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Table of Contents

Cover: 2006 Housing Justice Award winners Fred Fuchs (David B. Bryson Memorial Award), Laura Tuggle (Special Award in Honor of Legal Services Attorneys in the Gulf Coast), Kate Walz and Julie Becker (2006 Housing Justice Award winners). For the complete story, see page 233.

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A Brief Review of State and Local Preservation Purchase Laws*

The Role of State and Local Government

During the past two decades, both before and after the creation and operation of the federal preservation programs, many state and local governments have become increasingly aware of the integral role played by privately owned, federally supported developments in meeting their affordable housing challenges. Additional funding is obviously needed to preserve more housing, both to ensure proper rehabilitation and to purchase at-risk properties. Many state and local governments have recently begun to allocate more of their own resources or other funds within their control (usually, bond financing and tax credits) to meet these preservation needs.[1]

Because funding alone may prove insufficient to preserve high-priority developments, states and cities have also undertaken other regulatory preservation initiatives, such as improved notices.[2] Others have reevaluated the principle of owner choice underlying the current prepayment and opt-out policies, where owners alone determine whether to preserve properties as affordable housing. Some states and cities have enacted measures to transform this preservation issue into a public policy decision, by adopting additional rights of first refusal, rights of offer, or rights to purchase, when an owner seeks to convert property to market-rate use. These restrictions express conscious public policies about which properties should be preserved through transfers to preservation purchasers, often those endorsed by the tenants, and possibly supported with additional public funding. This article and the accompanying chart on pages 224-225 provide a brief summary of these state and local laws.

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*Ed. Note: This article is an update of *Rights of First Refusal in Preservation Properties: Worth a Second Look*, which first appeared in 32 HOUS. L. BULL. 1, 1 (2002), and includes relevant state and local legislation enacted since then in Illinois, New York City, California, and Rhode Island.

[1] *See* National Housing Trust, *Working Paper: State and Local Preservation Initiatives*, *available at* http://www.nhtinc.org/documents/State_Pres.pdf (updated June 2005).

[2] *See* NHLP, *Preserving Federally Assisted Housing at the State and Local Level: A Legislative Tool Kit*, 29 HOUS. L. BULL. 183, 183 (1999) (survey of state and local preservation initiatives). *See also, e.g.*, COLO. REV. STAT. § 24-32-718 (2006) (state database for notices of termination); CONN. GEN. STAT. §8-68c (2006) (one-year notice for prepayments and terminations to tenants and state and local governments); WASH. REV. CODE § 59.28.040 (2006) (one-year notice for prepayments and expirations to tenants, PHA and state and local governments); MINN. STAT. § 504B.255 (2006) (one-year notice to tenants for prepayments or Section 8 terminations); MINN. STAT. § 471.9997 (2006) (requiring tenant impact statement to local government at least twelve months prior to intended prepayment or termination).

Existing Purchase Opportunity Laws in General

State and local purchase opportunity laws differ in several important respects, including (1) what kinds of affordable properties are covered, (2) what event triggers their application, (3) the nature of the purchase opportunity provided, and (4) which entities can take advantage of the purchase opportunity. The balance of this article will cover these points, as well as procedural protections.

Types of Housing Covered

In creating purchase opportunities, these state and local preservation laws seek to address the threatened conversion of affordable housing that is supported by a variety of federal, state and local programs. The law might cover any federally assisted, restricted use property or only, for example, prepayments of subsidized mortgages subsidized by the Department of Housing and Urban Development (HUD) or termination of project-based Section 8 contracts. Newer state and local laws commonly address at least both prepayment of mortgages on HUD-subsidized properties, properties subsidized by Rural Development (RD), as well as properties with expiring project-based Section 8 contracts, or contract terminations or non-renewals initiated by owner action.[3] In addition to covering these HUD and RD properties, other states and cities also cover properties with expiring rent restrictions under the federally funded but state-administered Low-Income Housing Tax Credit (LIHTC) program.[4] Of these, California, Illinois, and New York City have reached still further to cover certain state and locally supported affordable housing, with California and New York City providing the most extensive coverage—reaching those with expiring or terminating restrictions under many other state or local affordable housing programs that have income eligibility and rent restrictions.[5]

Note that many of the programs covered by these laws no longer promise the possibility of an ongoing subsidy as part of the transaction, which makes preservation more difficult because more funding usually must be raised to provide equivalent affordability to current and future tenants. Section 8 and other rent subsidy programs are the notable exception.

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The "Triggering Event"

A related issue raised by these laws is what event "triggers" the statutory purchase opportunity. Triggering events are primarily of two types: (1) a planned sale or other disposition of the property, or (2) any action that would affect the current affordability structure, such as expiration or termination of use or affordability restrictions or any subsidies. In some jurisdictions, even though coverage is nominally broad to cover many types of housing or multiple conversion threats, the purchase opportunity is not triggered until the owner decides to sell the property. Maryland's right of first purchase is triggered only by a proposed transfer,[6] although other notice requirements are triggered by other termination actions. The District of Columbia provides a general right of first purchase for tenants, triggered by proposed sale or transfer of interest by the owner, regardless of whether the property is subsidized or not;[7] for proposed sales of federally subsidized properties, the right of first refusal extends to the city.[8] Illinois law, formerly triggered only by intended sale or disposition (thus leaving uncovered conversion where owners retain title), was amended in 2004 to reach all proposed conversions as well.[9] San Francisco uses a proposed sale or transfer as the trigger for purchase rights; a proposed prepayment triggers other procedures and protections, whereas a Section 8 contract expiration or opt-out at its original expiration date triggers no rights.[10] Laws using a sale trigger usually do a poor job of preserving housing, since owners retain the ability to convert the property to market-rate first and escape statutory coverage, either by converting and holding the property or delaying any sale until after conversion.

