- Working with the tenants, advocates can determine the viability of a strategy that emphasizes preservation. If contract termination or foreclosure is not imminent, this strategy may include taking action against the owner to enforce compliance with the lease and housing quality standards. Preservation should also include investigating the possibility of transferring the property to a new owner that has the capacity to undertake rehabilitation while retaining the assistance contract. If preservation proves undesirable or infeasible, advocates should work to ensure adequate tenant protections for all currently assisted households, such as replacement vouchers and other relocation benefits.

For further information on addressing troubled properties in your area, please contact Jim Grow at NHLP's Oakland office at jgrow@nhlp.org. ■

State Court Hands Down Disappointing Preemption Ruling

A New York state appellate court recently invalidated a New York City local preservation law that gives tenants the first right to purchase a building in which an owner is opting out of a project-based Section 8 contract.[1] The court based its decision on an improper analysis of federal preemption law. While this decision sets back the New York City preservation law, its reach need not extend further than New York state and should be limited for reasons further discussed below.

Background

Federal law governing properties with project-based Section 8 contracts permits most owners to withdraw from the program when their fixed-term contracts expire.[2] This framework allows the owner to convert the property into a market-rate operation. Recognizing that the unregulated ability to withdraw from the program could lead to a severe reduction in affordable housing, several localities have passed laws designed to induce preservation of the building's affordability. In 2005, New York City Council enacted one such law—Local Law 79.[3] This law enables a tenant association to exercise a right to purchase or a right of first refusal to purchase a building when an owner intends to sell or take other action that would result in the owner withdrawing from an assisted rental housing program.[4] If tenants assert and execute their right to purchase the property, it will remain affordable.

In March 2006, the owner of Mother Zion Apartments issued notice of its intent to opt out of the project-based Section 8 program, thus triggering Local Law 79. A month later, in April 2006, the Mother Zion Tenant Association invoked its right to purchase the property. Instead of convening a panel to appraise the value of the property as required by the local law, the New York City Department of Housing Preservation and Development (HPD) and the owners of Mother Zion challenged the tenants' right in

---

[1]Mother Zion Tenant Ass'n v. Donovan, 865 N.Y.S.2d 64 (2008) (hereinafter Mother Zion).

[2]*See* Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRAA), Pub. L. No. 105-65, Title V, 111 Stat. 1343, 1384 (Oct. 27, 1997), codified at 42 U.S.C.A. § 1437f (Historical and Statutory Notes, "Multifamily Housing Assistance") (West, Westlaw through P.L. 110-449 approved 11-21-08).

[3]Local Law 79, N.Y.C. Admin. Code 60.4, *et seq.* (1990); *see also* NHLP, *New York City Enacts Preservation Purchase Law*, 36 Hous. L. Bull. 45, 45 (Feb. 2006).

[4]*Id.*

state court. The state trial court ruled in favor of HPD and owners.[5] The court reasoned that because the NYC law requires property owners to either remain in the federal housing program or sell the property to the tenants, it conflicts with Congress' scheme for the program which allows owners to withdraw after a certain term. The court thus ruled that the local law was preempted by federal law. The tenants appealed the decision, but the intermediate state court affirmed the lower court ruling.[6] The tenants have filed a motion for leave to appeal with the State of New York Court of Appeals.

Preemption

Congress may preempt state or local law either expressly or impliedly. Local Law 79 is not expressly preempted by any federal law. Implied preemption occurs when a local law conflicts with federal law or when federal law occupies a field completely. Conflict preemption can either result from an actual conflict that makes complying with both laws impossible or when the local law impedes the achievement of a federal objective.[7]

Trial Court Ruling

The initial trial court decision in Mother Zion based its reasoning on an Eighth Circuit case, *Forest Park II*.[8] In *Forest Park II*, the Eighth Circuit held that a Minnesota preservation law dealing with notice requirements for the prepayment of mortgages on Section 236 housing was preempted expressly by the Low Income Housing Preservation and Resident Homeownership Act (LIHPRHA) and impliedly by conflict preemption. It reasoned that the local law stood as an obstacle to Congress's objective of involving private developers in a housing subsidy program to provide low-income housing because prepayment was created as an incentive to enter the program.[9] Thus, the state notice laws interfered with the framework by which Congress set up the subsidy program. This conclusion was reached without using a traditional preemption analysis because the Court asserted that the "unique federal laws and programs involved in [*Forest Park II*] make it difficult to apply a traditional preemption analysis."[10] No reasoning for such a bold assertion is given. LIHPRHA does not apply to project-based Section 8 and thus that portion of *Forest Park II* is irrelevant to *Mother Zion*. However, the trial court extended *Forest Park II*'s reasoning on implied preemption to the project-based Section 8 at issue in *Mother Zion*. It ruled that Local Law 79 conflicts with Congress' intent to allow an owner to withdraw from the project-based Section 8 program and interferes with the framework that Congress prescribed for such opt-outs.

