

SOLUTIONS TO THE CRISIS IN AFFORDABLE HOUSING: A PROPOSED MODEL FOR NEW YORK CITY

Maria Cristiano Anderson¹ and Paula A. Franzese²

“The general welfare and security of the nation require the realization as soon as feasible for a decent home and a suitable living environment for every American family.” (Housing Act of 1949)

I. INTRODUCTION

Federal and state housing programs were created decades ago to increase the availability and quality of affordable housing in the United States.³ Among the most well-known of these federal programs is the Housing Choice Voucher Program (“Section 8”), that provides rental assistance to help meet the housing needs of the poor.⁴ Section 8 is administered by the United States Department of Housing and Urban Development (“HUD”), which pays rental subsidies to eligible families so that they can afford decent, safe, and sanitary housing.⁵ The rental assistance provided under Section 8 is either project-based, where money is paid to families that live in specific housing developments or units, or tenant-based, where the tenant chooses the unit and limited financial resources are provided to assist the tenant with the payment of the rent.⁶ In essence, Section 8 provides a rent subsidy to low-income families.⁷

Despite the expansion of HUD programs over the past few decades, federal rental assistance programs have not been able to keep pace with the nation’s demand for affordable housing.⁸ Moreover, the available data reveals that HUD does not provide

¹ Maria Cristiano Anderson is an attorney who has practiced real estate law in New Jersey and New York for twelve years.

² Paula A. Franzese is the Peter W. Rodino Professor at Law at the *Seton Hall University School of Law*. J.D., *Columbia University School of Law*; B.A., *summa cum laude*, *Phi Beta Kappa*, *Barnard College*, *Columbia University*. The authors thank Susan Ericksen, Esq., Julianna K. Ruiz, Margaret Lamb and Brian Powers for their valuable assistance.

³ See Kristin A. Siegesmund, *The Looming Subsidized Housing Crisis*, 27 WM. MITCHELL L. REV. 1123, 1125-1131 (2000); David S. Broder, *The Neglected Issue of Housing*, BOSTON GLOBE, June 10, 2002, at A15; Peter S. Cannellos, *Crisis Threatens Housing Programs; Agency Faces Deficit Jump*, BOSTON GLOBE, July 27, 1997, at A1.

⁴ See DECLARATION OF POLICY AND PUBLIC HOUSING AGENCY ORGANIZATION, 42 U.S.C.A. § 1437 (2004).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*; *supra* note 3; Jackie Calmes, *New Contract, In Bush’s “Ownership Society,” Citizens Would Take More Risk*, WALL STREET JOURNAL, February 28, 2005, at A1, A12;; Susan Davis, *New York City*

assistance to all of those who qualify.⁹ In cities and rural towns across America, many families with young children, the disabled, and seniors have been displaced, rendered homeless, and lived in poverty.¹⁰

Federal rental assistance programs have reached a crisis point as a consequence of inadequate funding and a critical shortage in the number of available housing units.¹¹ Historically, state and local governments worked in partnership with the federal government to abate the problem.¹² However, recent federal policy initiatives shift the financial and administrative burdens of providing affordable housing to the states.¹³ Some advocates contend that the policies of the current federal administration are aimed at eventually dismantling Section 8 in its entirety.¹⁴ Federal housing officials dispute this characterization, citing HUD's sustained commitment to affordable housing. Irrespective of conjecture, states are under mounting pressure to increase and improve their stock of affordable housing despite the socio-economic pressures that compromise their ability to do so effectively.¹⁵

For example, by now many of the incentives and tax benefits originally offered to property owners and landlords to develop and maintain affordable housing have expired, making owners' conversion of these properties to market rates financially attractive.¹⁶ Current economic conditions have contributed to the drain on the affordable housing pool.¹⁷ Unprecedented increases in real estate property values, low mortgage interest rates, and the current maturity of the original mortgage debt on many affected properties have created an environment ripe for record numbers of property

Coalition Against Hunger News Release, Aug. 27, 2004; Howard Husock, *The Housing Reform That Backfired*, 14 Manhattan Institute d/b/a City Journal 81 (2004).

⁹ See Andrea Robinson, *Family Too Big for Studio, Can't Afford More: Working Poor Increasingly Face Housing Crisis*, MIAMI HERALD, Oct., 2004, at 7F; Michael Powell, *New York's Homeless Get Prison for Shelter: City Wrestles with Options as Record Number in Need*, WASH. POST, Aug. 16, 2002, at A3; Roland Lewis, *New York Needs a Place to Live*, N.Y. TIMES, July 20, 2001, at A21; Husock, *supra* note 8 at 81; Kathryn P. Nelson, *Losing Ground in the Best of Times: Low Income Renters in the 1990s* (2004), <http://www.nlihc.org/research/losingground.pdf>; National Low Income Housing Coalition; Community Service Society Fighting Poverty Strengthening New York ("CSS"), Advocacy Brief No. 1, Resident Participation in Public Housing: Making It Effective (July 2002) http://www.cssny.org/pubs/special/advocacybrief_housing.html; Canellos, note 3 at A1.

¹⁰ *Id.*

¹¹ See Craig Gurian, *Developing Sustainable Urban Communities: Let Them Eat Cake*; George Pataki, *Market Ideology and the Attempt to Dismantle Rent Regulation in New York*, 31 FORDHAM URB. L.J. 339 (2004); Nelson, *supra* note 9; Calmes, *supra* note 8 at B1.

¹² See Paulette J. Williams, *The Continuing Crisis in Affordable Housing: System Issues Require Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 440-442 and 447 (2004); Davis, *supra* note 8; Lewis, *supra* note 9 at A21.

¹³ See Calmes, *supra* note 7 at A1, A12.; Editorial, *The War on Affordable Housing*, N.Y. TIMES, Oct. 16, 2004, at A16; John J. Delaney, *Addressing the Workforce Housing Crisis in Maryland and Throughout the Nation: Future Housing Supply and Demand Analysis for the Greater Washington Area*, 33 U. BALT. L. REV. 153 (2004); Gurian, *supra* note 11 at 339; Nelson, *supra* note 9.

¹⁴ *Id.*

¹⁵ See *The War on Affordable Housing*, *supra* note 13 at A16; Lewis, *supra* note 9 at A21; Carol D. Leonning, *Housing Crisis: Anger Over D.C. Demolitions*, WASH. POST, Mar. 29, 2000, at B1; Jeff Whelan, *Codey's Day of Bold Promises: His Speech Charts Expensive Course Towards Compassion*, STAR-LEDGER, Jan. 12, 2005, at 1.

¹⁶ See Gurian, *supra* note 11 at 339 (discussing the potential effect of regulation of affordable housing on New York City rental market); Nelson, *supra* note 9.

¹⁷ *Id.*

owners to opt-out of subsidized housing programs.¹⁸ This alarming trend has compelled states and municipalities to draft various legislative initiatives aimed at preserving the affordable housing that remains.¹⁹

A number of states have enacted laws to preserve affordable housing within their jurisdictions by granting tenants, non-profit groups, and local housing agencies the right of first refusal to purchase and maintain affordable housing developments in the event that an owner endeavors to convert a development to market rate housing.²⁰ Where state legislatures have failed to act, various municipalities have adopted ordinances at the local level, aimed at preserving affordable housing in the event that an owner intends to convert the development into market-rate housing.²¹

II. NEW YORK CITY'S SOLUTION

In response to the drop in federal funding, New York City (“City”) adopted legislation (“the law”) in 2005 that allows tenant associations the right to purchase multi-unit rental developments within federal, state, or City income eligibility restrictions.²² The law applies to any development created under the Limited Dividend or Mitchell-Lama Housing Programs, sections 8, 202, 207, 221, 232, 236 and 811 of the

¹⁸ See Williams, *supra* note 12 at 440-442 and 447; Gurian, *supra* note 11 at 339; Nelson, *supra* note 9.

¹⁹ See also, *The War on Affordable Housing*, *supra* note 13 at A16; Lewis, *supra* note 9 at A21; Nelson, *supra* note 9; CSS, *supra* note 9; Canellos, *supra* note 3 at A1; Husock, *supra* note 8; Broder, *supra* note 3 at A15.