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[3] *See, e.g.*, Md. Ann. Code, Hous. & Comm. Dev. § 7-102 (West 2006); Me. rev. Stat., Title 30-A, §§ 4972 and 4973 (2006); R.I. Gen. Laws § 34-45-4(5) and 34-45-7 (as amended 2006); D.C. Stat. § 42-2851.03 and 42.2851.02(6) (2006); Denver Mun. Code § 27-46 (2006) (definitions of "federal" and "local" preservation projects); Portland City Code § 30.01.030 (2006) (definitions of "federal" and "local" preservation projects). San Francisco covers properties with Section 8 contracts, but only those where owners are seeking to terminate prior to the full original term. San Francisco Admin. Code § 60.4(a) and (y) (2006).

[4] *See, e.g.*, 310 Ill. Comp. Stat. § 60/4 (2006) (as amended by SB 2329, enacted July 2004); Cal. Govt. Code § 65863.11(a) (incorporating definition of "assisted housing development" in § 65863.10(a)(3) (as amended by SB 1328 (2004), effective July 1, 2005)) (2006); NYC Admin. Code § 26-801 (2006). *Compare* Tex. Govt. Code Ann. §§ 2306.185(f) & 2306.853 (2006) (notice requirements for prepayments and opt-outs, but not LIHTC properties with expiring use restrictions); Tex. Govt. Code Ann. §§ 2306.6702(a)(5) & 2306.803 (2006) (developments with expiring LIHTC restrictions considered "at risk" for purposes of allocating future credits and other resources).

[5] *Compare* Cal. Govt. Code § 65863.11(a)(1) (incorporating definition of "assisted housing development" in § 65863.10(a)(3)(F) through (M) (2006) and NYC Admin. Code § 26-801(c)(1) (2006), *with* 20 Ill. Comp. Stat. § 3805/8.1 (2001) (only covering prepayment of certain state-financed loans).

[6] Md. Ann. Code, Hous. & Comm. Dev. § 7-102(a)(4) and (b) (2006) (statute apparently covers only "protected actions" and any sale, conveyance or transfer that is part of a protected action, or follows within one year).

[7] D.C. Stat. §§ 42-3404.02 and 3404.08 (2006).

[8] *Id*. § 42-2851.04.

[9] *Compare* current 310 Ill. Comp. Stat. § 60/4 (2006) (as amended by SB 2329, enacted July 2004) with former 310 Ill. Comp. Stat. § 60/4 (2002).

[10] San Francisco Admin. Code § 60.9 (2006).

California has taken another approach. In addition to using conversions as the trigger, California's law was amended in 2004 to extend its "right to make a purchase offer" provisions to cover any owner proposal to sell or otherwise dispose of a covered development *within five years prior* to the expiration of rent restrictions. In the case of prepayments or project-based Section 8 terminations, coverage is extended to any proposed sale within five years of the project's eligibility for prepayment or termination.[11]

To maximize preservation of affordable housing and subsidies, the trigger for the purchase opportunity should be broadly defined to include any conversion event (*e.g.*, termination of federal assistance or restrictions), not merely sale or transfer. This is the approach taken by Maine, California, Illinois, New York City and Rhode Island.[12] In Maine, for example, the triggering event is the sale, transfer or *other action that would result in termination of the financial assistance*;[13] in California, the statutory rights are triggered by the owner's decision to take any action that would terminate the federal assistance or by the lapse of federal, state or local restrictions, as well as by any proposed sale or transfer within five years prior to termination of assistance or termination or lapse of restrictions.[14] Illinois, New York City, and Rhode Island all cover situations where owners seek to terminate assistance or restrictions;[15] like California, Illinois also clearly covers those situations where the restrictions are expiring without owner action.[16] In Maryland, while notice rights and other procedural protections are broadly triggered by either a proposed transfer or threatened prepayment or termination,[17] the right of first purchase is triggered only by a proposed transfer.[18] Texas has a similarly broad trigger for its requirements, but creates no direct purchase right.[19] Denver and Portland's notice and city purchase offer requirements are both triggered by an owner's decision to opt-out of a project-based Section 8 contract, as well as owner actions to terminate other state and local affordability arrangements.[20]

Nature of the Rights Created

The kind of purchase opportunity created by state or local preservation law directly determines the community's ability to affect the future use of the property. These rights vary substantially, and jurisdictions use different terminology in granting them to tenants, nonprofits, municipalities, or others. The purchase opportunity created by current state or local laws typically takes one of several different forms:

- a "right of first refusal," permitting a designated purchaser to acquire title by matching another existing offer,
- a "right to make an offer," with no obligation on the owner's part to sell, and
- a "right to purchase," requiring the owner to sell to a designated preservation purchaser at market value in lieu of converting the property to market-rate.

