



**NOTE:** This is a draft issue brief prepared for the National Policy Forum on November 7 and 8, 2007 in Washington, D.C. Participant input is appreciated, please contact Laura Arce with CFED at (202) 207-0155 or e-mail [lance@cfed.org](mailto:lance@cfed.org) with your comments. The final version will be made available on the *Window of Opportunity* website: [www.cfed.org/windowofopportunity.org](http://www.cfed.org/windowofopportunity.org).

## State and Local Regulatory Initiatives to Preserve Threatened Affordable Housing



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### OVERVIEW

During the past two decades, while federal preservation policy has fluctuated dramatically, many state and local governments have undertaken regulatory initiatives intended to facilitate preservation of at-risk developments. These measures, complementing initiatives that provide additional financial resources for preservation,<sup>1</sup> usually seek to redress two problems: poor information flow from the federal government about federally assisted properties facing conversion and unilateral owner prerogatives to preserve affordability or convert to market-rate. Adopted by numerous states and cities nationwide, these regulatory initiatives include improved notices,<sup>2</sup> as well as provisions seeking to require or encourage the transfer of developments facing conversion to market-rate use, such as rights of first refusal, rights of offer, or rights to purchase. These restrictions often express conscious public policies about which properties should be preserved, which preservation owners should be advantaged and usually supported with additional public funding.

Virtually all state and local jurisdictions adopting notice laws have initially focused on properties with HUD-subsidized mortgages and project-based Section 8 contracts. Recently, many jurisdictions with notice laws have expanded

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

<sup>2</sup> See Preserving Federally Assisted Housing at the State and Local Level: A Legislative Tool Kit, 29 HOUS. L. BULL. 183 (Oct. 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; state agency must post on website within 10 days); 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 12 months prior to intended prepayment or termination). Notice laws also exist in Error! Main Document Only. California, Illinois, Maine, Maryland, Texas, Rhode Island, and Washington, in the District of Columbia and in an additional seven cities (Denver, San Francisco, Los Angeles, Portland, Sacramento and Santa Cruz, CA, and Stamford, CT).

their coverage to include other kinds of privately-owned affordable housing facing conversion. Prominent additions include Low-Income Housing Tax Credit developments, whose time-limited affordability restrictions may expire or be terminated, and affordable rental housing produced under a variety of state or local housing programs, including state or locally administered federal block grant programs.

In addition to covering various types of affordable housing, these notice laws also differ on key elements, including the number and length of notices, recipients and required contents of notice, exemptions, and remedies for violations.

In light of federal government's failure to effectively distribute information about threatened conversions on a timely basis to state and local governments and prospective preservation purchasers, state and local notice laws have generated little controversy. These notice laws generally originated from efforts of advocates or public officials concerned with the threatened loss of affordable housing. Since federally subsidized tenants already receive notices required by federal law, the benefits of additional notice requirements include providing more information or information to those who may ordinarily get no such notice (tenants of other programs, or state or local public officials).

Those jurisdictions recently seeking to address the conversion risk itself have adopted or amended their "purchase opportunity" laws to require or advantage preservation transfers. A vital underlying purpose of these laws is to preserve any ongoing federal subsidy itself, which is otherwise lost via termination or expiration. Originally, these laws focused on creating rights of first refusal, usually triggered by an owner's intention to sell a covered affordable property. Maryland and the old Rhode Island law were examples of this approach, and San Francisco and the District of Columbia adopted similar provisions. California's variant (Cal. Govt Code § 65863.10 to 65863.13) creates a right to make a purchase offer, triggered by any sale within five years prior to the scheduled expiration of affordability restrictions or by any proposed termination or expiration of restrictions. Portland and Denver also create rights for the city to make a purchase offer, triggered by threatened conversions, and Texas similarly provides time for the state to identify a prospective preservation purchaser.