²⁰ See CAL. GOV'T CODE § 65863.11(d)(1)-(4) and (e)(2) (West 2004) (offering tenant associations and non-profit organizations the right of first refusal so long as the purchaser agrees to maintain the property as low income housing for a period of thirty years); R.I. GEN. LAWS § 34-45-8 (West 2004) (requiring owners of federally assisted affordable housing developments who intend to sell or discontinue participation in an affordable housing program provide the tenant association, local housing authority or municipal government the right of first refusal); ME. REV. STAT. ANN. tit. 30-A, § 4973 (2004) (granting the right of first refusal to the State Housing Authority if the owner takes action that results in termination of financial assistance to an affordable housing rental unit); MD. ANN. CODE art. 83B §§ 9-104(b)(1)(i)-(iii) & 5(1)-(3) (2004) (adopting similar legislation granting local housing authorities, local municipalities or tenant groups the right of first refusal conditional on the development remaining affordable for a period of at least twenty years) (repealed 2005) (Acts 2005, ch. 26 §1, effective October 1, 2005); 310 ILL. COMP. STAT. ANN. 60/4(a) and 60/6(a) (West 2004) (requiring an owner provide a tenant association with six months notice of its right to match a bona-fide offer to purchase the affordable housing development); see also 20 ILL. COMP. STAT. ANN. 3805/8.1(a) & 8.1(c)(3) (West 2004) (requiring owner to provide tenant nine months notice of opportunity to purchase the property either at a bargained for price or fair market value).

²¹ See DENVER, COLO. CODE § 27-49 (2005) (requiring owner to provide ninety days notice to the city of an owner's intent to convert affordable housing and permitting the city, or its designee, the right of first refusal to purchase the development on the condition that affordability controls are maintained); S.F., CALIF. CODE §§ 60.5(a), 60.8(a) & 60.8(b)(1) (West 2004) (requiring an owner provide eighteen months notice to city's Director of Housing and tenants of the development of its intent to withdraw from an applicable affordable housing program, and further providing a municipal, non-profit entity or tenant association the right to purchase the development and maintain it as affordable housing for its “remaining useful life”); PORTLAND, OR. CODE Ch. 30.01.050 (West 2004) (permitting the city to acquire any federally funded development, by negotiation for purchase or condemnation, if the owner intends to withdraw from the affordable housing program).

²² See N.Y.C. 62 § 26-801(c) (2005); Davis, *supra* note 8 at A21 (commenting on factors which demonstrate that it has never been more difficult for New Yorkers to find a decent place to live in New York City).

National Housing Act, or Section 8.²³ The law requires owners of such developments to provide tenants, tenant associations, and the City's Department of Housing Preservation and Development ("DHPD") with: 1) twelve months notice of an intent to sell, transfer, pre-pay the mortgage, or withdraw from any program which would result in the termination of participation in an assisted rental housing program;²⁴ and 2) notice of a bona-fide offer to purchase such property, after such offer has been approved by the DHPD, by an entity that will not continue to participate in the assisted rental housing program.²⁵

Upon receipt of notice, DHPD and the tenant association are provided a right of first refusal to purchase the property at the amount offered by the bona-fide purchaser, or at an amount established by a panel of three appraisers.²⁶ If a bona-fide purchaser does not exist, DHPD must convene an advisory panel consisting of three appraisers, one appointed by the tenant association, one by the owner, and a third appointed by either the tenant association and owner's agreement or the agreement of the two designated appraisers where no such agreement exists, to determine the market value of the development.²⁷

Either the tenant association or DHPD must express in writing the intent to exercise this right of first refusal within thirty days of receipt of notice from an owner.²⁸ Once the right of first refusal is exercised, the tenant association or DHPD is provided an additional 120 days to purchase the development.²⁹ In the event that DHPD or the tenant association cannot purchase the development, the right to do so can be assigned to a not-for-profit corporation.³⁰ In such an event, the law preserves the status quo, allowing tenants to remain in their units for six months at the same rent, or be relocated by the owner to a comparable unit at a comparable rent in accordance with procedures established by DHPD.³¹ Moreover, the law provides that if additional requirements are imposed by federal or state law regarding the form, content and time to serve notice upon a tenant, tenant association, or supervising agency, those provisions, rather than the City's requirements, would apply.³² Finally, any person who wishes to contest the appraisal decision, or DHPD's failure to approve a bona-fide offer, may appeal to and seek judicial review.³³ The law seeks to preserve approximately 125,000 units of affordable housing constructed in New York City between 1928 and 1978 as part of the Limited Dividend and Mitchell-Lama Housing Programs.³⁴ The Mitchell-Lama Program was created in 1955 when Senator MacNeil Mitchell and Assemblyman Alfred Lama sponsored legislation to amend the Private Housing Finance Law.³⁵ The Mitchell-Lama

²³ See N.Y.C. 623 §§ 26-801(c) & 26-804 (2005).

²⁴ See N.Y.C. 623 § 26-801(c), (e), (f), and (i) (2005); see also N.Y.C. 623 § 26-802 (2005).

²⁵ See N.Y.C. 623 § 26-803 (2005).

²⁶ N.Y.C. 623 § 26-805 (2005).

²⁷ N.Y.C. 623 § 26-804(b) (2005).

²⁸ N.Y.C. 623 § 26-805(a) (2005).

²⁹ N.Y.C. 623 § 26-805(b) & (c) (2005).

³⁰ N.Y.C. 623 §§ 26-801(n), 804, 805 & 809 (2005).

³¹ N.Y.C. 623 § 26-806 (2005).

³² N.Y.C. 623 §§ 26-802(f) & (g) (2005).

³³ N.Y.C. 623 § 26-813 (2005).

³⁴ N.Y.C. Comptroller, William C. Thompson, Jr. Report, *Affordable No More: New York City's Looming Crisis in Mitchell-Lama and Limited Dividend Housing*, p. 9 (February 18, 2004).

³⁵ *Id.* At 5; see also, N.Y. PRIV. HOUS. FIN. LAW § 10, *et. seq.* (McKinney 1976).

Program provided low interest, long-term loans to finance as much as 95 percent of the then total development costs, and granted developers real estate tax exemptions for developing moderate and middle-income housing.³⁶ In exchange, developers of Mitchell-Lama housing were required to operate in accordance with guidelines that limited their profits by regulating the amount of rent that could be charged a tenant based upon the tenant's annual income.³⁷

New York City's DHPD supervises the Mitchell-Lama projects financed by City loans, while its Department of Housing and Community Renewal ("DHCR") supervises the Mitchell-Lama projects that are financed by state loans.³⁸ When a Mitchell-Lama project is financed in part by City loans, and in part by federal loans issued by HUD, supervision is shared by both DHPD and HUD.³⁹ Currently, DHPD and DHCR supervise 227 Mitchell-Lama developments and approximately 120,000 units of affordable housing.⁴⁰

In 1957, the Private Housing Finance Law was amended to allow Mitchell-Lama developers to pre-pay their mortgages and withdraw from the program.⁴¹ Mitchell-Lama developments that were financed with loans made prior to May 1, 1959 must participate in the program for thirty-five years before the original loan can be paid in full, while developments financed by a loan made after May 1, 1959 are permitted to pre-pay the mortgage and opt-out of the program after twenty years.⁴² Before doing so, a Mitchell-Lama developer must provide at least one year's notice to its supervising agency (such as DHPD, DHCR and/or HUD) and tenants.⁴³ When a Mitchell-Lama developer pre-pays its mortgage and opts out of the program, it becomes subject to New York City's Rent Stabilization Law ("RSL") if the project was occupied prior to January 1, 1974 but units occupied after January 1, 1974 may become market-rate housing.⁴⁴

The Limited Dividend Housing Program was created in 1926 by adoption of the State Housing Law.⁴⁵ Similar to the Mitchell-Lama Law, the State Housing Law also encouraged the development of affordable housing by providing real estate tax exemptions for fifty years while limiting the developer's profits to six percent.⁴⁶ In 1961, the Private Housing Finance Law was amended to incorporate the Limited Dividend Housing Program and place it under the supervision of DHCR.⁴⁷ In 1962, that law was amended again to allow all Limited Dividend housing corporations organized after April 1, 1962 to prepay their mortgages and withdraw from the program twenty years after a development's occupancy date.⁴⁸ Presently, ten Limited Dividend projects containing 6,166 units of housing remain in the program.⁴⁹

³⁶ *Id.* (citing N.Y. PRIV. HOUS. FIN. LAW §§ 22 & 23.1 (McKinney 1976)).

³⁷ *Id.* (relying upon N.Y. PRIV. HOUS. FIN. LAW § 23.2 & 3. (McKinney 1976)).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 6 (relying upon N.Y. PRIV. HOUS. FIN. LAW §§ 12.3, 35.1, 35.3, 36 (McKinney 1976)).

⁴² *Id.* (relying upon N.Y. PRIV. HOUS. FIN. LAW § 35.2 (McKinney 1976)).

⁴³ *Id.* (citing N.Y. COMP. CODES R. & REGS. tit. 9, § 1750 (1988)).

⁴⁴ *Id.* (citing N.Y. UNCONSOL. § 8621 (McKinney 2004)).

⁴⁵ *Id.* (citing State Housing Law, Laws of New York, 1926, Ch. 823, Article 1, § 2).

⁴⁶ *Id.* at 7.

⁴⁷ *Id.* (citing N.Y. PRIV. HOUS. FIN. LAW OF 1961, Article IV, Ch. 803, § 96).