Common among older laws is the classic right of first refusal, requiring owners to provide a bona fide offer of sale to specified preservation purchasers that have a first right to purchase, whenever the existing owner proposes a sale to another party. Maryland law provides a "right of first purchase," but only upon a sale or conveyance that is a "protected action," permitting eligible entities the right to buy the property and match any subsequent offers.[21] Upon a proposed sale in conjunction with a proposed intended prepayment or any contract termination, San Francisco law creates a similar purchase right for specified entities.[22] Other laws may use "right of first refusal" labels, but in fact establish a purchase right because they are triggered by proposed conversions, not just sales.[23]

Some jurisdictions go beyond providing a right of first refusal to match another purchase offer to also require any owners seeking to convert to provide notice and make certain project information available to enable prospective preservation purchasers to make an offer to purchase. For example, California requires any owner proposing to convert a covered property to market rate (as well as those

[11]Cal. Govt. Code § 65863.11(c) (2006).
[12]Me. Rev. Stat. Ann., Title 30-A, § 4973 (1999); Cal. Govt. Code § 65863.11(b) (2006); 310 Ill. Comp. Stat. § 60/4 (2006); NYC Admin. Code § 26-802 (impending conversion) and 26-803 (proposed sale) (2006); R.I. Gen. Laws § 34-45-7 (as amended 2006).
[13]Me. Rev. Stat. Ann., Title 30-A, § 4973(1) (2006).
[14]Cal. Govt. Code § 65863.11(b) and (c) (2006).
[15]310 Ill. Comp. Stat. § 60/4 (2006); NYC Admin. Code §§ 26-801(f) (definition of conversion), 26-802 (impending conversion) and 26-803 (proposed sale) (2006); R.I. Gen. Laws § 34-45-7 (as amended 2006).
[16]310 Ill. Comp. Stat. §§ 60/3(i) and 60/4 (2006).
[17]Md. Ann. Code, Hous. & Comm. Dev. §§ 7-201 and 7-202 (2006).
[18]Md. Ann. Code, Hous. & Comm. Dev. § 7-203(b) (2006).
[19]Tex. Govt. Code Ann. §§ 2306.185(f), 2306.852, 2306.853 (2006).
[20]Denver Mun. Code §§ 27-47 (federal properties), 27-49 (state and locally supported properties) (2006); Portland City Code §§ 30.01.050 (federal properties), 30.01.080 (state and locally supported properties) (2006).
[21]Md. Ann. Code, Hous. & Comm. Dev. §§ 7-102, 7-203 (b) and 7-204 (2006) (this includes those sales or conveyances that are made in conjunction with a protected action (prepayment or contract termination), or within one year thereafter).
[22]San Francisco Admin. Code § 60.8 (2006) (all full-term contract expirations are covered by the reference to § 60.9).
[23]For example, although nominally providing eligible entities with a "right of first refusal" to buy the property or match third-party offers, Rhode Island's recently amended provision effectively establishes a purchase right because it is triggered not just by a proposed sale or other disposition, but also by an owner's intended federal mortgage prepayment or Section 8 contract termination. R.I. Gen. Laws § 34-45-8 (2006). Although prepayments that would terminate affordability restrictions were covered by the prior law, and owners were required to offer to sell at that time, the 2006 amendments added contract terminations and established the appraised market value price in new subsections (b) and (c).

selling within five years of expiration or eligibility for termination) to notify specified entities of an opportunity to submit an offer to purchase; for those filing a conversion notice, during the following 180 days, the owner may not accept an offer to purchase from any other entity.[24] Where a qualified purchaser makes an unaccepted offer during this 180-day period, the owner must provide the qualified entity with a right of first refusal to match the terms of any other sale offer accepted during a second 180-day period.[25] However, California's right for specified prospective purchasers to submit a non-binding purchase offer imposes no general duty on an owner to sell.[26]

Other laws seek to prescribe lesser involvement where sales are not proposed. Texas law simply gives the state time to "attempt to locate a buyer who will conform to the development restrictions" provided by the law.[27] Denver and Portland just prevent owners from taking any action during the required notice period that would "preclude the city or its designee from succeeding to the contract or negotiating with the owner for purchase,"[28] explicitly referencing the city's eminent domain power.

The most effective means of controlling the future use of the property is through establishment of true purchase rights for any threatened conversions, which exist only in Maine, Illinois, New York City and Rhode Island.[29] Maine's broad "other action" trigger granting the State Housing Authority a "right of first refusal" to purchase the property at its current appraised value[30] effectively operates as a preemptive option, not a right of first refusal. Illinois' 2004 statutory amendments create purchase rights for tenants and their chosen partners when an owner proposes to sell or terminate the existing federal subsidy programs or restrictions.[31] New York City requires owners to notify tenants of any proposed action that would result in conversion of the assisted rental housing, which must advise tenants of their purchase rights, as established by other sections of the law.[32] Owners must also notify tenants of any proposed purchase offers to which the owner intends to respond, so that tenants can exercise their rights of first refusal to purchase.[33] Recent amendments to the Rhode Island law similarly establish purchase rights for tenants and other specified entities when an owner seeks to convert the development by prepaying the mortgage or terminating the Section 8 contract, as well as for a proposed sale that would terminate the subsidies or restrictions.[34]

Who Has the Opportunity to Purchase?