Because rights of first refusal triggered by a proposed sale are easily avoided by conversion prior to sale, the most recent trend seeks to create mandatory purchase rights for preservation purchasers (at market value), triggered by an owner's notice of intention to convert to market-rate. In concept these laws resemble the framework for the federal Rural Development program, which requires an exiting owner to first offer to sell to preservation purchasers, as well as certain local and state laws governing mobile home parks and historic landmarks. These more recent laws creating purchase rights to preserve affordable housing include those in Illinois (310 Ill. Comp. Stat. §§ 60/3 through 60/8), Rhode Island (RI Gen. Laws §§ 34-45-7 & -8), Maine (Me. Rev. Stat. Ann. Tit. 30A, § 4973) and New York City (NYC Admin. Code § 26-801 et seq.). This chart accompanying this article provides a brief summary of these state and local laws.

Purchase opportunity provisions are usually built upon the framework of state and local notice laws. In addition to the variable elements of notice laws (number, length, recipients, and required contents of notice, exemptions, and remedies for violations), key differences in purchase opportunity laws include triggers (any threatened conversion event?, or just a proposed sale), nature of the purchase opportunity created (e.g., right of first refusal upon sale, right of offer upon threatened conversion, right of purchase upon conversion), who can exercise preferential purchase or offer rights (tenants, nonprofits, public agencies, for-profits, role of tenant endorsement and future commitments), access to property information, the mechanism for determining price, and other procedural requirements. 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.

## EXAMPLE

Notice Laws. Effective July, 2005, California's revised notice and right of offer law (Cal. Govt Code § 65863.10 to 65863.13) expanded coverage to thousands of tenants previously unprotected, now reaching tenants of state and locally subsidized properties, in addition to those of federally subsidized and LIHTC developments. These notice requirements (12 and 6 month notices, with specified content) now reach virtually all affordable housing in the state, totaling hundreds of thousands of units. In addition, California's "right of offer" provision (adopted in the late 1990s) was extended to properties being sold within five years of a scheduled expiration. These revisions resulted

from the efforts of preservation advocates. Like other notice laws, California's approach is easily replicable.

**Purchase Opportunity Laws.** In 2004, the state of Illinois revised its right of first refusal law (310 Ill. Comp. Stat. §§ 60/3 & 60/4), first enacted in 1988, in two key respects. First, the state law was expanded to cover other affordable housing programs, including properties with expiring project-based Section 8 contracts and LIHTC. Second, by expanding the triggering event beyond a proposed sale to include a proposed conversion to market-rate use, the revised law was effectively changed from a right of first refusal to a right to purchase.

This revision was accomplished through the two-year efforts of statewide preservation advocates, with the leadership of the Chicago Rehab Network. By creating purchase opportunities for tenants (with preservation partners) of virtually all federally assisted housing in the state where owners seek to sell or convert the property, tenants and eligible applicants for tens of thousands of units are affected. The Illinois approach has already been replicated by Rhode Island's 2006 revisions, as well as by New York City's Tenant Empowerment Act in 2005.

For its part, in the wake of the Illinois law, the City of Chicago recently enacted a local preservation ordinance intended to supplement the state right to purchase law for affected properties within the city. Chicago Mun. Code sec. 2-44-111 (July 2007). When notifying tenants when seeking to exit a federal program under state law, owners must also provide notice to the City Department of Housing with specified information about the development. If the tenants fail to exercise their state law rights to pursue a purchase, and the owner seeks to sell the property to a non-qualified preservation entity, entities qualified under the ordinance have a 120-day right of first refusal to match the terms of the sale and thereby acquire the property. Apparently, the local ordinance does not address the gap created if tenants fail to pursue their state law rights and the owner holds the property and exhausts the state and federal notice law periods.

Note that notice and purchase opportunity laws may raise issues about federal and state preemption, and that purchase opportunity laws may also raise constitutional questions. Courts have reached varying decisions on these important questions.