⁴⁸ *Id.* (citing N.Y. PRIV. HOUS. FIN. LAW OF 1961, Article IV, Ch. 803, § 96(1)(2)).

⁴⁹ *Id.*

Of the approximately 125,000 housing units in Limited Dividend and Mitchell-Lama developments, roughly 53 percent are cooperative apartments and 47 percent are rentals.⁵⁰ In addition, approximately 90 percent of the Mitchell-Lama rental units were occupied after January 1, 1974 and thus, would not be subject to the RSL if the development withdrew from its program.⁵¹ The Federal Census Bureau reported in 2001 that New York City's population increased by 6 percent (more than 450,000 persons) since 1990.⁵² However, from 1991 to 2000, the number of housing units within the City increased by only 3.3 percent.⁵³ The median annual household income of renters in the City is \$31,000, and in 2002, 22.5 percent of those renters were below the federal poverty level.⁵⁴ In New York City, the vacancy rate is approximately two percent for units rented at \$500 to \$799 per month, while the vacancy rate is ten percent for units renting at more than \$1,750.00 per month.⁵⁵

Since 2000, 16 percent of the developments in the Mitchell-Lama and Limited Dividend Housing Programs have been withdrawn, as their owners have exercised the mortgage prepayment option.⁵⁶ These developments had contained a significant number of affordable rental units. More alarming still, the owners of an additional eleven developments containing more than 6,300 units of affordable housing have notified their supervising agencies of their intent to withdraw from the Mitchell-Lama and Limited Dividend Programs.⁵⁷ These withdrawals diminish significantly available stores of affordable housing.

The law adopted by the City creates a viable solution to this emerging crisis. It endeavors to allay tenants' potential displacement by granting DHPD and tenant associations the right to purchase their assisted rental housing. The law aims to provide some protection to the owners of the affected developments by requiring that they be compensated based on the market value of the given development, as determined by three real estate appraisers during a process administered by the DHPD.⁵⁸ In the event that DHPD or the tenant association does not, or cannot, purchase the development, the law seeks to preserve the affordable housing by allowing a not-for-profit corporation to exercise a right to purchase before the development can be sold to a private buyer.⁵⁹ If the right of first refusal is not exercised by any eligible party, the law affords affected tenants sufficient time to prepare for displacement by preventing displacement for six months, unless the tenant is relocated sooner to a comparable unit at comparable rent.⁶⁰

The law represents a meaningful solution to a significant problem. Still, it is not without its detractors. There are several legal issues likely to be raised to challenge the enforceability of the proposed scheme. Each of these will be discussed in turn.

⁵⁰ *Id.* at 9.

⁵¹ *Id.* at 10.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* (relying upon information compiled by DHPD).

⁵⁵ *Id.*

⁵⁶ *Id.* at 10.

⁵⁷ *Id.* at 3.

⁵⁸ N.Y.C. 623 § 26-804.(2005).

⁵⁹ N.Y.C. 623 § 26-803 (2005).

⁶⁰ N.Y.C. 623 § 26-810 (2005).

III. PREEMPTION ISSUES UNDER FEDERAL AND STATE LAW

A. PREEMPTION BY FEDERAL LAW

State or local laws are preempted by federal law where: 1) Congress specifically expresses the intent to preempt state law; 2) the federal legislation is so comprehensive that it creates the inference that Congress intended to leave no room for state regulation in the same area; and 3) state law conflicts with federal law.⁶¹ State law conflicts with federal law when: 1) compliance with both federal and state law is physically impossible or 2) the state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of the federal law.⁶²

Preemption of state or local law is not to be presumed lightly, and courts will exercise even greater restraint when areas traditionally regulated by the states are subject to a preemption challenge.⁶³ Specifically, the presumption against preemption is strong when the exercise of a state's police power is the subject of a challenge.⁶⁴ The recognition that states are independent sovereigns in our federal system means that preemption will be found only in the presence of a clear congressional intent to supersede the states' police powers.⁶⁵ Against this backdrop, it becomes necessary to determine whether applicable federal housing laws preempt application of the City's law to housing developments that are the subject of both federal and local regulation.

In 1934, Congress enacted the National Housing Act ("NHA") to provide "a decent home and suitable living environment for every American family."⁶⁶ In 1968, Congress amended the NHA to add Section 236, which established a program to provide low-interest forty-year mortgages as an incentive to induce property owners to accept below-market rental rates.⁶⁷ In 1970, HUD adopted regulations which permit Section 236 program participants to prepay their subsidized mortgages at the expiration of twenty years, and thereby no longer accept the federally-imposed rents.⁶⁸ In 1987, Congress passed the Emergency Low Income Housing Preservation Act ("ELIHPA") to address the concern that the stock of such low-income housing could be completely depleted by property owners withdrawing from the Section 236 program after twenty years.⁶⁹ ELIHPA placed a two-year moratorium on the ability to prepay these mortgages.⁷⁰ At the conclusion of that moratorium in 1990, Congress replaced ELIHPA

⁶¹ See *Franklin Tower One, LLC v. N.M.*, 725 A.2d 1104, 1111 (N.J. 1999) (further citations omitted).

⁶² *Id.*

⁶³ *Id.*; see also, *Gurrieri v. William Zinsser & Co. Inc.*, 728 A.2d 832, 835 (N.J. Super. Ct. App. Div. 1999).

⁶⁴ See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quoting *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724, 756 (1985) ("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."); see also, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins., Co.*, 514 U.S. 645, 655 (1995) (exercise by local authority of historic police power is not to be superseded by federal statutes unless that was the clear and manifest purpose of Congress).

⁶⁵ See *Medtronic*, 518 U.S. at 485; see also, *Jones v. United States*, 529 U.S. 848, 860 (2000) (Stevens, J., concurring) (citing *U.S. v. Bass*, 404 U.S. 336, 349 (1971)).

⁶⁶ 12 U.S.C.A. § 1701t (West 2004).

⁶⁷ See *id.* § 1715z-1.

⁶⁸ See *id.* § 1715-z(h).

⁶⁹ See *id.* § 4101.

⁷⁰ *Id.*

with the Low Income Housing Preservation and Resident Homeownership Act (“LIHPRHA”), which imposed additional requirements upon the pre-payment of such mortgages in order to accomplish a withdrawal from the federal program, while also providing incentives to stay within the program.⁷¹ LIHPRHA also expressly provided that it preempted state and local law:

No state or political subdivision of a state may establish, continue in effect, or enforce any law or regulation that:

(1) Restricts or inhibits the prepayment of any mortgage described in § 248.101 . . . of this chapter on eligible low income housing projects; 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.⁷²

At the same time, LIHPRHA expressly provided that regulations of “general applicability,” which are imposed at the state or local level, are not subject to preemption:

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 of 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 non-assisted housing. This section shall not preempt, annul or alter any contractual restrictions or obligations existing before November 28, 1990 or voluntarily entered into by an owner of eligible low income housing on or after that date, and that limit or prevent that owner from prepaying the mortgage on the project or terminating the mortgage insurance contract.⁷³

In 1996, Congress eliminated the pre-payment restrictions contained in LIHPRHA by enacting the Housing Opportunity Program Extension Act (“HOPE”).⁷⁴ HOPE now permits property owners to prepay their mortgages after twenty years, but prohibits any increase in rent for sixty days after withdrawing from the program.⁷⁵ Although HOPE does not expressly state that it preempts state or local law, it did not

⁷¹ See *id.* §§ 4101(a) & 4108.

⁷² *Id.* § 4122(a).

⁷³ *Id.* § 4122(b) (emphasis added).

⁷⁴ Housing Program Extension Act, Pub. L. No. 104-120, 110 Stat. 834 (1996) at 12 U.S.C.A. § 1701 (1996), 12 U.S.C.A. § 4101 (West 1996), and 42 U.S.C.A. § 1437f (West 1996)), amended by Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, 112 Stat. 2461, Pub. Law 105-276, Oct. 21, 1998; Amendment in sec. 599E(a) at 112 Stat. 2663; American Homeownership and Economic Opportunity Act of 2000, 114 Stat. 2944, Pub. Law 106-569, Dec. 27, 2000; Amendment in sec. 202 at 114 Stat. 2951.

⁷⁵ 12 U.S.C.A. § 4114(a)(1)

invalidate the preemption provision contained within LIHPRHA.⁷⁶ Although a property owner must obtain approval from HUD to prepay its mortgage, LIHPRHA does not require notice to be provided to tenants within a specific time period before it obtains that approval.⁷⁷ However, HOPE requires an owner to provide no less than 150 days, and not more than 270 days notice to its tenants prior to pre-payment of the mortgage.⁷⁸

The provision in LIHPRHA that preempts state or local laws restricting or inhibiting the pre-payment of mortgages has been the subject of two published decisions.⁷⁹ Those decisions reflect a split in the Eighth and Ninth Circuit courts regarding Congress's intent to preempt state law that seeks to regulate the property owner's conduct when a Section 236 mortgage is paid after the expiration of twenty years.