State or local laws provide purchase opportunity rights to tenant organizations, nonprofits and public agencies, or other prospective purchasers (including for-profit entities) that commit to specified preservation terms. Illinois law, for example, provides the right to purchase to tenants associations or their designees,[35] presumably recognizing that any tenants association may lack the capacity to execute a purchase or raise the necessary funds, or may lack either the will or the capacity to operate the property as owner. Thus, many laws grant the purchase opportunity rights to a broader variety of preservation entities. California offers its "right to make a purchase offer" to many different prospective purchasers, including the resident tenants association, local nonprofits and public agencies, regional or national nonprofits and public agencies, and profit-motivated purchasers, so long as the entity is capable and committed to maintaining the low-income use for at least thirty years, including renewal of available rent subsidies.[36] Maryland provides its "right of first purchase" to the local housing authority, the local jurisdiction, and to any state-registered group representing the tenants, any registered nonprofit low-income developer, or other registered persons with low-income housing experience that are unrelated to the owner,[37] so long as they commit to specified extended use terms equal to the original use restrictions, but no less than twenty years.[38] Maine provides its purchase right only to a public agency, the Maine State Housing Authority.[39] Rhode Island provides the purchase right to the tenants association, the

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[24]Cal. Govt. Code § 65863.11 (c), (g)(1) and (i) (2006).
[25]Cal. Govt. Code § 65863.11(*l*) (2006).
[26]The California statute does create limited exceptions to the owner's ability to reject offers in two circumstances where the right to make an offer is triggered by another sale offer: (1) upon a proposed sale within five years prior to eligibility for termination or expiration of restrictions, or (2) upon a proposed sale taking place within the second six-month period after proposed conversion notice was given, when the owner rejected an offer from a qualified entity within the first six months. Cal. Govt. Code § 65863.11(c) and (*l*) (2006). At least in the latter case, under the express language of subsection (*l*), the right to make an offer effectively becomes a right of first refusal to purchase that the owner must accept. In the former case, it remains unclear whether the owner's duty can be satisfied simply by permitting qualified entities to make an offer (presumably an offer matching the terms of the proposed sale), or whether the owner must accept one if made.
[27]Tex. Govt. Code Ann. § 2306.185(f) (2006).
[28]*E.g.*, Denver Mun. Code § 27-47(e) (federal properties) (2006); Portland City Code § 30.01.050(E) (2000).
[29]Aside from these state and local laws, for developments subsidized by the Rural Development agency of the United States Department of Agriculture under the Section 515 Rural Rental Housing program, federal law requires that owners who decline incentives and seek RD approval of a proposed prepayment must, if prepayment cannot be approved because of certain adverse impacts specified by federal law, first offer to sell the property at market value to a preservation purchaser. 42 U.S.C. § 1472(c). If no offer is forthcoming within 180 days, the owner may prepay and convert.
[30]Me. Rev. Stat. Ann., Title 30-A, § 4973(2) (2006).
[31]310 Ill. Comp. Stat. § 60/5 (2006) (as amended by SB 2329, enacted July 2004).
[32]NYC Admin. Code §§ 26-802 (2006) (notice of impending conversion, which must recite rights under § 26-806 (right of first opportunity to purchase) and 26-805 (right of first refusal)).
[33]NYC Admin. Code § 26-803 (2006) (notice of bona fide offer).
[34]R.I. Gen. Laws §§ 34-45-7 and 34-45-8 (2006).
[35]310 Ill. Comp. Stat. § 60/5 (as amended by SB 2329, July 2004).
[36]Cal. Govt. Code § 65863.11 (d) and (e) (2006).
[37]Md. Ann. Code, Hous. & Comm. Dev., § 7-204(a) (2006).
[38]*Id*. § 7-208.
[39]Me. Rev. Stat. Ann., tit. 30-A, § 4973(2) (2006).

state housing agency, the local housing authority, and the local municipality, in that order of priority.[40] The District of Columbia provides its right of first refusal to both the city and the tenants upon a proposed sale of federally subsidized property.[41] New York City grants the rights of first purchase and first refusal to tenants associations, and other "qualified entities" experienced in the management of affordable housing if designated by at least 60% of the residents.[42]

Procedural Protections

Purchase opportunities for housing threatened by sale or conversion are advanced by specific procedural requirements and enforcement mechanisms for prospective purchasers. Due to fluctuating requirements or other deficiencies in federal notice laws, many state and local laws require the owner to give the tenants and others ample notice of the potential loss of assistance or restrictions, as well as additional information about the impact of the proposed conversion and available rights. In particular, purchase opportunity laws also often require owners to provide additional information useful for exercising specified rights, such as information about the development and the tenants, together with prescribed remedies for violations.