## **RESULTS/OUTCOMES**

These initiatives providing better information about threatened affordable housing promote development of more responsive state and local preservation policies, including creation or targeting of resources or other programmatic responses. In addition, better information permits local constituencies to pursue appropriate preservation strategies, including transfers. Violations of notice requirements may provide more time to pursue preservation strategies.

Those initiatives providing purchase opportunities can permit formulation of preservation purchase offers leading to purchase and sale negotiations and eventual transfer, or decisions by current owners to remain in the program. In Illinois, at least one threatened property has reportedly been preserved through purchase, and in Rhode Island, the state agency was pursuing another.

Maximizing effectiveness of these approaches often requires development of purchaser capacity and additional financial resources for acquisition, rehabilitation and transaction costs. In addition, state and local governments, or local tenant representatives, need to take enforcement action where notice or purchase opportunity laws are violated.

## **RESOURCES/MORE INFO**

For information concerning state and local regulatory preservation initiatives generally, contact the author. NHLP's website will soon be updated with the most current information and links to current versions of these laws.

In addition, for information on those laws in:

California: contact **California Housing Partnership Corporation**, [www.chpc.net](http://www.chpc.net)

Illinois: contact **Chicago Rehab Network**, [www.chicagorehab.org](http://www.chicagorehab.org)

New York City: contact **New York Tenants and Neighbors**, [www.tandn.org](http://www.tandn.org)

## KEY TERMS

**Right of first refusal:** the right of a specified party to match the purchase and sale terms already offered by another party and accepted by the seller, and thereby acquire the property.

**Right of offer:** the right of a specified party to make an offer to purchase the property, which the owner remains free to reject in favor of holding onto the property.

**Right of purchase:** the right of a specified party to purchase the property at market value, regardless of any intention to sell, while retaining the existing subsidies and affordability restrictions.

**Affordability restrictions:** typically, the limitations on rents, eligible occupancy, and methods of operation, including any deep subsidy contracts such as Section 8 rental assistance.

## ABOUT MACARTHUR FOUNDATION

The John D. and Catherine T. MacArthur Foundation is a private, independent grantmaking institution helping to build a more just and sustainable world. Through the support it provides, the Foundation fosters the development of knowledge, nurtures individual creativity, strengthens institutions, helps improve public policy, and provides information to the public, primarily through support for public interest media. With assets of more than \$6.4 billion, the Foundation makes approximately \$260 million in grants annually.

The *Window of Opportunity* housing preservation initiative is part of MacArthur's larger program focused on stable, affordable housing with a special emphasis on rental housing. The Foundation welcomes inquiries about this work and encourages interested parties to contact recipients of its support and other housing leaders.

For more information, including specific funding guidelines and a current list of affordable housing grantees, please visit [www.windowofopportunity.macfound.org](http://www.windowofopportunity.macfound.org), or e-mail [housing@macfound.org](mailto:housing@macfound.org).

## ABOUT CFED

CFED is a nonprofit organization that expands economic opportunity. We work to ensure that every person can participate in, contribute to, and benefit from the economy by bringing together community practice, public policy, and private markets. We identify promising ideas; test and refine them in communities to find out what works; craft policies and products to help good ideas reach scale; and foster new markets to achieve greater economic impact.



Established in 1979 as the Corporation for Enterprise Development, CFED works nationally and internationally through its offices in Washington, DC; Durham, North Carolina; and San Francisco, California.

## ABOUT CENTER FOR HOUSING POLICY

The Center for Housing Policy is the research affiliate of the National Housing Conference (NHC), the nation's premier public policy and housing advocacy organization. The Center works to broaden understanding of the housing challenges facing American households and to examine the impact of policies and programs developed to address these needs. Combining research and practical, real-world expertise, the Center helps to develop effective policy solutions at the national, state and local levels that increase the availability of affordable homes. For more information, please go to [www.nhc.org](http://www.nhc.org).

## COMMENTS AND QUESTIONS

Please direct your comments or questions to the authors, or you may contact Laura Arce with CFED at (202) 207-0155 or e-mail [larce@cfed.org](mailto:larce@cfed.org).