The Eighth Circuit examined a Minnesota law that required a property owner to provide at least one year's notice of its intent to pre-pay a mortgage.⁸⁰ The court found that the state law restricted and inhibited the right of a property owner to prepay its mortgage under LIHPRHA for two reasons: 1) the property owner could comply with HOPE, which required the same notice to be provided no less than 150 days and not more than 270 days prior to pre-payment of the mortgage; and 2) despite compliance with HOPE, the property owner would not be permitted to prepay the mortgage because it had not complied with the state law.⁸¹ The court also found that the federal statutes set forth in the NHA, ELIHPA, LIHPRHA and HOPE, and the regulatory scheme adopted by HUD, created the inference that Congress intended to preempt state law regulating pre-payment of mortgages.⁸² The court determined that the Minnesota law was preempted because it imposed notice as a condition for prepayment and forced "owners to remain in a federally subsidized program from which Congress [had] authorized withdrawal."⁸³

However, in reliance upon the language contained in LIHPRHA that limits preemption, the Eight Circuit also stated:

We do not suggest that 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 place additional requirements on Federal program participants, restrict the

⁷⁶ See *id.* § 4101, *et. seq.*

⁷⁷ See *id.* § 4101(a); *id.* § 4108; *id.* § 4114; *id.* § 4120.

⁷⁸ Appropriations Act, Pub. L. No. 105-276, § 219(b)(3), 112 Stat. 2461 (1999) (Appendix Unclassified).

⁷⁹ See *Forest Park II v. Hadley*, 336 F.3d 724, 727 (8th Cir. 2003) (holding that state statutes were expressly preempted under LIHPRHA's preemption provision). *But see*, *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065, 1067 (9th Cir. 2003) (holding that LIHPRHA did not preempt state statutes limiting rent increases for tenants who participated in subsidized housing programs). See also, 12 U.S.C.A. § 4122(b).

⁸⁰ See *Forest Park II*, 336 F.3d at 727-731.

⁸¹ *Id.* at 732-33.

⁸² *Id.* at 733.

⁸³ *Id.* at 733-34.

exercise of the participants' federally granted prepayment rights, or create delays in the prepayment process, they are preempted.⁸⁴

The same year, the Ninth Circuit reviewed an ordinance adopted by the City of Los Angeles that prohibited owners who pre-paid their federally funded mortgages from raising rents to market rates until after existing low-income tenancies terminated.⁸⁵ The Ninth Circuit agreed with the Eighth Circuit's finding that LIHPRHA's preemption provision was still effective, despite the enactment of HOPE.⁸⁶ However, the Ninth Circuit concluded that the Los Angeles ordinance was not preempted because it did not restrict or inhibit an owner's option to pre-pay his or her mortgage.⁸⁷ The court found that LIHPRHA insulated the ordinance from challenge because it prevented all owners of low-income housing from increasing rents, regardless of whether or not an owner pre-paid, or opted out of federal housing programs.⁸⁸ In reaching its decision, the Ninth Circuit determined that the Los Angeles ordinance was distinguishable from the Minnesota law previously reviewed by the Eighth Circuit because it did not specifically prohibit the prepayment of a federal mortgage if the owner did not comply with a longer notice period than that imposed by HOPE.⁸⁹

Based upon the rationale expressed by both the Eighth and Ninth Circuits, the law at issue here should survive federal preemption claims. Unlike Minnesota's law, New York City's law does not prevent the owner of an affordable housing development from pre-paying its mortgage beyond the notice period required by HOPE. Rather, the law simply requires twelve months' prior notice of an owner's intent to pre-pay, and notice of an offer from a bona-fide purchaser, to provide DHPD and the tenant association adequate time to exercise the right of first refusal to purchase a property. Moreover, the law expressly recognizes that if its notice requirements are longer than those required by federal law, the federal notice requirements would apply, thereby obviating any potential conflict. Consequently, the notice provisions contained in LIHPRHA and HOPE should not be deemed to preempt the law at bar.

In addition, the provisions contained in the law fall within the types of examples of local legislation expressly recognized as permissible by LIHPRHA. Specifically, LIHPRHA permits local laws of general applicability to be applied to housing receiving federal assistance, as well as to non-assisted housing on matters pertaining to issues of rent control or the conversion of rental housing to private ownership. In this regard, New York City's law is similar to the Los Angeles ordinance affirmed by the Ninth Circuit, insofar as it requires a landlord to allow a tenant to remain in its affordable housing unit for six months at the current rent.

New York City's law also grants the given tenant association the right to purchase the development in the event that it is to be converted to market-rate housing. Since the law applies to developments that contain a "majority" of assisted housing, it would apply to developments containing both assisted and non-assisted housing. Moreover, the law would apply to all owners of low-income housing who seek to withdraw from that

⁸⁴ *Id.* at 734.

⁸⁵ *See* *Topa Equities, Ltd. v. City of Los Angeles*, 342 F.3d 1065, 1068-1069 (9th Cir. 2003).

⁸⁶ *Id.* at 1069.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1070; *see also* 12 U.S.C. A. § 4122(b).

⁸⁹ *See* *Topa Equities*, 342 F.3d at 1070.

market, regardless of whether or not the particular owner pre-paid his or her mortgage. Consequently, the law would have general applicability, as permitted by LIHPRHA

Section 8 of the NHA, which provides a mechanism for the federal government to subsidize tenants' rents by entering into a contract with the owner of the affordable housing development, permits owners to terminate a contract by providing at least one year's advance notice.⁹⁰ Specifically:

Not less than one year before termination of any contract under which assistance payments are received under this section, other than a contract for tenant-based assistance under this section, an owner shall provide written notice to the Secretary and the tenants involved of the proposed termination. The notice shall also include a statement that, if the Congress makes the funds available, the owner and the Secretary may agree to a renewal of the contract, thus avoiding termination, and that in the event of termination [HUD] will provide tenant-based rental assistance to all eligible residents, enabling them to choose the place they wish to rent, which is likely to include the dwelling unit in which they currently reside. Any contract covered by this paragraph that is renewed may be renewed for a period of up to 1 year or any number of years, with payments subject to the availability of appropriations for any one year.⁹¹

Section 8 does not contain any express language preempting state or local regulation. Absent such a declaration, one can reasonably infer that Congress did not intend to preempt state and local regulation in this area. Indeed, at least one state's highest court has ruled that state and local laws are not preempted by Section 8.⁹² State law in New Jersey prohibits a landlord from refusing to accept a Section 8 rental voucher from a tenant.⁹³ However, federal law states that a property owner's participation in the Section 8 program is purely voluntary.⁹⁴ The New Jersey Supreme Court found that its state law was not preempted, because the Section 8 regulations contain no express provision to that effect.⁹⁵ In reaching its decision, the court noted that the federal law creating Section 8 housing was neither comprehensive nor all-inclusive, and therefore could not support the inference that it could not be supplemented appropriately by governing state regulation.⁹⁶ Moreover, the court recognized that Section 8 regulations specifically contemplate substantial state participation in the regulation of the program.⁹⁷ As a result, the court found that New Jersey law was co-extensive and consistent with the laudable objectives of the Section 8 program, since both sets of rules and restrictions endeavor to protect low-income

⁹⁰ 42 U.S.C.A. § 1437, *et. seq.*

⁹¹ *Id.* § 1437f(c)(8)(A).

⁹² *See Franklin Tower One, LLC v. N.M.*, 725 A.2d 1104, 1112 (N.J. 1999).

⁹³ N.J. STAT. ANN. § 2A:42-100 (West 2004).

⁹⁴ *See Franklin Tower*, 725 A.2d at 1113.

⁹⁵ *Id.*

⁹⁶ *Id.* at 1108-09, 1113.

