPE impliedly repealed the LIHPRHA preemption clause, given that the Act's new opt-out requirements post-dated the defunding of LIHPRHA.<sup>158</sup>

On appeal, the Ninth Circuit reversed the district court and concurred with the Eighth Circuit's holding that LIHPRHA's

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<sup>153</sup> *Id.* at 733.

Congress used very broad language in defining the types of mortgages covered by the preemption provision. To the extent that it intended preemption to apply only to laws affecting mortgages subject to LIHPRHA, it could have stated as much. The fact that Congress no longer funds the incentive programs established by LIHPRHA does not mean that the prepayment provisions contained therein are irrelevant or that the statute is no longer the law.

*Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065 (9th Cir. 2003).

<sup>156</sup> *Id.* at 1070.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

preemption provision applies to HOPE's prepayment schedule.<sup>159</sup> Specifically, the Ninth Circuit determined that LIHPRHA's preemption provision was still effective, despite the termination of funding for LIHPRHA-based programs.<sup>160</sup> The court concluded that congressional inaction had no effect on LIHPRHA's express preemption provision.<sup>161</sup> Thus, the court expressly joined the Eighth Circuit in limiting the inquiry to the unrepealed language of the dormant LIHPRHA program.<sup>162</sup>

*B. Determining the Scope of the Preservation Act's Preemption Provision*

In *Forest Park*, the Eighth Circuit determined that Congress intended for Section 4122 to be applied broadly.<sup>163</sup> The court supported its holding by citing the broadness of the "restrict or inhibit" language of LIHPRHA's preemption provision. Further, the court emphasized that Congress had originally intended to offer prepayment as an incentive for owners to participate in the HUD program.<sup>164</sup> According to the court, the broad language used in defining the types of mortgages covered by the preemption provision implied that the provision's application was not limited to mortgages subject to a POA for LIHPRHA prepayment.<sup>165</sup> The court therefore interpreted the Preservation Act's preemption provision to apply to projects opting out under alternative

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1069 (citing and quoting *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 575 (9th Cir. 2000)) ("The intention of the legislature to repeal must be clear and manifest, and in the absence of some affirmative showing of an intention to repeal, the *only* permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.").

<sup>161</sup> *Topa Equities*, 342 F.3d at 1069 ("While it is true that Congress has, since enacting HOPE, ceased funding LIHPRHA's incentive programs, that inaction has no effect on LIHPRHA's express preemption provision. That provision is extant.").

<sup>162</sup> *Id.*

<sup>163</sup> *Forest Park II*, 336 F.3d at 732-34.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

*AFFORDABLE HOUSING PRESERVATION* 779

prepayment processes, such as HOPE.<sup>166</sup>

In order to determine whether the Minnesota statutes “restrict or inhibit” the prepayment of mortgages, the court examined the “practical effect” of the state restrictions.<sup>167</sup> The court recognized that the statutes did not, on their face, directly “restrict or inhibit” the prepayment of mortgages.<sup>168</sup> Nonetheless, the Eighth Circuit reasoned that the *effect* of the state statutes was to “restrict or inhibit” prepayment of federal mortgages since an owner could be in compliance with the federal notice requirement when prepaying the mortgage, but would still need to wait to prepay in order to comply with the state’s notice requirements.<sup>169</sup> The court explained that because compliance with state regulations is required, “the statutes have the direct effect of impeding, burdening, and inhibiting the prepayment of federal mortgages even if the additional requirements may be minimal.”<sup>170</sup>

Moreover, the court found that the federal laws regarding prepayment “impliedly preempt the [Minnesota] statutes because the state statutes conflict with federal law.”<sup>171</sup> Under the practical effects test, any statute that diminishes the realization of federally

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<sup>166</sup> *Id.* at 729.

<sup>167</sup> *Id.* at 733.

<sup>168</sup> *Forest Park II*, 336 F.3d at 733.

<sup>169</sup> *Id.* The court stated:

The effect is that the state law forces the federal government to continue to provide financial assistance to the participant when both the federal government and the participant have chosen to end their relationship. In this way, the state law not only regulates the conduct of the citizen-owner, requiring him to take additional actions in order to withdraw, but also regulates or restricts the actions of the federal government under its own federal program.

*Id.*

<sup>170</sup> *Id.* The court described the state statute as an additional requirement “that forces owners to remain in a federally subsidized program from which Congress has authorized withdrawal.” *Id.* at 733-34. The court further explained that “[s]ince the Minnesota law stands as an obstacle to the accomplishment and execution of [HUD’s] full purposes and objectives as defined by Congress, it must give way.” *Id.*

<sup>171</sup> *Id.* at 733.

granted expectations is preempted by Section 4122.<sup>172</sup>

The Ninth Circuit in *Topa Equities v. City of Los Angeles*<sup>173</sup> determined that the preemption provision should be narrowly applied, thereby implicitly rejecting the “practical effects” approach endorsed by the Eighth Circuit.<sup>174</sup> The Ninth Circuit articulated a different test—the “legal consequences” approach—for determining whether the state statute at issue was preempted by LIHPRHA.<sup>175</sup>

Under the legal consequences test, the court found that the Los Angeles rent stabilization law was not preempted as applied to a building opting out of a Section 236 HUD-subsidized mortgage.<sup>176</sup> The Ninth Circuit examined whether LARSO directly prohibited or limited the ability of federal housing project owners to prepay their mortgages by imposing some legal bar or impediment to their doing so. Unlike the Eighth Circuit in *Forest Park*, the *Topa Equities* court did not address whether LARSO made prepayment impracticable as an economic matter.<sup>177</sup>

In reviewing the case, the court noted that there was a presumption against preemption stemming from the historical understanding of housing and land use issues as part of the states’ police powers.<sup>178</sup> The court cited paragraph (b) of the LIHPRHA

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<sup>172</sup> *Id.*

<sup>173</sup> *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065 (9th Cir. 2003).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Topa Equities*, 342 F.3d at 1071 (quoting from *Kargman v. Sullivan*, 552 F.2d 2, 6 (1st Cir. 1977)). The court in *Kargman* addressed whether a local rent control ordinance was preempted by HUD regulations. The First Circuit concluded that the ordinance was not preempted because it operated independently from the federal subsidized housing program. *Kargman*, 552 F.2d at 6. A different result was reached by the First Circuit in *City of Boston v. Harris*, 619 F.2d 87 (1st Cir. 1980), in which the Court of Appeals held that Boston’s rent control ordinance directly conflicted with HUD regulations and was accordingly preempted. The Court in *Topa Equities* looked to whether the city’s “traditionally strong interest in local rent control must yield.” *Topa Equities*, 342 F.3d at 1070.

## AFFORDABLE HOUSING PRESERVATION 781

preemption provision, which preserves certain state or local laws, and commented that “nothing in the HUD regulations purports to limit states from enacting their own rent control laws of general applicability which apply equally to apartment owners who exit the federal program as well as other apartment owners.”<sup>179</sup> Additionally, the court cited a First Circuit decision that held that “federal legislation creating the network of subsidized housing laws is superimposed upon and consciously interdependent from the substructure of local law relating to housing.”<sup>180</sup>

The Ninth Circuit reasoned that the local ordinance at issue was not preempted by Section 4122 because it did not “restrict or prohibit” an owner’s prepayment options.<sup>181</sup> Specifically, the Ninth Circuit held that subsection (b) of Section 4122 insulated the city ordinance from challenge because the ordinance applied across the board, preventing all owners of low-income housing from increasing rents, regardless of whether an had owner prepaid or opted out of federal housing programs.<sup>182</sup> The court distinguished the Eighth Circuit’s findings in *Forest Park* by holding that the Los Angeles ordinance, unlike the Minnesota statutes, restricted rental increases in all apartment buildings, regardless of an owner’s past or present participation in federal housing programs.<sup>183</sup>

The Eighth Circuit in *Forest Park*<sup>184</sup> and Ninth Circuit in *Topa*

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<sup>179</sup> *Topa Equities*, 342 F.3d at 1072.