Appellate Division Ruling

The Appellate Division, First Department of the New York Supreme Court affirmed the lower court ruling regarding conflict between the local and federal law. It stated that because Local Law 79 "actually conflicts with the federal regime of an entirely voluntary program with inducements to encourage owner to remain in Section 8" it is invalid.[11] The court supported this statement with the contention that Local Law 79 was enacted partly to nullify the federal provision allowing for an owner's withdrawal from the program and with the characterization that the local law turns a voluntary federal program into a mandatory one.[12] The opinion further states that "Local Law 79 would have the effect of discouraging owners from embarking on new Section 8 housing developments, which would also run afoul of congressional goals."[13] Thus, the court relied on *Forest Park II*'s analysis which ignored the presumption against preemption and instead focused on whether the local law conflicts with the methods by which Congress chose to implement its objective. Using this analysis, the Appellate Division upheld the lower court ruling.

The decision offers little explanation of its rejection of petitioners' arguments. It quickly dismissed *Rosario v. Diagonal Realty*, a case also decided by the New York Court of Appeals, by stating that the law at issue there was expressly contemplated by legislative and regulatory language.[14] It then distinguishes state cases relied upon by the tenants as dealing with antidiscrimination laws and thus not relevant to the instant case.[15] These antidiscrimination laws dealt with source of income issues that provided state and local protections to Section 8 voucher holders. With regard to *Kenneth Arms*,[16] a case that conflicts with *Forest Park II*, the court simply stated that it found the reasoning in the latter case to be more persuasive.[17]

---

[5]Mother Zion Tenant Ass'n v. Donovan, 2007 WL 2175521 (N.Y.Sup. Apr. 11, 2007).
[6]*Mother Zion*, 865 N.Y.S.2d 64 (2008).
[7]Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
[8]Forest Park II v. Hadley, 336 F.3d 724 (8th Cir. 2003); *see also* Jason Lee, *New York City's Preservation Law Preempted by Federal and State Law*, 37 Hous. L. Bull. 88 (Apr.-May 2007).
[9]*Forest Park II* at 733.
[10]*Id.* at 731.
[11]*Mother Zion* at 67.
[12]*Id.*
[13]*Id.*
[14]Rosario v. Diagonal Realty, 8 N.Y.3d 755 (2007).
[15]*Mother Zion* at 67, *citing* Commission on Human Rights & Opportunities v. Sullivan Assoc., 739 A.2d 238 (Conn. 1999); Attorney General v. Brown, 511 N.E.2d 1103 (Mass. 1987); Franklin Tower One, LLC v. N.M., 725 A.2d 1104 (NJ 1999).
[16]Kenneth Arms Tenant Assoc. V. Martinez, 2001 U.S. Dist. LEXIS 11470, No. Civ. S-01-832 LKK/JFM (E.D.Ca. order July 3, 2001) (enjoining preliminarily proposed prepayment of HUD Section 236 mortgages and termination of Section 8 project-based contracts based primarily on violation of state law that was not federally preempted).
[17]*Mother Zion,* at 68.

Critique

The court's ruling is flawed for a number of reasons. First, as explained in the tenants' brief, any analysis of federal preemption must begin with the strong presumption against preemption admonished by both federal and state courts.[18] As noted earlier, the court in *Forest Park II*, and in turn *Mother Zion*, ignored this presumption. To find a state or local law preempted, there must be a "clear demonstration of conflict."[19] This clear demonstration cannot rely on a conjecture regarding congressional intent. In *Mother Zion*, both the lower and intermediate courts acknowledged that the Local Law 79 may comport with Congress' objective of creating affordable housing, but claimed that it conflicted with an intent the court imposed upon Congress—that an owner must be allowed to withdraw from the project-based Section 8 program without any restrictions. Nothing in the federal statute points toward such an intent.