⁹⁷ *Id.*

tenants.⁹⁸ This reasoning bolsters the premise that the New York City law should survive a challenge on preemption grounds.⁹⁹

B. PREEMPTION BY STATE LAW

Article 9 of the New York State Constitution and the State's Municipal Home Rule Law grant local government "broad powers to enact legislation for the protection and welfare of persons and property."¹⁰⁰ However, both the state Constitution and the Municipal Home Rule Law prohibit local legislation that is inconsistent with "general" state law.¹⁰¹ A "general state law" is a state statute that applies alike to all counties, cities, towns, or villages.¹⁰² A "special law" is a state statute that applies to one or more, but not all, counties, cities, towns, or villages.¹⁰³ Thus, if a New York City local law conflicts with a special law affecting only the City, it is not unconstitutional because it is deemed in furtherance of the City's police powers.¹⁰⁴

The fact that both the state and a municipality may regulate the same activity does not necessarily create a conflict or inconsistency.¹⁰⁵ It is only those local laws that expressly contradict, or are incompatible with the general laws of the state, that must be invalidated.¹⁰⁶ The mere fact that a local law may regulate or touch upon some of the same matters treated by state law does not render the local law impermissible *per se*.¹⁰⁷ Only when the State has evidenced a desire to occupy an entire field, to the exclusion of local law, is a municipality powerless to act.¹⁰⁸ Local laws may supplement, not

⁹⁸ *Id.* at 1111. Compare *Attorney General v. Brown*, 511 N.E.2d 1103, 1109 (Mass. 1987) (finding no preemption where state housing statute conflicted with federal law by mandating a landlord's participation in Section 8 program; the fact that Congress made participation in the Section 8 program voluntary did not preclude local housing authority from mandating participation); *Comm'n on Human Rights v. Sullivan Assoc.*, 1998 WL 395 196 at *9 (Conn. Super. Ct. 1998) ("nothing in the federal program prevents a state from mandating participation"); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 296 (2d Cir. 1998) ("participation by landlords is voluntary and they lawfully may refuse to accept applications from Section 8 beneficiaries"); *Knapp v. Eagle Property Mgmt. Corp.*, 54 F.3d 1272, 1282 (7th Cir. 1995) (stating that Section 8 is a "voluntary federal program," and noting in dicta that "it seems questionable . . . to allow a state to make a voluntary federal program mandatory").

⁹⁹ 42 U.S.C.A. § 1437(a) (stated purpose of Section 8 includes the intent to provide assistance to state and local governments "to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families" and to empower local public housing agencies with "the maximum amount of responsibility and flexibility in program administration.").

¹⁰⁰ See *Council for Owner Occupied Hous. v. Koch*, 462 N.Y.S.2d 762, 764 (Sup. Ct. 1983) (citing N.Y. CONST. art. IX, § 2(c)(1) & N.Y. MUN. HOME RULE § 1, *et. seq.* (McKinney 2004)).

¹⁰¹ See *Seavall Assocs. v. City of New York*, 510 N.Y.S.2d 435, 438 (Sup. Ct. 1986) (citing *Council for Owner Occupied Hous.*, 462 N.Y.S.2d at 764).

¹⁰² *Id.* (citing *Council for Owner Occupied Hous.*, 462 N.Y.S.2d at 764); see also N.Y. MUN. HOME RULE § 2 (McKinney 2004) (defining "general law").

¹⁰³ *Id.* (citing *Council for Owner Occupied Hous.*, 462 N.Y.S.2d at 764); see also N.Y. MUN. HOME RULE § 2 (McKinney 2004) (defining "special law").

¹⁰⁴ *Id.* (citing *Council for Owner Occupied Hous.*, 462 N.Y.S.2d at 764).

¹⁰⁵ *Council for Owner Occupied Hous.*, 462 N.Y.S.2d at 764 (citing *Sonmax, Inc. v. City of New York*, 401 N.Y.S.2d 173 (N.Y. 1977)).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; see also *Zorn v. Howe*, 716 N.Y.S.2d 128, 131 (3rd Dept. 2000).

¹⁰⁸ See *Council for Owner Occupied Hous.*, 462 N.Y.S.2d at 764.

supplant, general state law by providing details on a topic on which state statutes remain silent.¹⁰⁹

Based upon the foregoing, a local law may be invalidated if it: 1) permits an act that has been specifically prohibited by state general law; 2) prohibits an act which has been specifically permitted by state general law; or 3) imposes restrictions on rights granted by the state by general law.¹¹⁰ Against this backdrop, the state laws that regulate Mitchell-Lama and Limited Housing developments must be reviewed to determine if they preempt the City law at issue here.

The financing of property developed pursuant to the Mitchell-Lama and Limited Dividend Housing Programs are regulated by the New York State Private Housing Finance Laws.¹¹¹ When a Mitchell-Lama developer pre-pays its mortgage and opts out of the program, it becomes subject to the City's RSL as long as its project was occupied prior to January 1, 1974, as well as the State Emergency Housing Rent Control Law (commonly referred to as the "Urstadt Law") and the State Emergency Tenant Protection Act ("ETPA").¹¹² Since the RSL and ETPA apply only to the City, they are special laws, incapable of working preemption in this context.¹¹³ Therefore, only the Mitchell-Lama and Urstadt Laws need to be examined to determine if they pose a potential preemption problem.

The Mitchell-Lama Law was enacted by the state legislature to address a seriously inadequate supply of safe and sanitary dwellings in municipalities within the state by creating a mechanism to finance such housing and undertake projects directly, or in combination with the federal government or private enterprise.¹¹⁴ In passing the law, the Legislature declared that any and all of the following actions taken by municipalities serve a public purpose: 1) money and property given, loaned or expended to finance such affordable housing; 2) indebtedness contracted to finance such housing; and 3) the exercise of eminent domain to acquire land to construct such housing.¹¹⁵

The Mitchell-Lama Law permits a company¹¹⁶ to lease "with or without an option to purchase," all, or any part, of a project to any person.¹¹⁷ If a project is aided by a loan made before May 1, 1959, it may be withdrawn from the Mitchell-Lama program with the consent of the supervising agency by paying the balance of the loan in full if thirty-

¹⁰⁹ *Id.*; see also Zorn, 716 N.Y.S.2d at 131.

¹¹⁰ *Id.*; see also Seawall Assocs., 510 N.Y.S.2d at 444.

¹¹¹ N.Y. PRIV. HOUS. FIN. § 1, *et. seq.* (McKinney 2004).

¹¹² *KSLM Columbus Apartments, Inc. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 772 N.Y.S.2d 665, 667 (1st Dept. 2004); see also, N.Y. UNCONSOL. § 8601, *et. seq.* (McKinney 2004) ("Emergency Housing Rent Control Act"); *id.* § 8621, *et. seq.* (McKinney 2004) ("Emergency Tenant Protection Act"); N.Y. COMP. CODES R. & REGS. tit. 26 § 26-501, *et. seq.* (1992) ("Rent Stabilization Law").

¹¹³ See *KSLM*, 772 N.Y.S.2d at 668. The provisions of the RSL and ETPA do not appear to conflict with New York City's proposed legislation. N.Y. Comp. Codes R. & Regs. tit. 26 § 26-512 (1992) (RSL makes it unlawful to charge any "rent" in excess of the legal regulated rent).

¹¹⁴ N.Y. UNCONSOL. § 8605 (McKinney 2004).

¹¹⁴ N.Y. PRIV. HOUS. FIN. § 11 (McKinney 2004).

¹¹⁵ *Id.* §§ 11-a.5 & 6.

¹¹⁶ A company is defined by the Mitchell-Lama Law as a limited profit housing company, a company incorporated pursuant to the not-for-profit corporation law to provide housing for staff members, employees or students of a college, university, hospital or child care institution and their immediate families, or for aged or handicapped persons of low income, municipally aided non-profit company or a low income non-profit housing company. *Id.* § 12.2.

¹¹⁷ *Id.* § 17.1(p).

five years has expired from the date of occupancy.¹¹⁸ In addition, projects aided by a loan made before May 1, 1959 can only be transferred prior to that thirty-five-year period to a company organized under the Mitchell-Lama Law.¹¹⁹ A company aided by a loan made after May 1, 1959 may be voluntarily dissolved without the consent of the supervising agency not less than twenty years after the occupancy date, and upon the payment in full of the remaining balance of principal and interest due upon the mortgage.¹²⁰ Upon such dissolution, title to the project “may be” conveyed in fee to the owner or owners of the company’s capital stock or to any corporation designated by it, or them. In addition, the company “may be” reconstituted pursuant to appropriate laws relating to the formation and conduct of corporations upon payment of all current operating expenses, taxes, indebtedness, and all accrued interest thereon as well as the par value and accrued dividends of outstanding stock of the company.¹²¹ After such dissolution and conveyance, or such reconstitution, the provisions of the Mitchell-Lama Law become inapplicable to the project and its owners.¹²²

Based upon the foregoing, if an owner prepays its mortgage in accordance with the Mitchell-Lama Law, it is not necessary that title to the development be conveyed to the owner of the project. Therefore, the City’s law, which would require title to be conveyed to DHPD, the tenant’s association, or their assignor, is not in conflict with the Mitchell-Lama Law. If an owner prepaid its mortgage, the provisions of the Mitchell-Lama Law would no longer govern, and therefore, could not preempt the City’s law. Finally, the Mitchell-Lama Law does not contain any provision to prohibit the rights sought for tenants under the City’s law. It therefore supplements, rather than supplants, applicable state law.¹²³

In *Council of Owner Occupied Housing v. Koch*, the City adopted an ordinance regulating certain aspects of the conversion of rental units to co-operative or condominium status.¹²⁴ The City’s law was challenged in that case on the basis that it conflicted with, and was preempted by, state laws regulating the sale of real estate securities.¹²⁵ The court found that although the local law did impact an area regulated by the state, it was an “attempt to preserve the existing housing stock and to afford greater protection to tenants of buildings undergoing a conversion.”¹²⁶ In reliance upon that purpose, the court determined that the local law was a “legitimate government concern,” which supplemented the state regulatory process, and implicit therein was the

¹¹⁸ *Id.* § 35.1.