<sup>180</sup> *Id.* (citing to *Kargman*, 552 F.2d at 1).

<sup>181</sup> *Id.* at 1067.

<sup>182</sup> *Id.* at 1070.

<sup>183</sup> *Id.* (finding that the Minnesota law prohibited prepayment of federal programs if the participant did not provide a longer period of notice than the federal notice required upon opting out of the federal program; therefore, while the Los Angeles ordinance affected all low-income housing owners, regardless of participation in federal low-income housing programs, the Minnesota statute was specifically limited to those owners who sought to prepay federal-subsidized mortgages) (citing *Kenneth Arms*, 2001 U.S. Dist. LEXIS 11470) (finding state statutes that required owners seeking to prepay federally subsidized mortgages to comply with state regulations that required longer notice than federal law and provided tenants with first refusal rights were not preempted by the preemption language contained in LIHPRHA).

<sup>184</sup> *Forest Park II*, 336 F.3d at 724.

*Equities*<sup>185</sup> are the only circuit courts to have ruled on whether the LIHPRHA preemption provision applies to housing projects opting out under alternative federal statutes.<sup>186</sup> The courts' decisions to apply the preemption provision in such cases were based on a plain and ordinary reading of the statute. While the cases are distinguishable based on the types of statutes or regulations involved (a procedural requirement to opting out as compared to a regulation limiting property owners' returns upon opting out), they appear to conflict regarding the applicable scope of LIHPRHA's preemption provision.<sup>187</sup>

#### V. ANALYSIS

The holdings of *Forest Park*<sup>188</sup> and *Topa Equities*<sup>189</sup> have significant implications for the low- and very-low income tenants residing in the remaining 1.4 million rental units in more than 23,000 privately owned, HUD-subsidized properties.<sup>190</sup> These holdings restrict the ability of state and local governments to address distinctly local housing issues in the face of the federal government's progressive burdening of state and local governments with responsibility for administering federal programs to house the poor.<sup>191</sup> In their attempts to address affordable housing shortages, several states and localities have enacted preservation laws that work to maintain the quickly diminishing permanent stock of affordable housing.<sup>192</sup> Despite the

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<sup>185</sup> *Topa Equities*, 342 F.3d at 1065.

<sup>186</sup> *Id.* at 1069; *Forest Park*, 336 F.3d at 732.

<sup>187</sup> *Independence Park Apts. v. United States*, 61 Fed. Cl. 692, 704 (Fed. Cl., 2004). *Compare Forest Park*, 336 F.3d at 732 (holding that the Minnesota preservation statutes are expressly and impliedly preempted by the applicable federal statutes) with *Topa Equities*, 342 F.3d at 1070 (holding that the Los Angeles preservation ordinance is not expressly or impliedly preempted by the applicable federal statutes).

<sup>188</sup> *Forest Park II v. Hadley*, 336 F.3d 724 (8th Cir. 2003).

<sup>189</sup> *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065 (9th Cir. 2003).

<sup>190</sup> *National Housing Trust Testimony*, *supra* note 80.

<sup>191</sup> *Topa Equities*, 342 F.3d at 1069; *Forest Park II*, 336 F.3d at 724.

<sup>192</sup> For discussion on state and local preservation policies, *see supra* Part

*AFFORDABLE HOUSING PRESERVATION* 783

agreement of the Eighth and Ninth Circuits regarding the first issue in the preemption analysis—whether LIHPRHA’s preemption provision applies to HOPE’s prepayment provisions—courts should continue to review this issue, particularly in light of the ambiguous and incongruous results of the Eighth and Ninth Circuit’s plain reading interpretation of an implied relationship between LIHPRHA and HOPE.

With regard to the circuit split on the second issue—the applicable scope of federal preemption—the Ninth Circuit’s reasoning is more consistent with past preemption jurisprudence. First, housing regulations, land use restrictions, and zoning ordinances are within the zone of state police powers.<sup>193</sup> In light of the presumption against preemption of laws and regulations enacted in accordance with a state’s police powers, the provision must be construed narrowly.<sup>194</sup> Second, LIHPRHA’s legislative history illustrates congressional intent not to limit the ability of state and local governments to regulate privately owned, subsidized affordable housing projects after opt out.<sup>195</sup> The courts’ interpretations of these issues determine whether owners are permitted to opt out without complying with the state procedures intended to preserve affordable housing.

*A. In Search of Congressional Intent*

Although the Eighth and Ninth Circuits ruled on the issue of whether the LIHPRHA preemption provision applies to projects opting out of federal affordability restrictions under HOPE, this remains an open question. State courts and federal courts in other circuits are not bound by the decisions of these circuits; indeed, a state court in the Ninth Circuit reached the opposite conclusion subsequent to Ninth Circuit’s decision in *Topa Equities*.<sup>196</sup> The

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III.

<sup>193</sup> See *supra* note 133 and accompanying text.

<sup>194</sup> *Cipollone v. Liggett Groups, Inc.*, 505 U.S. 504, 516 (1992).

<sup>195</sup> See *infra* notes 256 through 260 and accompanying text.

<sup>196</sup> *College Gardens Preservation Committee v. Eugene Burger*, No. 03 AS02608, slip op., at 3 (Sac. Superior Court, Cal. Nov. 19, 2003) (ruling that California’s law requiring notice to tenants in prepaying rental projects was not

debate over whether to apply the LIHPRHA preemption provision to HOPE is shaped by differing methods of statutory interpretation: the circuit courts have applied a plain meaning approach, while affordable housing advocates have sought to direct the courts' attention to the statutory purpose and congressional history of LIHPRHA.<sup>197</sup> The standard for determining the effect of the LIHPRHA preemption provision is congressional intent; therefore, the method of statutory interpretation applied by the courts dictates the scope of the examination.<sup>198</sup>

The plain meaning approach used by the Eighth and Ninth Circuits gives effect to the clear, ordinary language of the Acts.<sup>199</sup> The LIHPRHA preemption provision, by its terms, applies to any laws or regulations that restrict prepayments of "eligible low-income housing."<sup>200</sup> In 1990, when Congress enacted LIHPRHA, buildings in all federal housing programs were LIHPRHA eligible and regulated by HUD.<sup>201</sup> The Eighth Circuit determined that

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preempted by the long-dormant LIHPRHA when the owners were not seeking to prepay under LIHPRHA), *available at* <http://www.ruralhome.org/manager/uploads/college.pdf>.

<sup>197</sup> *Forest Park*, 336 F.3d at 729 ("Appellees argue that [the preemption] provision is not applicable to Forest Park's Section 236 mortgage because of Congress's subsequent actions."); *see generally Topa Equities*, 342 F.3d at 1070.

<sup>198</sup> Ultimately, rules of statutory interpretation attempt to determine the "intent of the legislature." 2A SUTHERLAND STATUTORY CONSTRUCTION § 45.5 (6th ed.). Differing theories of statutory interpretation are in essence means of giving a particular law the meaning intended by Congress. For a discussion on the plain meaning method of statutory interpretation, *see supra* note 127.

<sup>199</sup> *Id.*

<sup>200</sup> H.R. Rep. No. 101-559, at 78 (1990) [hereinafter *House Comm. Report*].

[Section] 4122 would preempt and declare null and void any state or local law, ordinance or regulation that limits an owner's right to pay off a mortgage on eligible low-income housing or, limits the occupancy, type of tenure, use or rental charges of such a property. The committee wishes to emphasize that the pre-emption provision only applies to *eligible* housing, defined in the bill as projects with mortgages that are insured or assigned under Section 221 (d)(3)(BMIR) or Section 236 program.