Notice

Additional notice provisions are a staple of purchase opportunity legislation. Typically, state and local laws supplement the notice requirements of federal law, providing significant variations on issues such as length, recipients, and content. As explained *infra*, many of the states and localities creating purchase opportunities also require separate notices or other documents detailing the terms of any sale offer or purchase right for designated parties, rather than combining these requirements with the threatened conversion notice.[43]

Rhode Island requires two years' notice of any intent to sell, lease, otherwise dispose of, or prepay the mortgage on any subsidized property, to each tenant, the tenants association, the state housing agency, the local housing authority, and the city; the notice must also be filed in the local land records.[44] A similar two-year notice is required for terminations of Section 8 assistance, but the owner must provide it only to the state agency, which must then promptly post it in the development and provide it to the tenants association.[45] The offer of sale with detailed terms must be provided at least one year before termination of the Section 8 contract.[46] San Francisco requires eighteen months' notice of prepayments or mid-term Section 8 opt-outs, and twelve months' notice of Section 8 contract expirations.[47]

Purchase opportunities for housing threatened by sale or conversion are advanced by specific procedural requirements and enforcement mechanisms for prospective purchasers.

California requires two notices—a one-year notice with specific content to tenants, the state housing department, the public housing authority (PHA) and local government of any proposed termination of subsidies or restrictions, and another notice of at least six months, to both tenants and public entities, that includes proposed new rents and other important information about the threatened conversion.[48] The owner must also provide a separate notice of the right to make a purchase offer to qualified entities that have directly contacted the owner or are on a list maintained by the state.[49]

Texas also requires a one-year notice to the state housing department prior to sale or threatened conversion.[50] Illinois also requires owners to provide at least twelve months' notice to the tenants, local government, PHA and the state housing agency, prior to any sale or other proposed conversion of the property's affordable use,[51] and New York City imposes a similar requirement, which also serves to provide some of the information needed for a prospective purchaser to commence due diligence.[52]

Although requiring owners to provide a one-year notice of pending Section 8 contract expirations to the

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[40]R.I. Gen. Laws §§ 34-45-7(3) and 34-45-8(e) (as amended, 2006).
[41]D.C. Stat. §§ 42-3404.02 and 3404.08 (2006) (tenants), 42-2851.04 (city).
[42]NYC Admin. Code §§ 26-801(n) and 26-809 (2006).
[43]*Compare, e.g.*, the statutes for California, Rhode Island, Maryland, and Illinois, which create separate requirements, *with* NYC Admin. Code § 26-802 (2006) (generally one notice concerning impending conversion providing specific information about the development, unless owner receives a bona fide offer to purchase, which triggers a separate notice). Note that in many jurisdictions, administrative regulations may augment the required content of these notices.
[44]R.I. Gen. Laws § 34-45-6 (2006) (apparently the drafters inadvertently omitted an "or" in the statute with respect to prepayments).
[45]*Id.*, § 34-45-5 (2006).
[46]*Id.*, § 34-45-8(b) (2006). The offer must be provided at an unspecified time prior to a prepayment or sale. *Id.*, § 34-45-8(a) (2006). The detailed terms are specified in § 34-45-8(c).
[47]San Francisco Admin. Code § 60.5 (prepayments), § 60.9 (expirations) (2006).
[48]Cal. Govt. Code §§ 65863.10 (b), (c), and (d) (2006). The law requires more specific content for the second notice required for public entities, and additional notice of subsequent significant changes in the information.
[49]Cal. Govt. Code §§ 65863.11(g) and (h) (2006).
[50]Tex. Govt. Code Ann. § 2306.185(f) (2006).
[51]310 Ill. Comp. Stat. § 60/4(a) (2006, as amended by SB 2329, July 2004). Illinois law also requires owners of certain state-financed properties to provide nine months' notice of intended prepayments, and to offer such properties for sale to the tenants or their designee. 20 Ill. Comp. Stat. § 3805/8.1 (2006).
[52]NYC Admin. Code § 26-802 (2006).

city and the tenants,[53] both Portland and Denver require owners intending to opt-out of long-term contracts to give 210 days' notice, and 150 days for opting out of one-year contract extensions.[54] Maine requires the shortest notice—owners must provide ninety days' notice to the tenants, the State Housing Authority and the local PHA, prior to any contract of sale, transfer or other termination action.[55] More time obviously provides potential purchasers a greater chance to develop a viable preservation purchase offer for the property, since it takes substantial time to perform necessary due diligence and secure funding for a purchase.

Although creating no specific purchase opportunity, many states and localities require notice to tenants and state and local government prior to conversion (and sometimes prior to sales).

