Brief History of HUD-Subsidized Mortgage Preservation Issues

This piece provides a brief historical description of how the federal government's reliance on time-limited mortgage subsidy programs inherently presents conversion risks, and of the federal government's efforts, first to preserve these threatened units and more recently since 1996, to retreat from that objective.

In the 1960s, beginning with the Section 221(d)(3) Below-Market Interest Rate (BMIR) and continuing with the Section 236 interest subsidy programs, the federal government embarked upon an effort to utilize private ownership as a way to substantially increase the supply of subsidized multifamily housing for lower income families. The subsidy mechanism chosen to accomplish this purpose was a federally guaranteed loan[1] with a reduced or subsidized interest rate that enabled housing to be provided at slightly below-market rents. In exchange for this limited subsidy and guaranteed loan, the owner executed a Regulatory Agreement containing certain restrictions upon project operations, including HUD approval of budget-based rent increases[2] and tenant income eligibility. The use restrictions were to remain in place as long as the mortgage and Regulatory Agreement existed. Those restrictions could be terminated by a "prepayment" of the mortgage in advance of the original mortgage maturity date,[3] or by expiration of the full mortgage term.

Generally, most of these HUD-subsidized units were subject to a 20-year prepayment restriction, requiring HUD approval for any prepayment within that first 20-year period,[4] but imposing no restriction on prepayment and conversion after that time.[5] While Congress made the shallow subsidies and loan guarantees available for the full mortgage term (usually 40 years), HUD structured these programs in such a way that many profit-motivated owners could prepay the mortgage and terminate the use restrictions[6] without any HUD approval after expiration of a 20-year period from the date of the loan. This was an

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[1] Subsidies under the Section 236 program were also made available to thousands of units that did not have federal mortgage insurance under Section 236. These projects, located primarily in New York, Massachusetts, and Illinois, are sometimes called "non-insured" or "state-aided" Section 236s. Financing was usually provided by a state housing finance agency. Generally, these properties face the same conversion risks as their HUD-insured counterparts, except that the state agency may have imposed different conditions governing terminations as a condition of receiving the state financing.

[2] Some properties that only received HUD-insured mortgages and not interest subsidies under a variety of HUD multifamily mortgage insurance programs (*e.g.*, Section 221(d)(4) or Section 207) also have federal regulation of rent levels by virtue of HUD-approval requirements in the property's regulatory agreement. These provisions are also terminable by prepayment, and generally those programs imposed no minimum restricted use period prohibiting unilateral prepayment, so owners may usually prepay at any time and terminate the regulatory controls, unless the original or amended note or other contract imposes a HUD approval requirement.

[3] For projects with mortgages that receive HUD subsidies under Section 236 but are not HUD-insured, having obtained their financing from a state agency, HUD's regulations permitted, but did not require, the mortgage to contain a provision requiring the written approval of both the mortgagee and HUD prior to any prepayment. Former 24 C.F.R. § 236.30(e) (1992). Prepayment rules for these projects are thus also determined by reference to the mortgage and loan documents, as well as any state statutes and regulations governing the agency's activities.

[4] *See* § 12.3.1.3 of the Green Book, 4th ed. (2012).

[5] The exceptions to the general 20-year restricted use period are: (1) projects currently owned by nonprofit owners (restricted for the full 40-year mortgage term, absent HUD approval); (2) projects that were originally developed by nonprofit owners, but that were sold to profit-motivated owners after September 1980 (same full mortgage term restriction); (3) projects with current Rent Supplement contracts (same); and (4) projects that have received Flexible Subsidy assistance after December 1979 ("low- and moderate-income" restriction for full mortgage term). *See* former 24 C.F.R. §§ 221.524(a), 236.30, 265.16 and 219.110(b) (1995). While HUD removed these rules from the Code of Federal Regulations in 1996, many of them remain effective for projects participating in the program as of that date. *See, e.g.,* 24 C.F.R. § 236.1 (2003) (savings provision specifying that any project with Section 236 mortgage insurance is governed by subpart A of 24 C.F.R. Part 236 in effect immediately before May 1, 1996, as contained in the April 1, 1995 edition of the C.F.R.); 24 C.F.R. § 219.2 (2003) (similar savings clause for Flexible Subsidy); 24 C.F.R. § 200.1302 (2003) (similar savings clause for Rent Supplement). *Compare* 24 C.F.R. Part 221, Subpart C (2003) (no savings clause, ostensibly because of HUD's representation that the revised codification represents no change in substantive law, 61 Fed. Reg. 14,397 (Apr. 1, 1996)). For many of these properties, restrictions also derive from the provisions of various program statutes or preservation laws, or from contractual provisions in program documents.