*Id.* (emphasis added).

<sup>201</sup> *Id.*

*AFFORDABLE HOUSING PRESERVATION* 785

Minnesota laws mandating additional procedural requirements for projects attempting to opt out of federal affordable housing programs infringed upon HUD's administrative mandate to regulate federal housing policies and programs.<sup>202</sup> The court concluded that legislative history was irrelevant because the Supremacy Clause of the U.S. Constitution prohibits the states from interfering with the implementation of a federal program by a federal agency.<sup>203</sup> The court therefore held that the Minnesota laws were preempted based on a plain reading of HUD's federal prerogatives and the state law's impact on housing under federal programs.

Through its cursory analysis, the Eighth Circuit bypassed the opportunity to examine other evidence of congressional intent, including relevant legislative history and HUD's own policies, which do not support the application of the LIHPRHA preemption provision to projects opting out through HOPE.<sup>204</sup> The Ninth Circuit expressly adopted the Eighth Circuit's holding without significant discussion. The court appeared content with the plain reading conclusion that because LIHPRHA had not been explicitly repealed, the preemption provision continued to apply to HUD-regulated housing projects and programs.

The circuit courts' plain meaning interpretation of LIHPRHA leads to ambiguous and incongruous results. As such, the circuit courts should have considered other means of interpretation.<sup>205</sup> In effect, the courts have applied the terms of LIHPRHA to HOPE, a

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<sup>202</sup> See *supra* notes 148 through 153 and accompanying text.

<sup>203</sup> *Id.*

<sup>204</sup> This analysis would lead to the examination of HUD policies regarding the application of Section 4122 to projects opting out through HOPE. As mentioned above, the Court mentioned HUD's policies, but did not consider them to govern the decision. *Id.* This analysis appears inconsistent. Choosing to free HUD from state regulations that it does not deem restrictive would appear beyond what the court was called upon to do.

<sup>205</sup> *United States v. Kay*, 359 F.3d 738, 743 (2004) "If, after application of these principles of statutory construction, we conclude that the statute is ambiguous, we may turn to legislative history. For the language to be considered ambiguous, however, it must be susceptible to more than one reasonable interpretation or more than one accepted meaning." *Id.* (internal quotations and citations omitted).

separate statute, absent statutory language or congressional records explicitly addressing the relationship between the statutes.<sup>206</sup> The plain meaning approach is not appropriate when the court is examining two separate federal statutory programs.

Nonetheless, the courts held that because LIHPRHA's terms incorporate all buildings opting out of federal affordability programs today, these buildings also benefit from the Act's preemption provision. LIHPRHA provided HUD with guidance for regulating all federal housing programs; therefore, all buildings built before 1990 were LIHPRHA eligible.<sup>207</sup> Congress, however, subsequently ordered HUD to suspend further processing of preservation applications that did not have approved action plans, thereby rendering LIHPRHA dormant.<sup>208</sup> Although LIHPRHA was never expressly repealed, as evidenced by the fact that buildings participating in preservation programs continue to receive funding pursuant to agreements executed while the program was still accepting new applications, technically no buildings remain prospectively LIHPRHA eligible.<sup>209</sup> For this reason, the courts'

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<sup>206</sup> See *supra* note 78 through 80 and accompanying text.

<sup>207</sup> 12 U.S.C. § 4119(1) (2005).

§ 4119(1) The term "eligible low-income housing" means any housing financed by a loan or mortgage— (A) that is (i) insured or held by the Secretary under section 221(d)(3) of the National Housing Act [12 USCS § 1715l(d)(3)] and receiving loan management assistance under section 8 of the United States Housing Act of 1937 [42 USCS § 1437f] due to a conversion from section 101 of the Housing and Urban Development Act of 1965; (ii) insured or held by the Secretary and bears interest at a rate determined under the proviso of section 221(d)(5) of the National Housing Act [12 USCS § 1715l(d)(5)]; (iii) insured, assisted, or held by the Secretary or a State or State agency under section 236 of the National Housing Act [12 USCS § 1715z-1]; or (iv) held by the Secretary and formerly insured under a program referred to in clause (i), (ii), or (iii); and (B) that, under regulation or contract in effect before February 5, 1988, is or will within 24 months become eligible for prepayment without prior approval of the Secretary.

*Id.*

<sup>208</sup> See *supra* note 74 and accompanying text.

<sup>209</sup> See *Kenneth Arms*, 2001 U.S. Dist. LEXIS 11470, at \*13. HUD's inability to accept new preservation applications, execute new POAs or enforce

*AFFORDABLE HOUSING PRESERVATION* 787

application of the LIHPRHA preemption provision to buildings opting out under HOPE is inappropriate, as there is no active program for which the buildings may be deemed eligible. Since 1996, HUD has lacked the authority to accept new LIHPRHA applications.<sup>210</sup> It is illogical to suggest that, at LIHPRHA's creation, Congress intended that LIHPRHA should apply to properties that had never participated in LIHPRHA because, in 1990, Congress had no reason to address non-participating properties, which did not exist as a class until Congress ceased funding mandatory LIHPRHA preservation in 1996. HUD's own policy before these cases was consistent with this approach.<sup>211</sup>

As the Supreme Court held in *Cipollone*, "[w]here Congress explicitly preempts state law, Congress's enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted."<sup>212</sup> As non-LIHPRHA properties are not referenced in LIHPRHA's express preemption provision, such properties are beyond its reach. If the LIHPRHA preemption provision were applied to non-LIHPRHA properties, it is reasonable to assume that all LIHPRHA prepayment provisions should apply as well. This includes requiring owners to issue a LIHPRHA notice of intent and to submit and receive HUD approval of a POA.<sup>213</sup> It is counterintuitive to suggest that one provision of LIHPRHA applies to owners when owners are not required to meet any of the statute's other prepayment

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LIHPRHA's provisions except as to owners already participating in LIHPRHA prior to October 1, 1996 as sufficient reasoning for the holding that since "[t]he Owners were never involved in the LIHPRHA Preservation Program, and never operated under the LIHPRHA plan of action. Rather, the prepayment scheme followed by the Owners is that embodied in [Section 219], permitting mortgage prepayment without HUD approval, rather than LIHPRHA with its restrictions." *Id.* The court held that the preemption provision of LIHPRHA, 12 U.S.C. § 4122, does not govern and thus does not preempt the California notice and right of first refusal statutes. *Id.*

<sup>210</sup> See *supra* note 74 and accompanying text.

<sup>211</sup> Letter from Clare Harrigan, Office of HUD General Counsel, to Judge Lawrence K. Karlton, June 21, 2001 [hereinafter *HUD Letter*] (on file with author).

<sup>212</sup> *Cipollone v. Liggett Groups, Inc.* 505 U.S. 504, 517 (1992).

<sup>213</sup> See *supra* note 67 and accompanying text.

requirements. Indeed, if the buildings that were the subjects of review by the Eighth and Ninth Circuits were LIHPRHA eligible, without explicit congressional language on point, LIHPRHA would dictate that the owners of these buildings would be required to submit findings of minimal tenant impact as a condition of receiving HUD authorization to opt out.<sup>214</sup> To argue, as the Eighth and Ninth Circuits did, that a project is entitled to the benefits of LIHPRHA (express preemption), but need not shoulder its burdens (for example, detailed assurances that low-income tenants will not be harmed) turns a reasonable interpretation of congressional intent on its head. Indeed, as a slip opinion by a California Superior Court referencing the holdings of both *Forest Park* and *Topa Equities* recently noted, “Although LIHPRHA continues to apply to properties participating prior to 1996, in effect the heart of LIHPRHA has been eviscerated.”<sup>215</sup> A cursory analysis of these results seem incongruous or at the least unfair, thus requiring further examination of the legislative history and purpose of both statutes.<sup>216</sup>

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<sup>214</sup> *Id.*

<sup>215</sup> *College Gardens Preservation Committee v. Eugene Burger*, slip op., at 3.