¹¹⁹ *Id.* § 36.1.

¹²⁰ *Id.* § 35.2.

¹²¹ *Id.* § 35.3 (emphasis added).

¹²² *Id.* (emphasis added).

¹²³ The Mitchell-Lama Law requires the Commissioner or supervising agency, as the case may be, to promulgate regulations which: 1) recognize tenant associations and require a housing company to meet on a regular basis with representatives of such associations to discuss matters relating to the project; 2) afford tenants access to and an opportunity to acquire copies of all operating budgets or financial statements concerning the project in which the tenant resides to the extent that they are required by law to be kept by the commissioner or supervising agency; and 3) permit a tenant association to audit the books of the company and have access to the financial records upon which its financial statements are based. *Id.* § 32-a.1, 4 & 5. The New York City law does not impair the power of the Commissioner or supervising agency to adopt these regulations.

¹²⁴ 462 N.Y.S.2d 762, 763 (Sup. Ct. 1983).

¹²⁵ *Id.*

¹²⁶ *Id.* at 765.

recognition that additional governmental controls were necessary to meet the special housing problems to exist within the City.¹²⁷ For the same reasons, the law at issue here should not suffer preemption.

The Mitchell-Lama Law grants municipalities the authority to: 1) acquire by purchase, condemnation or otherwise, in accordance with the provisions of the appropriate general, special, or local law applicable to the acquisition of real property by such municipality, real property necessary for or incidental to a project; and 2) to sell any such project at any stage before, at the date of, or after the physical completion of such project to a company which will undertake, plan, construct, own, manage, or operate such project in accordance with the plan and the provisions of the Mitchell-Lama Law.¹²⁸ A company may also acquire property needed, or the municipality may, with respect to a municipally-aided project or a project aided by a state loan or loan from the New York Housing Finance Agency, take property by condemnation.¹²⁹ These provisions of the Mitchell-Lama Law grant the City the authority to expressly supplement the statute. The law at issue here does just that. It supplements the provisions of the Mitchell-Lama Law, as that law plainly permits.

Developments that withdraw from the Mitchell-Lama and Limited Dividend Housing Programs become subject to the State's Urstadt Law.¹³⁰ The Urstadt Law was enacted in 1971 to grant authority to municipalities to adopt legislation to impose rent controls. It grants every city with a population of 1,000,000 or more (thereby including the City), the power to adopt and amend local laws to regulate and control residential rents.¹³¹ It prohibits, however, any local law from regulating or controlling the rents of any residential housing that had been exempt from such regulation or control in 1971 or any housing "hereafter decontrolled either by operation of law, a city housing rent agency, or by order or otherwise."¹³² The Urstadt Law prohibits such laws unless otherwise approved by the DHCR.¹³³

The Urstadt Law was part of a series of bills that were prompted by the state's concern over the abandonment and divestment of rent-controlled housing in the City.¹³⁴ The objective of the law was to encourage owners to invest in the maintenance and improvement of existing housing units, stemming the tide of abandonment of sound buildings in the City.¹³⁵ Since the City recently enacted legislation to stabilize the rent charged for units in buildings constructed between 1947 and 1969, the Urstadt Law has achieved its purpose by prohibiting further City regulation of buildings "presently exempt" or "hereinafter decontrolled" and by requiring the DHCR to approve more stringent and restrictive City regulations.¹³⁶ The Urstadt Law's legislative history evinces an intent to "check City attempts, whether by local law or regulation, to expand

¹²⁷ *Id.*

¹²⁸ N.Y. PRIV. HOUS. FIN. §§ 36-a.2(a) & 3 (McKinney 2004).

¹²⁹ *Id.* § 29(a).

¹³⁰ See *KSLM-Columbus Apts., Inc. v. New York State Div. of Hous. & Cmty. Renewal*, 772 N.Y.S.2d 665, 667 (N.Y. App. Div. 2004).

¹³¹ N.Y. UNCONSOL. § 8605 (McKinney 2004).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See *City of New York v. N.Y. State Div. of Hous. & Cmty. Renewal*, 739 N.Y.S.2d 333, 339 (Ct. of App. 2001).

¹³⁵ *Id.*

¹³⁶ *Id.*; see N.Y. COMP. CODES R. & REGS. tit. 26 § 4 (1992).

the set of buildings subject to rent control stabilization. . . .” and limit City attempts to “enlarge its regulatory control over landlords.”¹³⁷

Consistent with the intent expressed in the legislative history of the Urstadt Law, courts have found local laws to be prohibited only when they attempt to regulate rent.¹³⁸ Since its adoption, a number of local laws have withstood the challenge that they violate the Urstadt Law as being more stringent than the laws in effect prior to 1971.¹³⁹ Generally, courts that have examined such challenges have consistently found that local laws that do not regulate rent are not prohibited by the Urstadt Law.¹⁴⁰

In *Seawall Associates v. City of New York*, the City adopted a law seeking to preserve and maintain SRO units in an effort to deal with its housing shortage and mounting homeless problem.¹⁴¹ The law imposed a moratorium on the demolition of conversion of single room occupancy (“SRO”) dwellings and imposed affirmative obligations on the owners of such buildings to: 1) maintain such units in habitable condition; 2) rehabilitate them to a habitable condition; and 3) rent at rates authorized by law.¹⁴² The plaintiffs contended that this local law was inconsistent with the vacancy and dwelling provisions of the Urstadt Law, RSL, and City Multiple Dwelling Law.¹⁴³ Although the Court did find that part of the local law regulating SRO units was inconsistent with the Urstadt Law, it found that inconsistency did not automatically preempt the Urstadt law.¹⁴⁴ The Court found that the Urstadt Law was a special law that

¹³⁷ *Id.* In *City of New York v. New York State Division of Housing and Community Renewal*, the court reviewed the City’s law, which changed the formula used to value property and establish a maximum rent base. 739 N.Y.S.2d at 334. Even though the local law reduced the return on capital value to the landlord, the court found it did not diminish the protections in the Urstadt Law against changes in rent control. *Id.* at 341. Rather, the court found it preserved the regulatory scheme of that law by restoring the congruence between the measure of capital value and the actual value of rent controlled buildings “that the state Legislature took for granted when it [was] passed.” *Id.*

¹³⁸ See *Mayer v. City Rent Agency*, 412 N.Y.S.2d 867, 871 (N.Y. 1978) (New York City law which took away a landlord’s right to pass to tenants a class of labor costs was a “substantial change” to the laws regulating rents in effect in 1971 and prohibited by Urstadt Law); *214 E. 22nd St. Corp. v. City Rent Agency*, 350 N.Y.S.2d 631 (N.Y. 1973) (New York City law which removed a class of apartments from eligibility for rent increases under its hardship increase provisions was unlawful because it enlarged the City’s regulatory control); *210 E. 68th St. Corp. v. City Rent Agency*, 349 N.Y.S.2d 896, *mod. in part & aff’d*, 350 N.Y.S.2d 424, *aff’d*, 354 N.Y.S.2d 941 (N.Y. 1974) (striking down City’s attempt to repeal the MBR provisions of Local Law 30 as enlarging regulatory control and prohibited by Urstadt Law).

¹³⁹ See *Bryant Westchester Realty Corp. v. Bd. of Health of City of New York*, 397 N.Y.S.2d 322 (Sup. Ct. 1977); *City of New York v. N.Y. State Div. of Hous. and Cmty. Renewal*, 718 N.Y.S.2d 70 (1st. Dept. 2001); *City of New York*, 739 N.Y.S.2d at 333; *Seawall Assocs.*, 134 Misc. 2d 187, 203, ; 510 N.Y.S.2d 435, 447; 1986 N.Y. Misc. LEXIS 3085, 34 (Sup. Ct. 1986).

¹⁴⁰ See *Bryant*, 397 N.Y.S.2d at 324 (local law requiring landlord to install window guards does not violate Urstadt Law); *New York State Div. of Hous. & Community Renewal*, 718 N.Y.S.2d at 71 (local law which requires use of capital value to establish the maximum base rent formula does not impose more stringent regulations or controls upon landlords in violation of the Urstadt Law); *City of New York City*, 739 N.Y.S.2d at 341 (local law requiring capital valuation to establish maximum rents does not violate Urstadt Law); *Seawall Associates*, 510 N.Y.S.2d at 447 (local law which creates broad scheme to preserve single room occupancy dwellings and prevent homelessness does not regulate rents and thus does not violate Urstadt Law).