[6] A project's rent and use restrictions may also be terminated by the mortgagor and mortgagee's agreement to terminate the mortgage insurance, but this action is now governed by the same authority as a prepayment. *See, e.g.,* 24 C.F.R. § 221.753 (2003).

administrative decision not required by the authorizing statutes,[7] possibly intended to attract private developers. Only owners who were for-profit or limited-dividend ever had this ability to withdraw from the program after 20 years. Even at the inception of the program, nonprofit owners and any owners of projects with a current Rent Supplement or Section 236 Rental Assistance Program contract could not prepay their mortgages before the end of the full mortgage term.

This combination of time-limited use restrictions and profit-motivated ownership, when combined with any changing housing market conditions that create more profitable uses, threatens the continued use of this housing for low-income families. As described *infra*, although Congress initially acted to restrict conversions after the 20-year point under statutes passed in 1987 and 1990, and established criteria (in 1983 and 1987) governing HUD's approval decision during any restricted use period, Congress has more recently restored the ability of most HUD-subsidized owners to prepay after 20 years without significant restrictions.

Scope of the problem. By 1988, because most of these privately owned multifamily units with HUD-subsidized mortgages were developed between 1965 and 1978, particularly during the period between 1970 and 1978, by the late 1990s, many owners became eligible to exercise this unrestricted option. By 2002, one study estimated that at least 367,000 units would then be eligible for prepayment.[8] Of course, not all eligible owners will actually exercise the prepayment option, since they may not stand to receive significant financial benefits from conversion under local market conditions. These owners may simply continue to operate under the HUD-subsidized program until the original loan is fully amortized, when the regulatory restrictions will then expire of their own terms, absent any further regulation.

Regional and local variation. The intensity of conversion threat for projects with HUD-subsidized mortgages varies considerably in different housing markets around the country. Particularly hard hit are those areas where property values in general have escalated dramatically since the projects were first developed, such as in coastal states and the Northeast. Also significantly affected are smaller residential submarkets within metropolitan areas where property values have increased faster than the surrounding area due to their attractiveness to higher-income people. Projects located in these areas, which exist in practically every metropolitan region, are usually threatened with conversion, even though the overall trend in the region's property values may be more stable.

Even where the regional rental housing market is weak, individual projects may occasionally be threatened because their rents are below even the depressed rents typical of the local housing stock, because of the project's attractive location or condition, or because of the owner's desire to be free of federal regulation.

HUD's pre-1988 policy. Before Congress's enactment of the 1988 preservation statute, few owners had reached their twentieth anniversary date. Although HUD approval was required for prepayments during the first 20 years, and that Congress restricted that approval in 1983,[9] some of these owners did succeed in prepaying their loans without being challenged. Other owners who claimed they had an unrestricted prepayment right were challenged in their attempt to prepay and convert.[10] In these situations,

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[7] *Compare*, *e.g.*, 12 U.S.C.A. § 1715z-1 (West 2001) (the Section 236 statute) *with* former 24 C.F.R. § 236.30 (1992).

[8] National Low-Income Housing Preservation Commission, *Preventing the Disappearance of Low-Income Housing* (1988), at 24. At that time, there were between 604,000 and 645,000 units in projects with subsidized mortgages, but only about 367,000 were eligible for prepayment. There was a considerable discrepancy in the project eligibility data since it did not include similar projects with HUD-subsidized mortgages financed by state housing finance agencies, which numbered about 100,000 units, concentrated in a few states such as New York, Illinois and Massachusetts.

[9] *See* § 12.3.1.3 of the Green Book, 4th ed. (2012). concerning Section 250 of the National Housing Act, 12 U.S.C.A. § 1715z-15 (West 2001).