<sup>216</sup> This is similar to holdings in various circuit courts in cases dealing with the American with Disabilities Act of 1990 (42 U.S.C. § 1201). While out of the preemption context, it does provide a workable solution about when and how to read congressional history and legislative purpose when dealing with absurd results of a plain meaning interpretation. The following circuit courts held against the plain language of the ADA, which states that an employer is required to accommodate an individual who is “regarded as” disabled. *See Kaplan v. City of North Las Vegas*, 323 F.3d 1226, 1231-33 (9th Cir. 2003).

On the face of the ADA, failure to provide reasonable accommodation to “an otherwise qualified individual with a disability” constitutes discrimination. And, on its face, the ADA’s definition of “qualified individual with a disability” does not differentiate between the three alternative prongs of the “disability” definition. The absence of a stated distinction, however, is not tantamount to an explicit instruction by Congress that “regarded as” individuals are entitled to reasonable accommodations. Moreover, because a formalistic reading of the ADA in this context has been considered by some courts to lead to bizarre results, we must look beyond the literal language of the ADA.

*Id.* at 1232 (*citing* *Royal Foods Co., Inc. v. RJR Holdings, Inc.*, 252 F.3d 1102,

*AFFORDABLE HOUSING PRESERVATION* 789

The ambiguity created by a plain meaning approach to interpreting the LIHPRHA preemption provision suggests that courts should apply a clearer and more thorough interpretative framework to the analysis of this provision by looking to statutory purpose and legislative history to determine whether to apply the LIHPRHA preemption provision to HOPE's prepayment provisions. The lack of congressional funding for LIHPRHA should give rise to an analysis of available congressional history and legislative purpose, which would serve to highlight the error of applying the preemption provision to properties opting out under HOPE. LIHPRHA's legislative purpose and congressional intent in this area dictate that the LIHPRHA preemption provision should not be applied to HOPE's provisions.<sup>217</sup> This analysis has been supported by a formal opinion of HUD, which, in lieu of relevant congressional language, should be granted deference.

*1. Analyzing the Legislative Purpose of LIHPRHA*

Congressional hearings on LIHPRHA suggest that LIHPRHA preemption is only applicable to LIHPRHA-eligible properties.<sup>218</sup> Furthermore, there is no preemption language contained in HOPE, the National Housing Act of 1934, the Emergency Low Income Housing Preservation Act of 1987, or the regulation promulgated by HUD that grants owners the right to prepay their mortgages.<sup>219</sup> Through LIHPRHA, Congress demonstrated its understanding that

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1108 (9th Cir. 2001)) (internal citations omitted) (recognizing that a court must look beyond the plain language of a statute when the literal interpretation would lead to an absurd result). *See also* Weber v. Strippit, Inc., 186 F.3d 907, 916-17 (8th Cir. 1999); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999); Newberry v. E. Texas State Univ., 161 F.3d 276, 280 (5th Cir. 1998).

<sup>217</sup> These arguments are expanded versions of arguments presented to the Sacramento, California Superior Court on behalf of the plaintiff, College Gardens Preservation Committee, in the case of *College Gardens Preservation Committee v. Eugene Burger*. *See Letter Brief on the Applicability of LIHPRHA, College Gardens Preservation Committee v. Eugene Burger*, No. 03 AS02608 (Sac. Superior Court, Cal. Nov. 19, 2003) (on file with author).

<sup>218</sup> *See House Comm. Report, supra* note 200.

<sup>219</sup> For a discussion on the relationship between various federal housing statutes, see *supra* Part II.

it was free to add a preemption provision when it deemed one necessary. Congress determined that a preemption provision was required in LIHPRHA because the Act added substantial burdens and cumbersome regulations to subsidized properties.<sup>220</sup>

Prior to its defunding, LIHPRHA was a comprehensive federal preservation program that substantially restricted prepayments of “eligible low-income housing.”<sup>221</sup> Only a few properties could satisfy LIHPRHA’s restrictive criteria for prepayment and conversion to market-rate housing.<sup>222</sup> In fact, the LIHPRHA program functioned primarily to provide federally funded incentives to preserve eligible properties.<sup>223</sup> Preemption was an integral part of the comprehensive LIHPRHA statutory scheme. The purpose of Section 4122’s preemption provision was to prevent states and localities from singling out LIHPRHA participants for special and disadvantageous treatment that would reduce the federal preservation incentives otherwise available under the program.<sup>224</sup>

The congressional record, in providing for express preemption of prepayment restrictions, demonstrates that Congress was concerned with equitable treatment of private affordable housing projects throughout the states and had no intention of abrogating state procedural requirements as they applied to non-participating properties.<sup>225</sup> Restrictions by individual states would have proven unnecessary and have created non-uniform procedures nationwide. Further, investors seeking to develop federally subsidized properties would have been able to choose where to develop based not on need, but rather, on the number and form of state opt-out provisions. Because the federal government abandoned project-subsidized programs in 1996 when it reinstated owners’ prepayment rights, it is reasonable to assume that the federalism interests that were of concern at the time of LIHPRHA’s enactment

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<sup>220</sup> See *House LIHPRHA Report*, *supra* note 72; *College Gardens Preservation Committee v. Eugene Burger*, slip op., at 3.

<sup>221</sup> See *supra* note 204 and accompanying text.

<sup>222</sup> See Winkelman, *supra* note 66.

<sup>223</sup> *Id.*

<sup>224</sup> See *House LIHPRHA Report*, *supra* note 72.

<sup>225</sup> *Id.*

*AFFORDABLE HOUSING PRESERVATION* 791

are no longer relevant. As such, courts should not second-guess Congress's decision not to add a preemption provision to HOPE.<sup>226</sup>

*2. Reviewing HUD's Interpretation of the LIHPRHA Preemption Provision's Applicability to Non-LIHPRHA Properties*

Upon the enactment of LIHPRHA, Congress charged HUD with administering the LIHPRHA program.<sup>227</sup> In exercising this mandate, HUD determined that the LIHPRHA preemption provision does not apply to non-LIHPRHA properties.<sup>228</sup> In the agency's opinion letter addressing this issue and related federal preemption questions concerning California's prepayment notice statutes,<sup>229</sup> HUD's General Counsel explained that because Congress ceased funding for new LIHPRHA action plans in 1996, LIHPRHA presently applies only to those projects that received LIHPRHA preservation incentives prior to 1996.<sup>230</sup> Therefore, state laws can be inconsistent with LIHPRHA only with respect to projects that have already received preservation incentives and

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<sup>226</sup> *United States v. Van Lufkins*, 676 F.2d 1189, 1194 (1982).

<sup>227</sup> LIHPRHA, 12 U.S.C. § 4101. ("General prepayment limitation (a) Prepayment and termination. An owner of eligible low-income housing may prepay, and a mortgagee may accept prepayment of, a mortgage on such housing only in accordance with a plan of action approved by the [HUD] Secretary. . . .").

<sup>228</sup> *HUD Letter*, *supra* note 211.

<sup>229</sup> *Kenneth Arms*, 2001 U.S. Dist. LEXIS 11470 (holding that the LIHPRHA preemption provision does not apply to four non-LIHPRHA apartment developments).

<sup>230</sup> *HUD Letter*, *supra* note 211.