¹⁴¹ 510 N.Y.S.2d at 438.

¹⁴² *Id.*

¹⁴³ *Id.* at 444.

¹⁴⁴ *Id.* at 445.

affected only the City and the local law was permitted because it was in furtherance of the City's police powers.¹⁴⁵

The Court in *Seawall* also found that the local law was not prohibited by the Urstadt Law. The aim of the Urstadt Law was to prohibit more stringent or restrictive local regulation of the rents that landlords could charge to ensure that landlords obtained a sufficient financial return to maintain existing housing.¹⁴⁶ Since the local law created a *broad* scheme to preserve SRO units, and was not aimed at restricting the amount of rent charged for them, the Court found it did not violate the Urstadt Law.¹⁴⁷ The rationale for the Court's holding in *Seawall* was expressed by the Court in *Bryant Westchester Realty Corp. v. Board of Health of City of New York*, which found a New York City law, which required the installation of window guards, did not violate the Urstadt Law.¹⁴⁸ Specifically, the *Bryant* Court stated that the provisions in the Urstadt Law:

. . . were not intended to restrict a municipality in adopting public safety legislation or regulations for purposes other than rent regulation even though more stringent than those in affect prior to 1971, and even though they may affect rent controlled housing.¹⁴⁹

The provisions in the City's law that grant DHPD, tenant associations, and their assignee, a right of first refusal to purchase an affordable housing development are not prohibited by the Urstadt Law because they do not alter the regulation or control of rent.¹⁵⁰ Moreover, the right of first refusal granted in the City's law does not violate the Urstadt Law because it seeks to preserve an existing stock of affordable housing. Finally, the Urstadt Law is a special law that does not affect all municipalities; therefore, none of the provisions in the City's law would be preempted because they are permitted under and in furtherance of the City's police powers.¹⁵¹

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 446.

¹⁴⁷ *Id.*

¹⁴⁸ See *Bryant*, 397 N.Y.S.2d at 324.

¹⁴⁹ *Id.*

¹⁵⁰ Section 8609 of the Unconsolidated Laws sets forth additional actions which are prohibited by the Urstadt Law. Specifically, it is prohibited to demand or receive any rent for any housing in excess of the maximum rent established by the City's state housing rent commission or rent agency, or to do any act in violation of any regulation, order or requirement of such agencies. N.Y. UNCONSOL. § 8609(a) (McKinney 2004). Second, it prohibits any person to remove any tenant who takes action authorized or required by the EHRL or any local law, regulation, order or requirement. *Id.* § 8609(b). Third, it prohibits any officer or employee of the City from disclosing any information obtained under the Urstadt Law for any personal benefit. *Id.* § 8609(d). Finally, a landlord or its agent may not act with intent to cause the tenant to vacate its housing by disturbing the comfort, repose, peace or quiet of the tenant in his use and occupancy of the premises. *Id.* The City's law does not violate any of these provisions.

¹⁵¹ *Id.*

C. THE POTENTIAL CONSTITUTIONAL CHALLENGES

1. FIFTH AMENDMENT CONCERNS

The Fifth Amendment of the United States and New York Constitution permit the taking of private property for public use with just compensation.¹⁵² In evaluating whether a legislative enactment serves a public use, a strong presumption of constitutionality applies.¹⁵³ States have the authority to exercise their police powers and enact regulations that further even broadly construed determinations of general health, safety, and welfare.¹⁵⁴ The United States Supreme Court, as well as the New York courts, have determined that legislative initiatives aimed at protecting tenant welfare and promoting affordable housing opportunities satisfy the public use test.¹⁵⁵

In *Kelo v. City of New London*,¹⁵⁶ the United States Supreme Court deemed constitutional the taking of private property for transfer to private developers. The Court determined that the taking did not occur to benefit specific private parties, but to further the public's interest in revitalizing the City's economy. Thus, the taking satisfied the public use test, no matter that the property at issue was not blighted. The Court rejected petitioner's alternative argument that, where a legislature initiates a taking for the purpose of economic rejuvenation, there should be "reasonable certainty" that the expected public benefits will actually accrue.¹⁵⁷ The Court deemed legislative determinations of appropriate public use worthy of considerable judicial deference, and found that the imposition of a heightened standard of judicial review would impede government's necessary functions.¹⁵⁸

This spirit of judicial deference to state and local determinations of public use is consistent with earlier United States Supreme Court precedent, rendered in *Hawaii Housing Authority v. Midkiff*¹⁵⁹ and *Berman v. Parker*.¹⁶⁰ For example, in *Midkiff*, the United States Supreme Court deferred to the Hawaii State Legislature's determination that efforts to break up oligopolistic land ownership practices and make home ownership more accessible to all citizens served a legitimate public purpose. Thus, the taking of private property at the state's behest from one group of private landowners to another, in exchange for just compensation, did not violate Fifth and Fourteenth Amendment standards.¹⁶¹

¹⁵² See U.S. CONST. amend. V; N.Y. CONST. art. 1 § 7(a). The Fifth Amendment applies to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV.

¹⁵³ See *Defiance Milk Prods. Co. v. Du Mond*, 132 N.E.2d 829, 830 (N.Y. 1956).

¹⁵⁴ See *City of Euclid v. Ambler*, 272 U.S. 365 (1926).

¹⁵⁵ See *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984); *Berman v. Parker*, 348 U.S. 26, 29 (1954); *Silverman v. Barry*, 845 F.2d 1072, 1087 (D.C. Cir. 1988); *Sea Wall Assoc. v. City of New York*, 510 N.Y.S. 2d 435, 447 (N.Y. Misc. 1986); *Weitzner v. Stichman*, 64 N.Y.S.2d 50, 56 (N.Y. App. Div. 1946). The States of California, District of Columbia, Maine, Maryland, and New Jersey have enacted legislation similar to New York City's law and provide similar relief to tenants. The legislation adopted in those states has never been challenged or declared unconstitutional on takings grounds.

¹⁵⁶ 125 S.Ct. 2655 (2005).

¹⁵⁷ *Id.* at 2667.

¹⁵⁸ *Id.*

¹⁵⁹ 467 U.S. 229, 240 (1984).

¹⁶⁰ 348 U.S. 26 (1954).

¹⁶¹ See *Hawaii Housing Authority*, 467 US at 233 (legislation reviewed by the Supreme Court was enacted in response to the realization that that 47 percent of the property in Hawaii was owned by only 72 families).

Earlier, in *Berman*, the Court upheld a taking for private redevelopment intended to remediate the harsh effects of urban blight. In that case, the Court emphatically embraced a posture of judicial deference toward legislative determinations of just what qualifies as a public use. Specifically, the Court stated: “Subject to specific constitutional limitations, when the legislature has spoken the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation.”¹⁶²

Similarly, there is ample precedent in New York that courts should defer to determinations of public use rendered by the coordinating branches of government. Indeed, case law in New York makes plain that courts should defer to the means created by the legislature for alleviating perceived housing shortages.¹⁶³ In a multitude of settings, New York courts have deemed “public use” to mean “any use which contributes to the health, safety, general welfare, convenience or prosperity of the community.”¹⁶⁴

The law at issue here is consistent with those interpretations of legitimate public use. It affords the right of first refusal to private enterprises whose purpose is to provide affordable housing. Satisfaction of this purpose depends upon the use of land that can be assembled only by the coordination of government oversight. Moreover, the law subjects participating entities to continuing public oversight, in the form of the supervising agency’s jurisdiction. Finally, the law serves the laudable public purpose of protecting and preserving affordable housing stocks.

Within the realm of Fifth Amendment jurisprudence, it becomes necessary to also consider whether the law satisfies the just compensation requirement.¹⁶⁵ New York courts have defined just compensation as “the price a willing buyer would pay a willing seller for the property.”¹⁶⁶ Still, courts have made plain that “just compensation cannot be reduced to inflexible formulas or inexorable rules.”¹⁶⁷

In fact, the United States Supreme Court has recognized that in this realm it is impossible to fashion one bright-line test with respect to what is, or is not, just compensation. The Supreme Court has stated that it “quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”¹⁶⁸ However, in most

¹⁶² See *Berman v. Parker*, 348 U.S. 26, 32 (1954).

¹⁶³ See *Weitzner*, 64 N.Y.S.2d at 53; see also *Berman*, 348 U.S. at 36 (1954) (holding that the definition of a public use is essentially the product of legislative determination subject to specific limitations identified by the legislature.); *Silverman*, 845 F.2d 1072 at 1087 (court in reviewing legislation granting affordable housing tenants a right of first refusal to purchase their units found the state has a legitimate interest in assuring the availability of adequate housing).

¹⁶⁴ In re *Byrne*, 101 A.2d 701, 702, 476 NYS2d 42 (4th Dept. 1984). For a recitation of New York case law to expansively construe the public use test, see David C. Wilkes & John D. Cavallaro, *This Land is Your Land? Eminent Domain's Public Use Limitation*, NYSBA Journal, vol. 77, no. 8 (Oct. 2005) p. 10.