Although creating no specific purchase opportunity, many states and localities require notice to tenants and state and local government prior to conversion (and sometimes prior to sales). In 2006, Connecticut adopted a one-year notice requirement for tenants, the state and the local government prior to the expiration or termination of any rental subsidy, mortgage prepayment, or sale, transfer or lease of the property; the state agency must post the notice on its website within ten days.[56] The state of Washington requires owners to serve a written notice to each household, local government, PHA, and the state, at least twelve months prior to any anticipated expiration of rental assistance or prepayment.[57] Colorado has taken the most deferential approach—only directing the state to "encourage" owners to submit a notice to the state 120 days before converting, and requiring the state to maintain a database of properties filing notice and authorizing it to coordinate preservation purchases.[58]

Access to Information

Many of these laws also require owners to provide tenants and others with information needed for evaluation of the possible purchase. Illinois[59] and California[60] require that the owner provide access upon request to the rent rolls, vacancy rates, operating expenses, capital improvements, project reserves and financial and physical inspection reports. California requires the owner's initial notice of purchase opportunity to state that such information is available. Illinois requires owners to comply with tenants association requests for such information after receiving the tenants' notice of intent to purchase. New York City requires much of the same information to be included in the original notice of the proposed conversion.[61] Rhode Island requires that the owner's offer of sale inform recipients that similar information is available.[62] The District of Columbia requires each offer of sale to state that the owner will promptly provide such information to the tenant, while also including a summary of the tenants' rights and sources of technical assistance, as published by the city.[63] San Francisco requires that such information be made available to any interested parties at least fourteen days prior to the required public hearing, which is no later than forty-five days after the owner gives notice of his intent to prepay or terminate prematurely.[64] Providing as much information as possible to potential preservation purchasers as early in the process as possible fosters quicker and better planning for purchase and financing.

Purchase Price

Once some form of purchase opportunity is triggered, the law may specify a method for determining the purchase price. For rights of first refusal or rights to make an offer, no price need be specified, since a right of first refusal by definition matches another existing bona fide offer, and a right of offer is just that—requiring no set price other than what the buyer can pay and believes the owner might accept. For example, in California, the right to make an offer sets no limit on the owner's asking price, as the owner is not obligated to accept any offer submitted unless it matches one already accepted from a nonqualified purchaser.[65] However, in jurisdictions establishing a purchase right, the issue of establishing price takes center stage.

Under the newly revised Rhode Island law, the price in the offer of sale can be no higher than the fair market value, as determined by the average of two independent qualified appraisals, with one appraiser drawn from the state agency's list.[66] In Illinois, after the tenants association makes known its intent to purchase, if the parties cannot agree on a price within sixty days of the notice of

[53]Denver Mun. Code § 27-47 (2006); Portland City Code § 30.01.050 (2006).
[54]Denver Mun. Code § 27-47 (2006); Portland City Code § 30.01.050(B) (2006).
[55]Me. Rev. Stat. Ann., Title 30-A, § 4973(1) (2006).
[56]Conn. Gen. Stat. § 8-68c (b) (2006).
[57]Wash. Rev. Code § 59.28.040 (2006).
[58]Colo. Rev. Stat. § 24-32-718 (2006).
[59]310 Ill. Comp. Stat. § 60/6(b) (2006).
[60]Cal. Govt. Code § 65863.11(h) (2006).
[61]NYC Admin. Code § 26-802 (2006).
[62]R.I. Gen. Laws § 34-45-8(c) (2006).
[63]D.C. Stat. § 42-3404.03 (2006).
[64]San Francisco Admin. Code §§ 60.6 (prepayments or premature terminations) and 60.9 (Section 8 contract expirations) (2006).
[65]The statute permits, but does not require, either the owner or the qualified offeror to request that the fair market value of the property be determined by an independent appraiser, but the appraisal is nonbinding on both parties. Cal. Govt. Code § 65863.11(k) (2006).
[66]R.I. Gen. Laws § 34-45-8(c)(1) (2006).

intent to purchase, the market valuation is determined by two independent appraisers, one paid by the owner, the other paid by the tenants association.[67] If the appraisers do not agree, the parties can take the average or jointly hire a third, binding appraisal.[68] San Francisco provides a complex formula to reach a "fair return price" that may not exceed the appraised value based on highest and best use.[69] In New York City, after the tenants or their designee have given notice of their intent to purchase, the city will convene a panel consisting of an appraiser selected by the owner, another by the tenants, and a third by mutual agreement, or by the city if there is no mutual agreement, which then determines the property's appraised value.[70] Maryland's "right of first purchase" statute requires the property to be offered at appraised fair market value—with dispute resolution steps similar to Illinois—unless someone else has made a higher bona fide offer, which the qualified entity can match.[71]

Other Issues

Other important provisions in state and local purchase opportunity laws include public hearings on the proposed conversion,[72] remedies for owner violations,[73] exceptions from coverage (for other preservation transactions),[74] definition of what constitutes a "transfer or sale," time periods in which to make offers, the assignability of rights, any relationship to the eminent domain power, preemption of federal law, and the waivability of rights conferred. Jurisdictions have addressed these issues in many different ways, each having a slightly different impact on the legislation's goals.