The preemption provision in LIHPRHA at Section 232, 12 U.S.C. Sec. 4122, was intended to afford protection to owners of properties that *were, or are, operating under the LIHPRHA Preservation Program* (emphasis added). Section 4122(b) states that the section "shall not prevent the establishment, continuing in effect, or enforcement of any law or regulation of any State or political subdivision of a State *not inconsistent with the provision of this subchapter.*" Thus, a state law could not be inconsistent with the provision of LIHPRHA for an owner who was never involved in the LIHPRHA Preservation Program and never operated under a LIHPRHA plan of action.

*Id.* (emphasis in original).

undertaken additional affordability restrictions.<sup>231</sup> The HUD Letter further stated that the express language of the LIHPRHA preemption provision limits preemption to local laws that are inconsistent with LIHPRHA.<sup>232</sup> In addition to relying on the limiting language of the LIHPRHA preemption provision, HUD further reasoned that because “HUD does not have authority to accept new preservation applications or to enter into new plans of action, it has continued to implement and enforce the provisions of LIHPRHA only as to those owners who were in the program prior to the passage of HOPE [the successor statutory scheme] in 1996.”<sup>233</sup>

In *United States v. Mead*,<sup>234</sup> the Supreme Court held that an agency’s “permissible construction of [a] statute” that it is charged with administering is entitled to “some deference,” even if the agency’s interpretation of the statute is not rendered within a public notice and comment rulemaking framework.<sup>235</sup> Indeed, as explained in *Skidmore v. Swift*,<sup>236</sup> such agency interpretations are “entitled to respect” to the extent they have the “power to persuade.”<sup>237</sup> Further, in *Auer v. Robbins*<sup>238</sup> the Supreme Court held that an agency’s interpretation of its own regulations is controlling unless “plainly erroneous or inconsistent with the regulation.”<sup>239</sup> Like the agency interpretation at issue in *Auer*, which was submitted in an amicus brief, HUD’s interpretation regarding preemption in the *Kenneth Arms* case was submitted by

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *HUD Letter*, *supra* note 211.

<sup>234</sup> 533 U.S. 218, 235 (2001) (finding that Customs letter “classification ruling may at least seek a respect proportional to its power to persuade, and may claim the merit of its writer’s thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight”).

<sup>235</sup> *Reno v. Koray*, 515 U.S. 50, 61 (1995) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

<sup>236</sup> 323 U.S. 134, 140 (1944).

<sup>237</sup> *Id.*

<sup>238</sup> 519 U.S. 452, 461 (1997).

<sup>239</sup> *Id.*

*AFFORDABLE HOUSING PRESERVATION* 793

letter brief at the court's invitation.<sup>240</sup> The agency's interpretation was not at issue in *Kenneth Arms*. Thus, like the agency interpretation in *Auer*, "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."<sup>241</sup>

For the foregoing reasons, future courts hearing preemption challenges should question the continued application of LIHPRHA's preemption provision to owners opting out under Section 219 of HOPE or other similar prepayment provisions.

*B. Future Preemption Analysis and the Ninth Circuit's Approach*

If courts continue to apply LIHPRHA's preemption provision to owners opting out under HOPE, courts should follow the Ninth Circuit's narrow "legal consequences" analysis.<sup>242</sup> This approach is

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<sup>240</sup> *Forest Park II v. Hadley*, 203 F. Supp. 2d 1071, 1076 (2002) (citing HUD Letter Brief in *Kenneth Arms*, 2001 U.S. Dist. LEXIS 11470, at \*33).

<sup>241</sup> *Auer*, 519 U.S. at 461. The Eighth Circuit in *Forest Park*, in a footnote, cast aside Supreme Court precedent and found that the Court owes no deference to the letter cited in *Kenneth Arms*. *Forest Park II*, 336 F.3d at 733, n.6. The Court distinguished the letter at issue from an official agency interpretation resulting from official agency rulemaking procedures. *Id.* The Court cited the Supreme Court case of *Christensen v. Harris County*, in which the Supreme Court found that a Department of Labor opinion letter taking the position that an employer may compel the use of compensatory time only if the employee has agreed in advance to such a practice was not due deference for the application of a clear and unambiguous statute. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

In *Christensen*, however, the Supreme Court also found that "[a]n agency's opinion letter interpreting its own regulation is entitled to deference when language of regulation is ambiguous." *Christensen*, 529 U.S. at 588. The only thing that is clear regarding LIHPRHA, its provisions, Congress's refusal to continue funding LIHPRHA programs, Congress's enactment of an alternative, and currently only prepayment option through budget Appropriation, is that the application of HOPE and LIHPRHA is ambiguous. For a discussion on the ambiguities created through a plain reading interpretation of the relationship between LIHPRHA and HOPE, see *supra* Part V.

<sup>242</sup> *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065 (9th Cir. 2003).

consistent with established preemption jurisprudence and congressional intent. The Eighth Circuit's expansive "practical effects" approach erroneously applies administrative law principles to a preemption analysis and is inconsistent with congressional intent.<sup>243</sup>

As past preemption cases dictate, there is a presumption against preemption within traditional spheres of local police powers, unless it can be shown that it is the clear and manifest purpose of Congress to preempt state authority.<sup>244</sup> Housing regulations, land use restrictions, and zoning ordinances fall within the traditional spheres of state and local police powers.<sup>245</sup> While the Supremacy Clause does not require a narrow or broad construction in response to the presumption against preemption,<sup>246</sup> the Supreme Court, in *Cipollone*, recently held that the preemption provision at issue required a narrow interpretation.<sup>247</sup>

The Eighth Circuit's holding and its doctrine of preempting regulations that have the practical effect of restricting or inhibiting the prepayment of HUD-subsidized mortgages is inconsistent with the presumption against preemption. Furthermore, absent any guidance, the application of this approach may impede the ability of state and local governments to preserve affordable housing within the existing framework of the federal prepayment scheme.<sup>248</sup> A modest application of this holding would in effect

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<sup>243</sup> *Forest Park II v. Hadley*, 336 F.3d 724, 732 (8th Cir. 2003), *reh'g* and *reh'g en banc* denied (2003).

<sup>244</sup> See discussion *supra* Part III and accompanying notes.

<sup>245</sup> *Id.*

<sup>246</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 544 (1992) (Scalia, J., concurring in judgment in part and dissenting in part).

<sup>247</sup> *Cipollone*, 505 U.S. at 517.

<sup>248</sup> *Forest Park II*, 336 F.3d at 734. The Eighth Circuit may have attempted to limit this expansive interpretation of LIHPRHA's preemptive scope, but its language fell short of such a goal.

[N]ot . . . all state attempts at preserving existing federally subsidized, low-income housing are preempted. Nothing in the federal statutes, their legislative history, or their stated objectives indicates that states are prohibited from instituting their own incentive plans or other programs to preserve low-income housing within the framework of the federal prepayment scheme. When, however, these state programs

## AFFORDABLE HOUSING PRESERVATION 795

preempt all state and local preservation laws that inhibit the realization of expectations by owners opting out or prepaying Section 221(d)(3) or 236 mortgages.<sup>249</sup> This language includes limitations on the property owners' returns and forced transfers of properties to preservation owners, in addition to the procedural requirements involved in the case.<sup>250</sup> As the court succinctly stated, a "further requirement imposed by a state statute would directly interfere with Congress's original intent of offering prepayment as an incentive."<sup>251</sup> Therefore, even though the Eighth Circuit found that the Minnesota notice requirements do not explicitly bar prepayment, it nonetheless found that they had the effect of restricting opt out and were consequently preempted.<sup>252</sup>

The Ninth Circuit held that LIHPRHA's structure supports the proposition that the "restrict or inhibit" language of Section 4122 was not intended to preempt state preservation laws that do not explicitly place barriers on the prepayment of Section 221(d)(3) and 236 mortgages.<sup>253</sup> The court found that LIHPRHA's preemption provision requires a narrow construction and expressly states that local laws are preempted "only to the extent that [they] violate the provisions of this subsection."<sup>254</sup> Further, the statute limits preemption to local laws "inconsistent" with LIHPRHA.<sup>255</sup>

Congressional history suggests that the Ninth Circuit's holding is more in line with what Congress intended and that Congress in

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place additional requirements on federal program participants, restrict the exercise of the participants' federally granted prepayment rights, or create delays in the prepayment process, they are preempted.