¹⁶⁵ See U.S. CONST. amend. V; N.Y. CONST. art. 1 § 7(a). The Fifth Amendment applies to the states through the Fourteenth Amendment. U.S. CONST. amend. XIV.

¹⁶⁶ See *In the Matter of the Acquisition of Real Property by the County of Clinton*, 612 N.Y.S.2d 496, 497 (App. Div. 1994); see *Matter of Town of Islip*, 49 N.Y.S.2d 354, 360 (1980).

¹⁶⁷ See *Saratoga Water Svcs. v. Saratoga County Water Auth.*, 83 N.Y.2d 205, 211 (1994); see also *In the Matter of the City of New York*, 25 N.Y.2d 146, 148-150 (1969); *Jankiewicz v. State*, 388 N.Y.S.2d 742 (App. Div. 1976); *Vill. of Lawrence v. Greenwood*, 300 N.Y. 231 (1949).

¹⁶⁸ Note, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 HOFSTRA L. REV. 539, 588 (1995) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)).

regulatory takings cases, courts attempt to strike an equitable balance between the legitimate use of state police power for the health, safety, welfare and morals of its residents, and the private party's cognizable property interest.¹⁶⁹ Here, the factors articulated by the United States Supreme Court in the landmark *Penn Central Transportation Co. v. New York City*¹⁷⁰ ruling take on added resonance.

In *Penn Central*, New York City adopted legislation designating Grand Central Station a historic landmark, thereby prohibiting the owners from building atop the structure.¹⁷¹ The owners contended that the legislation, as applied, constituted an unconstitutional taking without just compensation.¹⁷² In evaluating the merits of this claim, the Court examined "the economic impact of the regulation," the extent to which the regulation interfered with plaintiff's investment-backed expectations, and "the character" of the regulation.¹⁷³

With respect to the first factor, the Court held that the entire bundle of property rights must be compared to the diminution in property value resulting from the regulation.¹⁷⁴ As to the second factor, the Court held that although a regulation may interfere with an owner's investment-backed expectations, it is not a taking warranting just compensation if the owner can earn a "reasonable" return on its investment.¹⁷⁵ The more a regulation interferes with investment-backed expectations, the greater the inference that a compensable taking has occurred.¹⁷⁶ With respect to the final factor, the Court held that the restrictions imposed must be substantially related to the promotion of the general welfare. Accordingly, the legitimacy of an act is to be evaluated based on "the government's justification for its action."¹⁷⁷

The law at issue here finds support in the *Penn Central* calculation. First, the law would not work a diminution in the value of the properties occupied by Mitchell-Lama and Limited Dividend Housing projects. On the contrary, the law requires the owners of such developments to be compensated at full-market value. Second, the law would not interfere with owners' investment-backed expectations because it affords those owners a "reasonable return" on their investment. Finally, the restrictions imposed by the law are substantially related to the promotion of the general welfare.

New York courts have applied the *Penn Central* formulation with considerable consistency. For example, in *Sea Wall*,¹⁷⁸ the court found that a City law that imposed a moratorium on the demolition of single-room occupancy dwellings, requiring owners to maintain such dwellings in habitable condition, rehabilitate any sub-standard units, and pay penalties for units left vacant, constituted an impermissible regulatory taking. This conclusion was bolstered by the court's assessment that the regulatory scheme imposed an affirmative duty upon property owners to spend significant amounts of money to comply with its provisions, thereby imposing "crushing financial and rehabilitative

¹⁶⁹ *Id.* (citing *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887)).

¹⁷⁰ *Id.* (citing *Penn Cent.*, 438 U.S. at 124 & *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981)).

¹⁷¹ *See Penn Central*, 438 U.S. at 109-15.

¹⁷² *Id.* at 124.

¹⁷³ *Id.* at 130-31.

¹⁷⁴ *Id.* at 130-31.

¹⁷⁵ *Id.* at 136-33.

¹⁷⁶ *Id.* at 124.

¹⁷⁷ *Id.*

¹⁷⁸ *See Seawall Assocs. v. New York*, 134 Misc. 2d 187, 435 (N.Y. Misc. 1986).

burdens on the property owner.”¹⁷⁹ The City law at issue here is readily distinguishable, since it imposes no obligation upon property owners to infuse additional capital into their developments.

2. CONTRACTS CLAUSE ISSUES

The United States Constitution provides that no state shall pass any law impairing the obligation of contracts.¹⁸⁰ To state a claim for a violation of the Contracts Clause, a plaintiff must allege facts sufficient to demonstrate that a state law has operated to substantially impair a contractual relationship.¹⁸¹ In this realm, three factors are to be considered: 1) whether there is a contractual relationship; 2) whether a change in law impairs that contractual relationship; and 3) whether the impairment is substantial.¹⁸²

Even if a state law does constitute a substantial impairment, it will survive a Contracts Clause challenge if it serves a significant and legitimate public purpose, the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions, and it is of a character appropriate to the public purpose justifying the legislation's adoption.¹⁸³ When considering the severity of a contractual impairment, courts must consider whether the industry at issue has been regulated in the past.¹⁸⁴

In *West 95 Housing Corp. v. New York City Dept. of Housing Preservation and Development*, property owners claimed that the City's imposition of the RSL on Mitchell-Lama properties occupied prior to January 1, 1974 had impaired their contractual rights in derogation of the Contract Clause.¹⁸⁵ On appeal, the court found that the state legislature did not intend the Mitchell-Lama law to confer constitutionally protected contractual obligations.¹⁸⁶ The court noted that such legislative intent exists only where the language of the statute itself makes that intent plain.¹⁸⁷ Since the Mitchell-Lama law contained no such language, the court held that there could be no violation of the Contracts Clause.¹⁸⁸

Moreover, even assuming somehow that a contractual relationship did exist, the impairment alleged was deemed insubstantial.¹⁸⁹ Because the rental of residential property in New York City has been “heavily regulated,” the court found that property owners could not claim surprise to the extent that their contractual relationships were affected by government action.¹⁹⁰ Finally, the court concluded that, even if a property owner's contractual expectations were substantially impaired, the law would

¹⁷⁹ *Id.*

¹⁸⁰ *See* *W. 95 Housing Corp. v. New York City Dept. of Hous. Pres. & Dev.*, 2001 WL 664628 at *8 (S.D.N.Y. 2001), *aff'd*, 31 Fed. Appx. 19 (2nd Cir. 2002) (citing U.S. CONST. art. I, § 10).

¹⁸¹ *Id.* (citing *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)).

¹⁸² *Id.*

¹⁸³ *Id.* (citing *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983)).

¹⁸⁴ *Id.* (citing *Energy Reserves*, 459 U.S. at 411).

¹⁸⁵ *Id.*

¹⁸⁶ *See* *W. 95*, 31 Fed. Appx. 19, 20.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *See* *West 95*, 2001 W. 664628 at *8.

¹⁹⁰ *Id.*

nevertheless survive because it was enacted for a legitimate state purpose – to prevent unjust, unreasonable and oppressive rents during a housing emergency.¹⁹¹ Insofar as the legislation provided a mechanism to ensure that property owners would receive rent based upon market conditions, it satisfied the requirement that any adjustment of the rights of property owners be based upon reasonable conditions.¹⁹²

Here, the law at issue will impair a Mitchell-Lama developer from selling its property to an entity of its choice, and from entering the market rate rental arena for properties occupied after January 1, 1974. In view of the Second Circuit's determination that the state legislature did not intend the Mitchell-Lama law to create constitutionally protected contractual obligations, the law should survive a Contracts Clause challenge. Even if an argument could be made that contractual relationships are somehow impaired by the law, the precedent established in *West 95* suggests that the impairment alleged would fail to qualify as "substantial impairment." Specifically, because the rental of residential property in the City traditionally has been the subject of significant regulation, property owners cannot claim persuasively the presence of some unfair surprise because of the immediate initiative. Moreover, as in *West 95*, here the legislative response serves a legitimate state purpose, rooted in the preservation of diminishing stocks of affordable housing in response to a housing crisis. Finally, because the law ensures that property owners will be compensated at market value, it satisfies the requirement that any adjustment of the rights of property owners be based upon reasonable conditions.

Conclusion

The law recently adopted by New York City will preserve a large stock of affordable housing within its jurisdiction. It is the essential premise of this Article that the law's provisions are neither preempted by federal or state law, nor unconstitutional under the Fifth Amendment or Contracts Clause of the United States and New York constitutions. The law should be afforded the presumption of validity, and given every opportunity to succeed. It represents a laudable response to the assault on affordable housing, and an appropriate exercise of home rule.

¹⁹¹ *Id.* at *9.

¹⁹² *Id.*