Legal Issues Raised by State and Local Purchase Opportunity Laws

State and local purchase opportunity laws raise several possible legal issues, including primarily federal and state preemption, and regulatory takings. Although issues of state preemption center upon the distribution of legislative power between state and local governments that lie beyond our scope, a few courts have addressed the related issue of whether state and local governments have authority to legislate in this area under the federal Supremacy Clause by enacting either a notice or purchase opportunity laws. Several have found that state and local legislation in this area is neither expressly or impliedly preempted.[75] Only one court has found to the contrary.[76]

Although purchase opportunity laws creating either a right of first refusal or a right of first purchase potentially raise issues of regulatory takings under the United States Constitution's takings clause, they should pass constitutional standards because they assure just compensation to owners in the form of matching another sales price or providing appraised fair market value.[77] Additionally, the "public use" requirement for takings appears satisfied.[78]

Because of the stakes, there is little doubt that these legal issues will continue to be litigated as tenants seek to enforce any rights that have been created to preserve their homes.[79] ■

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[67]310 Ill. Comp. Stat. § 60/7(b) (2006).

[68]*Id*.

[69]San Francisco Admin. Code § 60.8(h) and (i) (2006).

[70]NYC Admin. Code § 26-804 (2006).

[71]Md. Ann. Code, Hous. & Comm. Dev. § 7-205 (2006).

[72]San Francisco Admin. Code §§ 60.6 (prepayments or premature terminations) and 60.9 (Section 8 contract expirations) (2006).

[73]California law permits injunctive relief. Cal Govt. Code §§ 65863.10(j) and 65863.11(p) (2006). San Francisco prescribes detailed civil remedies for noncompliance, including treble damages, attorney's fees for a civil suit, and $5000 civil penalties. San Francisco Admin. Code §§ 60.11 and 60.125(b) (2006).

[74]*See, e.g.*, Cal Govt. Code § 65863.13 (2006); Md. Ann. Code, Hous. & Comm. Dev. § 7-102(d) (2006); R.I. Gen. Laws § 34-45-9(b) (2006); NYC Admin. Code § 26-812 (2006); 310 Ill. Comp. Stat. § 60/8 (2006).

[75]Kenneth Arms Tenant Assoc. v. Martinez, 2001 U.S. Dist. LEXIS 11470, No. Civ. S-01-832 LKK/JFM (E.D. Cal. Order July 3, 2001) (citing HUD legal opinion in rejecting preemption challenge to California notice law as applied to non-LIHPRHA prepayments); College Gardens Preservation Comm. v. Eugene Burger Mgmt. Corp., No. 03 AS02608 (Cal. Super. Ct., motion to dissolve injunction denied Nov. 19, 2003) (rejecting preemption challenge to California notice law, even after *Forest Park*). *See also* Topa Equities Ltd. v. City of Los Angeles, 342 F.3d 1065 (9th Cir. 2003) (local rent control law neither expressly or impliedly preempted by federal law, as applied to properties where owner prepaid HUD-subsidized mortgage in 1998); Parkridge Investors Ltd. Partnership v. Farmers Home Admin., 13 F.3d 1192, 1199 (8th Cir. 1994) (federal rural housing preservation statute requiring owners to first offer to sell property at market value to preservation purchaser not a taking); Greenfield Country Estates Tenants' Ass'n v. Deep, 666 N.E.2d 988 (Mass. 1996) (statutory right of first refusal for manufactured housing tenants not a regulatory taking).

[76]Forest Park II v. Hadley, 336 F.3d 724 (8th Cir. 2003) (finding Minnesota notice law expressly and impliedly preempted by federal law).

[77]Because the Supreme Court has made clear that "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 105 S. Ct. 3108, 3120 (1985), if just compensation is provided, no unconstitutional taking occurs. Even in an inverse condemnation proceeding where a regulatory taking is found, the remedy is providing just compensation. Palazzolo v. Rhode Island, 121 S. Ct. 2448, 2461-62 (2001).

[78]Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2329-31 (1984) (reviewing large-scale state condemnation of fee interests underlying leaseholds for resale by state to lessees); Kelo v. City of New London, 125 S.Ct. 2655 (2005) (upholding redevelopment project as valid "public use").

[79]*E.g.*, Mother Zion Tenant Ass'n v. Donovan, No. 402239/06 (N.Y. Supreme Court, pending Nov. 2006) (seeking enforcement of NYC Tenant Empowerment Act, Local Law 79, in face of city and owner claims of federal and state preemption and unconstitutionality).

Rights of First Refusal, to Make Offer, or to Purchase Preservation Properties — State and Local Laws

National Housing Law Project (rev. November 2006)