*Id.*

<sup>249</sup> *Id.* at 732 (noting that the effect of the state statute was to limit a right to move to the market rates that Congress provided).

<sup>250</sup> For discussion on various preservation laws and regulations, *see supra* Part III.

<sup>251</sup> *Forest Park II*, 336 F.3d at 733. Nonetheless, the law that provided the incentive is not the law that provided the preemption provision—an inconsistency the court failed to address. *Id.*

<sup>252</sup> *Forest Park II*, 336 F.3d at 732.

<sup>253</sup> *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065 (9th Cir. 2003).

<sup>254</sup> LIHPRHA, 12 U.S.C. § 4122.

<sup>255</sup> *Id.*

fact considered state preservation laws and did not intend to preempt such laws.<sup>256</sup> Statements from various House committees illustrate that Congress intended LIHPRHA to work in conjunction with state preservation laws; indeed, a House conference committee specifically cited to a Maryland preservation law.<sup>257</sup> The Maryland law noted by the conference committee was adopted in 1989, the year before Congress enacted LIHPRHA.<sup>258</sup> This state law requires owners to provide notice to the local government and to tenants at least one year before prepayment, which is more comprehensive than the notice required by the Minnesota impact statement law at issue in *Forest Park*.<sup>259</sup> If the congressional committee did not intend to preempt the Maryland law, then it follows that Congress did not intend to preempt the Minnesota or California laws, which were less far reaching.<sup>260</sup>

Further, LIHPRHA's reporting requirements demonstrate that Congress understood state and local efforts as a means of ensuring

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<sup>256</sup> Congressman Hoagland, sponsoring the amendment that became section 4122(b), described it as "narrowing the State and local law preemption language in the bill so that the state and local laws that contradict this statute will be preempted." 136 CONG. REC. H6053-01, H6183 (daily ed. July 31, 1990). See also S. REP. NO. 316, 101 Cong., 2nd Sess. 1, 106 (June 8, 1990), reprinted in 1990 U.S.C.C.A.N. 5763, 5868 ("Local task forces have also considered the range of municipal responses (*rent control*, tax abatement, etc.) that can be taken alone or in conjunction with a federal preservation solution . . .") (emphasis added).

<sup>257</sup> See H.R.CONF.REP. 101-943, reprinted in 1990 U.S.C.C.A.N. 6070, 6171. ("In the event of prepayment, HUD would have several tools to protect the existing tenants and assist the affected community in replacing the stock. The tenant protections build upon provisions contained in the House bill as well as in State laws such as the Maryland Assisted Housing Preservation Act.").

<sup>258</sup> MD. ANN. CODE art. 83B, tit. 9, §§ 101-114 (2003); see statutes cited *supra* notes 93-94.

<sup>259</sup> MD. ANN. CODE art. 83B, tit. 9-103(a)(1)-(5) (2005); see statutes cited *supra* notes 93-94.

<sup>260</sup> MD. ANN. CODE art. 83B, tit. 9, §§ 101-114 (2003); see statutes cited *supra* notes 93-94. See also *Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 287-88 (1987) (finding "significant" the fact that Congress was aware of and acknowledged in debates existing similar state laws when enacting federal law and "failed to evince the requisite 'clear and manifest' purpose to supersede them").

*AFFORDABLE HOUSING PRESERVATION* 797

an effective flow of information regarding prepayment and viewed such local efforts as complementary to LIHPRHA. Throughout LIHPRHA are requirements that the owner and HUD notify both tenants and state or local government entities of all activities leading up to prepayment.<sup>261</sup> LIHPRHA thus encourages state and local entities to use this information to assist tenants in preserving affordable housing.<sup>262</sup> These provisions evince Congress's desire to empower tenants and state and local governments to effect the preservation purposes of the Act. In a 1999 Hearing Notice provided to all affordable housing projects, HUD clearly supported

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<sup>261</sup> LIHPRHA, 12 U.S.C. § 4102(b) (2005). In relevant part, the statute provides:

The owner, upon filing a notice of intent under this section, shall simultaneously file the notice of intent with the chief executive officer of the appropriate State or local government for the jurisdiction within which the housing is located and with the mortgagee, and shall inform the tenants of the housing of the filing.

*Id.* § 4106(c). "The Secretary shall make any information provided to the owner under subsections (a) and (b) of this section available to the tenants of the housing together with other information relating to the rights and opportunities of the tenants." *Id.* § 4107(a)(2).

Each owner submitting a plan of action under this section to the Secretary shall also submit a copy to the tenants of the housing. The owner shall simultaneously submit the plan of action to the office of the chief executive officer of the appropriate State or local government for the jurisdiction within which the housing is located.

*Id.* § 4118:

The Secretary shall confer with any appropriate State or local government agency to confirm any State or local assistance that is available to achieve the purposes of this title and shall give consideration to the views of any such agency when agency when making determinations under this subchapter. The Secretary shall also confer with appropriate interested parties that the Secretary believes could assist in the development of a plan of action that best achieves the purposes of this subchapter.

*Id.*

<sup>262</sup> LIHPRHA, 12 U.S.C. § 4107(a)(2) ("An appropriate agency of such State or local government shall review the plan and advise the tenants of the housing of any programs that are available to assist the tenants in carrying out the purposes of this title.").

this position, explaining that “besides meeting the Federal notification requirement, project Owners must also comply with any State or local notification requirements.”<sup>263</sup>

There is a distinct legal difference between imposing a barrier to prepayment and imposing rent control on formerly subsidized buildings.<sup>264</sup> Speculative owners may argue that differentiating between the two destroys the intent of the preemption provision because applying rent control post-opt out, from an owner’s perspective, compels the same result as a prepayment barrier.<sup>265</sup> By opting out of a federal program, however, an owner changes the essence of the particular building. For example, the owner is no longer required to comply with certain federally mandated property standards, the owner is no longer liable under certain federal laws, and the tax structure of the investment is changed.<sup>266</sup> The legislative history of LIHPRHA suggests that, while Congress intended to provide property owners with an opportunity to free themselves from the increased oversight and potential liability associated with participation in a federal housing program, it did not intend to permit owners to free themselves from the historic police powers of states and localities to regulate housing and land use issues.

Therefore, LIHPRHA’s structure, notice requirement, and legislative history do not demonstrate the clear and manifest congressional intent required for Section 4122 to preempt state notice laws.<sup>267</sup> Conversely, they suggest congressional approval of supplementary state preservation efforts, such as the Maryland

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<sup>263</sup> *Kenneth Arms*, 2001 U.S. Dist. LEXIS 11470, at \*10 (citing HUD Housing Notice 99-36, Dec. 29, 1999).

<sup>264</sup> *Forest Park II v. Hadley*, 336 F.3d 724, 732 (8th Cir. 2003), *reh’g* and *reh’g en banc* denied (2003). *See also* *Lifgren v. Yeutter*, 767 F. Supp. 1473 (D. Minn. 1991) (holding that the Preservation Act and regulations relating thereto are not inconsistent with the borrower’s option to prepay at any time, but rather, the Preservation Act and its regulations simply provide procedures that must be followed in the event that a borrower evidences an intent to prepay).

<sup>265</sup> *Forest Park*, 336 F.3d at 732.

<sup>266</sup> *Winkelman*, *supra* note 38, at 1160.