Bolstering the tenants' argument that Congress did not intend to preempt state and local preservation laws is the fact that both states and localities have always had a hand in regulating housing. When Congress created laws regulating affordable housing, it did so knowing that an extensive system of housing regulation existed and designed such laws to work in conjunction with state and local law. In fact, a number of courts have specifically found that even when local laws regulate entities also regulated by the federal government, those laws are not preempted.[20] Furthermore, when Congress has wanted to preempt local law, it has expressly stated as much.[21] Congress revised the statute numerous times over a twenty-year period and only twice sought to expressly preempt any local preservation law. The first, found in LIHPRHA, does not apply to project-based Section 8. The second, in MAHRAA, prohibits local laws that restrict the return on investment earned by Section 8 landlords, but does not at all address withdrawal from the program. The lack of express preemption on preservation laws relating to project-based Section 8 opt-outs is strong evidence that Congress did not intend to do so.

Moreover, the court's ruling dismissed the tenants' position that another New York Court of Appeals case, *Rosario v. Diagonal Realty, LLC* should be persuasive.[22] That case addressed a local law that imposed a rule that a Section 8 voucher lease must be renewed after the initial lease term absent good cause—after Congress had removed such a requirement from federal law.[23] In *Rosario*, the court held that Congress did not intend to "remove state and local law protections afforded to Section 8 participants" when it removed the "endless lease rule."[24] While the court in *Mother Zion* simply dismissed this case as distinguishable, it provided no explanation. In fact, the reasoning in *Rosario* supports the tenants' argument in *Mother Zion*. As explained in the Petitioners' Motion for Leave to Appeal, the laws governing the project-based Section 8 program are analogous to the statutes governing the voucher program that were at issue in *Rosario* in that they "merely refrain from imposing any federal obstacles to their withdrawal."[25] Owners do not have an affirmative and absolute right to withdraw from the project-based Section 8 program under the statute. Thus, under the State of New York Court of Appeals' prior analysis in *Rosario*, Local Law 79 should be upheld.

Implications

The effects of the *Mother Zion* decision should be limited for a few reasons. First, the tenants have moved to appeal the decision. Given prior state decisions, such as that in *Rosario*, the tenants may prevail in the New York Court of Appeals. Second, other state courts have already considered the law and reasoning of *Forest Park II* and, unlike the Appellate Division in New York, rejected it. Finally, Congress may well address the preemption issue in pending legislation in the upcoming legislative session. Therefore, while the *Mother Zion* decision is certainly negative, its effects may be limited and very possibly reversed by legislative action. ■

---

[18]Brief of Petitioner-Appellants at 14, Mother Zion Tenant Ass'n. v. Donovan, No. 402239/06 (N.Y.Sup., App. Div., Nov. 19, 2007), *citing* Medtronic v. Lohr, 518 U.S. 470, 485 (1996), Madeira v. Affordable Housing Foundation, Inc, 469 F.3d 219, 238 (2d Cir. 2006); Balbuena v. IDR Realty, LLC, 6 N.Y.3d 338, 356 (2006); Holtzman v. Oliensis, 91 N.Y.2d 488, 494 (1998); and General Motors Corp. v. Abrams, 897 F.2d 34 (2d Cir. 1990).

[19]*Id.*

[20]*See* College Gardens Preservation Comm. v. Eugene Burger Mgmt. Corp., No. 03AM03563, slip. Op. (Cal. Super. Ct. Nov. 19, 2003); Independence Park Apts. v. U.S., 449 F.3d 1235, 1243 (D.C. Cir. 2006); TOPA Equities, Ltd. v. City of L.A., 342 F.3d 1065 (9th Cir. 2003).

[21]*See* Low Income Housing Preservation and Resident Homeownership Act (hereinafter LIHPRHA), 12 U.S.C.A. § 4101 (West, Westlaw through P.L. 110-449 approved 11-21-08).

[22]*Mother Zion* at 67.

[23]Rosario v. Diagonal Realty, 8 N.Y.3d 755 (2007).

[24]*Id.* at 762.

[25]Motion for Leave to Appeal of Petitioner-Appellants, Mother Zion Tenant Ass'n. v. Donovan, No.402239/06 (N.Y. Nov. 2008).