STATE OR CITY	TYPES OF HOUSING COVERED	TRIGGERING EVENT FOR EXERCISING RIGHT	NATURE OF RIGHTS TRIGGERED	WHOSE RIGHT	PROCEDURAL PROTECTIONS
ILLINOIS: 20 Ill. Comp. Stat. § 60/3 (as amended 2004)	all HUD-subsidized housing, RD § 515 & 514, LIHTC, certain state subsidized	prepayment or termination of subsidy or restriction	right to purchase	tenant association & partners	• 12-month notice to tenants & public agencies • tenant access to info • price appraisal mechanism
MARYLAND: Md. Ann. Code, Hous. & CD §§ 7-101 *et seq.*	all HUD-subsidized housing, RD § 515, § 514, § 8 expiring contracts	intended sale or disposition of property (any action that may terminate subsidy also triggers notice)	right of first refusal	local housing authority, group representing tenants, nonprofits	• not less than 1-year or more than 2-year notice to locality, tenant association, state • notice is triggered by any action that may terminate subsidy • price appraisal mechanism
CALIFORNIA: Cal. Govt. Code § 65863.10, § 65863.11, § 65863.13 (as amended in 2004 and 2005)	all HUD-subsidized housing, RD § 515, § 514, § 8 expiring contracts, LIHTC, other state and local subsidized	any action that would terminate subsidy	offer to purchase (right of first refusal if sale within 5 years prior to subsidy expiration or eligibility for conversion or if offer made and another accepted)	tenant association, nonprofit, some for-profits, public agencies	• 1-year notice to tenants, state, local housing authority, local government prior to termination or prepayment • 6-month notice to tenants, public entities with new rents, etc. • tenant and prospective purchaser get access to information • civil injunction remedy for violation
MAINE: Maine Rev. Stats. Ann. Title 30-A, § 4972 and § 4973	all HUD-subsidized housing, RD § 515, § 514, § 8 expiring contracts	sale or any action that would terminate subsidy	apparent purchase right by state HA ("right of first refusal to purchase")	state housing authority	• 90-day prior notice to tenants & state and local housing authorities; state HA written response creates additional 90 days • civil penalty of up to $2500
TEXAS: Texas Govt. Code Annotated §§ 2306.185(f) *et seq.*, 2306.801 *et seq.*	all HUD-subsidized housing, RD § 515, § 514, § 8 expiring contracts	sale or any action that would terminate subsidy	time for state to locate potential buyer	state housing agency	1-year notice to state, at least 90 days to tenants
RHODE ISLAND: Rhode Island Gen. Laws §§ 34-45-4 *et seq.* (esp. -7 & -8), as amended by ch. 67 (2006)	all HUD-subsidized housing, RD § 514, § 515	sale, disposition, or prepayment that would change assisted use or terminate any restrictions; condo conversion; termination of contract	owner offer of sale, right to purchase	tenant association, state housing agency, local PHA, or city	• 2-year notice prior to sale, disposition, termininationor prepayment to tenants association, state housing agency, local PHA, & city • offer of sale 1-year prior to Sec. 8 contract termination, and at unspecified time prior to prepayment or sale • prospective purchaser access to information in offer of sale and upon request • offer of sale sets price based on 2 appraisals • right of first refusal to match third party offers

STATE OR CITY	TYPES OF HOUSING COVERED	TRIGGERING EVENT FOR EXERCISING RIGHT	NATURE OF RIGHTS TRIGGERED	WHOSE RIGHT	PROCEDURAL PROTECTIONS
DENVER, CO: Denver Mun. Code §§ 27-46 *et seq.*	all HUD-subsidized housing, RD § 515, § 514, § 8 expiring contracts	opt-out or sale	time for city to negotiate for purchase	city	• 1-year notice to city, tenants for § 8 contract expirations • 210 days for long-term contract expirations • 150 days for 1-year extensions
SAN FRANCISCO, CA: San Francisco Admin. Code §§ 60.1 *et seq.*	all HUD-subsidized housing, § 8 contracts, if owner seeks to terminate prior to full term	intended sale or disposition of property	right of first refusal	city, tenants association, nonprofit	• 18-month notice to city and tenants for prepayment or termination • 12-month for § 8 contract expirations • tenant access to info • fair price analysis • public hearings • civil remedies for violations
PORTLAND, OR: Portland City Code §§ 30.01.030 *et seq.*	all HUD-subsidized housing, RD § 515, § 514, § 8 expiring contracts	opt-out or sale	time for city to negotiate for purchase	city	• 1-year notice to city, tenants for § 8 contract expirations • 210 days for long-term contract expirations • 150 days for 1-year extensions
NEW YORK CITY, NY: Local Law 79 (2005), NYC Admin Code §§ 26-801 to 26-810	all HUD-subsidized housing, § 8 expiring contracts, LIHTC, other state and local subsidized, where majority of units have eligibility & rent restrictions	threatened conversion action (prepayment or contract termination), or third-party sale	right to purchase	tenants association representing 60%, assignable to qualified designees	• 1-year prior notice to tenants association or tenants, and to city • prospective purchaser access to information in notice • tenants must give notice of intent to exercise purchase right within 60 days • price based on 3-appraiser panel • then 120 days to submit purchase offer • civil money penalties and attorney fees
DISTRICT OF COLUMBIA: D.C. Stat. §§ 42-2851.01-.05	all HUD-subsidized housing, § 8 expiring contracts	intended sale of assisted property **if** conversion threatened, but not just conversion threat	city right to purchase, assignable	city, via Mayor	• city must give statement of interest within 30 days of owner's notice offering sale • *note: tenants have right of first refusal upon sale or discontinued rental use under DC Stat. § 42-3404*

Notes: (1) *This chart covers only those provisions of state or local laws which create specific rights concerning possible transfers to preserve a property's subsidized status.* Other provisions may create additional procedural protections (such as advance notice) where subsidies or other restrictions are proposed for termination. (2) Statutory provisions may change, ***please check for updates***.