<sup>267</sup> *See Cipollone*, 505 U.S. at 516.

*AFFORDABLE HOUSING PRESERVATION* 799

preservation statute.<sup>268</sup>

VI. RECOMMENDATION: STATE AND LOCAL GOVERNMENTS  
SHOULD LOOK TO TRANSFER PROPERTIES TO PRESERVATION  
OWNERS

Preservation of affordable housing is an economical and efficient means of safeguarding housing for current and future low-income residents.<sup>269</sup> As the federal government continues to abandon affordable housing programs, state and local governments must look to preservation laws to maintain affordable housing or face waves of homeless or displaced low-income tenants.<sup>270</sup> Preservation policies offer security to current tenants facing drastically increasing rents in units that have benefited from subsidized rents for the past twenty years. Laws that encourage and provide methods of transferring federally subsidized affordable housing projects to non-speculative owners, such as the Illinois Assisted Housing Preservation Act and the New York Tenant Empowerment Act (Intro. No. 186), provide an optimal means of preserving at-risk housing.<sup>271</sup> The transfer of projects to tenant-endorsed or tenant-controlled non-profit organizations, whose purpose is to provide housing, not generate profit, will keep tenants in their homes and preserve properties as future housing sources.<sup>272</sup>

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<sup>268</sup> MD. ANN. CODE art. 83B, tit. 9-103(a)(1)-(5) (2005); *see* statutes cited *supra* note 93-94. MD. ANN. CODE art. 83B, tit. 9, §§ 101-114 (2003).

<sup>269</sup> Grow, *supra* note 9, at 3. Given current funding concerns, the development of new affordable housing units appears unlikely. *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Rather than providing notice of impending opt-out, these laws provide long-term security to the tenants and their communities. Grow, *supra* note 9, at 3.

<sup>272</sup> Galle, *supra* note 85, at 5. Obtaining both the necessary funds for transfer and site control from private owners remains a difficult challenge for state and local governments. *Id.* Some 150 states or localities have adopted housing trust funds providing revenue to assist the preservation of affordable homes. *Id.* Obtaining sufficient capital funds will usually require state or local financial contributions, which may include formerly “federal” funds such as Low-Income Housing Tax Credits, HOME Investment Partnership Program or Community Development Block Grant funds. *Id.* Low-Income Housing Tax

Legal and practical issues regarding these laws are untested, but following the preemption analysis set forth in the cases regarding other preservation laws, these laws should not be subject to federal preemption because they do not “restrict or inhibit” prepayment, as they apply after opt out.<sup>273</sup> Illinois’s statute and the proposed New

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Credit (LIHTC) is an indirect method of subsidizing low-income housing. *See* 132 Cong. Rec. S8146-8158 (daily ed. June 23, 1986) (explaining the legislative intent of the LIHTC). *See also* DAYE, *supra* note 3, at 247-49. HOME Investment Partnerships Program, U.S. Dep’t of Housing and Urban Dev., Home Investment Partnerships Program (2004), at <http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm>. For a discussion on the HOME Investment Partnership Act of 1990, *see* DAYE, *supra* note 3, at 240-42. For a discussion on Community Development Block Grant program (CDBG), *see supra* note 7.

Some states have dedicated some general revenues to maintaining affordability in HUD-subsidized housing. Galle, *supra* note 85, at 6 (“For example, in California the enacted budget for FY 2000 includes \$6 million for a broad purpose multifamily acquisition and rehabilitation program, with the first priority for funding being the preservation of currently affordable units.”). On the local level, San Francisco, for example, established the San Francisco Redevelopment Agency (SFRA) to administer several million dollars of redevelopment agency tax increment funds for a variety of uses, including grants and below-market loans for nonprofit purchasers, pre-development assistance, and tenant outreach, organizing, and technical assistance. Galle, *supra* note 85, at 6. More information regarding SFRA *available at* [http://www.sfgov.org/site/sfra\\_index.asp](http://www.sfgov.org/site/sfra_index.asp).

Federal Low-Income Housing Tax Credits and tax-exempt bond allocations may provide an important source of funds for nonprofit acquisitions. Galle, *supra* note 85, at 6 (“California reserves 10 percent of its Low-Income Housing Tax Credits for preservation. For several years in Massachusetts . . . 60 percent of the state’s credits are allocated to large-scale projects with significant federal resources.”) (internal quotations and citations omitted). *See generally* Ammann, *supra* note 8. Both state and municipal governments provide other capital or debt subsidy measures. Galle, *supra* note 85, at 7 n.36, 37 (“Many state housing finance agencies, including those in Maine, Missouri, Pennsylvania, and Vermont, use their own budgets for low- or no-interest loans to promote preservation purchases. These funds are used for costs of purchase, to rehabilitate properties, to expand affordability, [and] to cover predevelopment costs. . . .”).

<sup>273</sup> Grow, *supra* note 9, at 6; Galle, *supra* note 85, at 6; *See Franzese, supra* note 10.

A constitutional taking issue exists with the application of these

*AFFORDABLE HOUSING PRESERVATION* 801

York City housing regulations are good examples of laws that work to provide increased protections for current tenants.<sup>274</sup>

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preservation laws. Grow, *supra* note 9, at 6. Although there have so far been no such challenges to state or local purchase opportunity laws, the takings issue appears fairly straightforward so long as just compensation is provided. Grow, *supra* note 9, at 6 (*citing* Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985) (“The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation.”)). The federal Constitution prohibits takings for public use without just compensation. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation. . . .”) *Id.*

Federal, state, and local regulatory action can result in a constitutional taking of private property so long as it is for a valid public use and just compensation is provided. Grow, *supra* note 9, at 6. So long as preservation purchase opportunity laws are not mandatory or provide market value compensation by setting transfer prices at appraised market value, they appear to fall safely outside of the takings clause. *Id.* (*citing* Palazzolo v. Rhode Island, 533 U.S. 606, 625 (2001)) (“When a taking has occurred, under accepted condemnation principles the owner’s damages will be based upon the property’s fair market value . . . an inquiry which will turn, in part, on restrictions on use imposed by legitimate zoning or other regulatory limitations.”).

A constitutional takings challenge to LIHPRHA was examined along these lines. In *Chancellor Manor v. United States*, the Federal Circuit held that since the Owners of federally subsidized affordable housing projects should have known that HUD’s regulations regarding prepayment could be changed at any time, and that their right to prepay their mortgages was not a property interest protected by the Fifth Amendment’s takings clause. *Chancellor Manor v. United States*, 331 F.3d 891, 903 (Fed. Cir. 2003). The court remanded the case for a more thorough factual inquiry in order to determine whether the plaintiffs could “establish the existence of a regulatory taking under the Penn Central standards.” *Id.* at 906. The court directed the lower court to address all Penn Central factors including: (1) the extent to which HUD’s regulatory change interfered with the Owners’ objective reasonable expectations; (2) the economic impact of HUD’s regulatory change on the Owners; and (3) the nature of HUD’s regulatory change. *Id.* at 906.

<sup>274</sup> New York City Council Int. No. 186-2004 (“A Local Law to amend the administrative code of the city of New York, in relation to creating a right of first refusal and an opportunity to purchase.”). See Chen, *supra* note 10. These laws still create the challenge for purchasers and public agencies to find or provide the necessary funds. For a discussion on funding options, see Galle, *supra* note 85. Ideas for such funding in New York include the creation of a Housing Trust Fund, similar to the Federal Housing Trust Fund discussed. See Chen, *supra* note 9.

Additionally, these laws are good illustrations of why state and local governments should feel secure in the face of a preemption challenge.

Transfer laws seek to reinstitute a key “component of the federal preservation policy for HUD-subsidized properties that the federal government [has] abandoned since 1995—that preservation is of sufficient importance to warrant restrictions on owner conversion, so long as those restrictions are supported with market-value compensation.”<sup>275</sup> Both the Illinois law and the New York City regulation cover all properties with HUD-subsidized mortgages when the owners threaten conversion, sale, or disposition of properties.<sup>276</sup> Both statutes create purchase rights when an owner proposes to sell a property or terminate the existing federal subsidy programs or restrictions.<sup>277</sup> These rights provide tenant associations or their designees the right to purchase, recognizing that tenant associations are not always in the best position to purchase.<sup>278</sup> A valuation of the properties in question is performed through multiple appraisals, and a specified resolution procedure is available if an agreement on the property’s value cannot be reached.<sup>279</sup> Thus, these laws relieve the government of

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<sup>275</sup> See Grow, *supra* note 9, at 6. This principle still governs the federal Rural Housing Services-subsidized multifamily inventory. 42 U.S.C. § 1742(c) *et. seq.* (2004).

<sup>276</sup> Illinois law now covers properties with HUD-subsidized mortgages, properties with certain state-provided mortgages, properties with expiring or terminative project-based Section 8 contracts, and properties with expiring rent restrictions under the federally funded but state-administered Low-Income Housing Tax Credit program. 310 Ill. Comp. Stat. § 60/3 (as amended, July 2004). Proposed New York City Council Int. No. 186-2004, Chap. 9, §26-801 *et. seq.*

<sup>277</sup> 310 Ill. Comp. Stat. § 60/5 (2004) (as amended by SB 2329, enacted July 2004); Proposed New York City Council Int. No. 186-2004, §§ 26-805, 807.

<sup>278</sup> 310 Ill. Comp. Stat. § 60/5 (2004) (as amended by SB 2329, enacted July 2004); Proposed New York City Council Int. No. 186-2004, §§ 26-805, 807.

<sup>279</sup> 310 Ill. Comp. Stat. § 60/7(b) (2004) (as amended by SB 2329, enacted July 2004); Proposed New York City Council Int. No. 186-2004, § 26-804 (Appraisal Determination).

*AFFORDABLE HOUSING PRESERVATION* 803

the burden of maintaining housing projects, but encourage and provide means for stabilizing losses of affordable housing units.

These preservation laws can survive a LIHPRHA preemption challenge because they apply to buildings “following opt-out” of federal housing programs.<sup>280</sup> Notwithstanding anti-preemption arguments, current tenants should look for ways to preserve current affordable housing under the assumption that courts will continue to apply the preemption provision. The Eighth Circuit’s expansive doctrine is problematic, as a practical effect of forced transfer laws may be to limit conversions.<sup>281</sup> These transfer laws may limit the ability of owners to realize speculative gains since the goal of such preservation laws is to encourage owners to sell their properties to preservation owners. However, nowhere does the language or legislative history of LIHPRHA support the position that Congress intended to displace all state and local power on housing and land use issues.<sup>282</sup> Under the Ninth Circuit’s analysis, these laws will not be preempted, as they do not expressly “restrict or inhibit” prepayment.<sup>283</sup> State and localities are currently using procedural requirements in conjunction with other forms of preservation laws; however, in order to comply with possible federal preemption issues, it may be wise to limit this practice and repeal current procedural requirements.<sup>284</sup> Even under the Ninth Circuit’s analysis, procedural requirements may be interpreted as placing a barrier to prepayment.<sup>285</sup>

The ironic conclusion is that preservation laws that limit property owners’ returns on opting out (i.e., rent control) and aid or force the transfer to preservation owners (under eminent domain power) are more controversial than procedural requirements.<sup>286</sup>

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<sup>280</sup> See *Franzese*, *supra* note 10.

<sup>281</sup> The practical effects test preempts laws that have the effect of restricting owners from realizing profits from moving their building’s units to market rates. *Forest Park II*, 336 F.3d 724. According to the Eighth Circuit, this would be an attempt to circumvent the “restrict or inhibit” language of Section 4122. *Id.*

<sup>282</sup> *Topa Equities*, 342 F.3d 1065.

<sup>283</sup> *Id.*

<sup>284</sup> *Forest Park II*, 336 F.3d 724.

<sup>285</sup> For further discussion, see *supra* Part V.B.

<sup>286</sup> See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND*

This is one of the more absurd results of express preemption provisions and the reason many scholars have called for the cessation of congressional use of preemption provisions.<sup>287</sup> Nonetheless, preservation laws that apply post-opt out will have significant advantages in overcoming LIHPRHA preemption issues and helping to provide “a decent home and suitable living environment for every American family.”<sup>288</sup>

#### CONCLUSION

The preservation of project-based affordable housing is a vital part of any housing program for low- and very-low-income individuals. In the recent past, the federal government has maintained preservation requirements in order to continue to provide housing for America’s poorest residents. In the mid-1990s, Congress, at the whim of changing national priorities, determined that funds should be redirected toward the goal of balancing the national budget.<sup>289</sup> Congress subsequently enacted HOPE and discontinued federal preservation requirements.<sup>290</sup>

State and local governments both before and after these federal efforts have used preservation policies to provide homes for low- and very-low income tenants. As witnessed throughout the nation, these policies continue to provide security to those fearing impending notice of a drastic increase to market-rate rents. Congress, in drafting LIHPRHA, recognized the crucial role of states and localities in providing affordable housing. In LIHPRHA, Congress provided that state and local preservation laws should not be superseded by the Act. Nonetheless, because the burdens imposed by LIHPRHA were heavy, Congress restricted the ability of states and localities to place further burdens on properties with a LIHPRHA “plan of action” by enacting the LIHPRHA preemption

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THE POWER OF EMINENT DOMAIN (1985); *see also* Jordan Rose, *Eminent Domain Abuse: The Growing Threat to Private Property*, 174 ARIZ. ISSUE ANALYSIS, Aug. 16, 2002.

<sup>287</sup> *See generally* Stabile, *supra* note 115.

<sup>288</sup> National Housing Act of 1949, 42 U.S.C. § 1441.

<sup>289</sup> *See supra* note 73 through 74 and accompanying text.

<sup>290</sup> *See supra* note 75 through 77 and accompanying text.

*AFFORDABLE HOUSING PRESERVATION* 805

provision.

Legislative history dictates that Congress intended for LIHPRHA's benefits, including its preemption provision, to be extended to those properties accepting the burdens of LIHPRHA. Therefore, buildings opting out under alternative prepayment schemes, such as HOPE, were not intended be the beneficial recipients of LIHPRHA incentives, including Section 4122. The buildings at issue in *Forest Park*<sup>291</sup> and *Topa Equities*<sup>292</sup> opted out of Section 236 affordability restrictions through HOPE's prepayment provisions, and therefore, should not have been afforded the benefit of LIHPRHA preemption. The analysis of both the Eighth and Ninth Circuits overlooked a basic manifestation of congressional intent as determined through rules of statutory construction endorsed by the Supreme Court.

In the event that courts continue to apply LIHPRHA's preemption provision to affordable housing properties opting out under alternative prepayment schemes, they should apply the Ninth Circuit's narrow approach. The Ninth Circuit's interpretation and analysis accord with established preemption jurisprudence and are more aligned with congressional intent, as determined through LIHPRHA's structure and legislative history. The Eighth Circuit's expansive "practical effects" approach erroneously applies administrative law principles to a preemption analysis and is not in line with explicit congressional intent. These divergent interpretations possess the potential to further reduce the availability of housing to the detriment of elderly and low-income tenants. Even though the federal government has given up on these tenants, the federal courts should not inhibit local governments from working for their benefit.

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<sup>291</sup> *Forest Park*, 336 F.3d 724.

<sup>292</sup> *Topa Equities*, 342 F.3d 1065.