[10] *Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730 (7th Cir. 1991) (challenge to owner's prepayment of Section 221(d)(3) BMIR project as contrary to 1988 Act rejected because prepayment occurred prior to enactment; HUD subsequently provided replacement Section 8 Certificate subsidies); *Ass'n of Tenants of Univ. Heights, Inc. v. University Heights Assocs.*, No. 87-0289 P (D.R.I. filed June 22, 1987), 21 CLEARINGHOUSE REV. 518 (No. 42,586, Oct. 1987) (challenge to owner's prepayment on numerous grounds, including Title VIII, resulted in eventual settlement and sale of project to tenants). At least one other owner did not even bother to wait until the expiration date. *See Korsko v. Harris*, No. B 78-256 (D. Conn. filed July 1978), 12 CLEARINGHOUSE REV. 313 (No. 24,905, Sept. 1978) (settlement in challenge to owner's prepayment of Section 221(d)(3) BMIR project resulted in owner's commitment to comply with Regulatory Agreement until twentieth anniversary date).

HUD's policy was generally to provide replacement subsidies such as Section 8 tenant-based Certificates or Vouchers to eligible very low-income tenants residing in these units. Because there was no requirement that the owner accept those subsidies on behalf of existing tenants, this policy did not avoid displacement, nor did it assure that previously subsidized households actually obtained replacement housing.

The 1987 and 1990 preservation acts. Facing the threatened loss of thousands of units, Congress passed major legislation in 1987 (enacted by presidential signature in early 1988) and 1990 to preserve existing subsidized units. These statutes authorized programs to preserve most properties with HUD-subsidized mortgages that have a conversion potential. They established statutory restrictions upon the owners' ability to prepay after 20 years and provided federally-funded financial incentives for owners to remain in the subsidized housing program or sell the project to new preservation owners. Although they are no longer funded to preserve currently threatened units, these statutes may still be important because approximately 110,000 units were preserved under them, and preservation program rules or agreements now establish specific restrictions on their future use. Hence, they are briefly discussed here.

The 1987 Act.[11] The Emergency Low-Income Housing Preservation Act of 1987 (referred to as "ELIHPA" or "Title II")[12] established significant temporary restrictions upon owners' rights to prepay HUD-insured or HUD-held mortgages which would have otherwise been eligible for prepayment without HUD approval during the two years after the law's enactment.[13] The statute established a temporary barrier to conversions, allowing prepayments for eligible projects only in accordance with a plan submitted by the owner and approved by HUD pursuant to statutory criteria,[14] and providing incentives or limited rent increases for projects unable to meet the statutory prepayment standard.[15]

Despite its succession by another preservation program in 1990 ("LIHPRHA" or Title VI) and subsequent events marking a pronounced retreat from federal efforts, ELIHPA remains relevant because many owners have executed preservation plans pursuant to its terms. HUD issued interim[16] and then final rules[17] to implement ELIHPA.

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[11] For more about this program *see* § 15.3 of the 1994 second edition of this Manual. For more on the technical aspects of the ELIHPA program, *see* National Housing Law Project, *Action Guide for Preserving Subsidized Housing Threatened by Expiring Use Restrictions* (Mar. 1990) (contact National Housing Law Project for price and ordering information).

[12] Pub. L. No. 100-242, §§ 201-235, 101 Stat. 1877 (1988), *as amended by* Pub. L. No. 100-628, §§ 1021-1027, 102 Stat. 3270 (1988), *codified at* 12 U.S.C.A. § 1715*l* note ("Preservation of Low Income Housing") (West 2001). Subsequent citations to ELIHPA herein will be made to particular sections, since those citations will be necessary to find the material in the Note codification. The statute was passed by Congress in December 1987; hence, it is part of the Housing and Community Development Act of 1987, but it was not formally enacted into law by the President's signature until February 5, 1988.

[13] ELIHPA survived constitutional scrutiny. When one group of tenants sued to gain the protections of ELIHPA, the owner defended on the basis that the statute was unconstitutional on due process and takings theories. While the district court rejected these contentions and upheld the statute, the Seventh Circuit reversed on the ground that the statute did not cover prepayments preceding its enactment. *See Orrego v. 833 West Buena Joint Venture*, *supra* note 10, *rev'g Orrego v. United States Dep't of HUD*, 701 F. Supp. 1384 (N.D. Ill. 1988) (Clearinghouse No. 43,231). *See also Cienega Gardens v. United States*, 503 F.3d 1266 (Fed. Cir. 2007)(holding that ELIHPA does not effect a regulatory taking). *But see Atwood-Leisman v. United States*, 72 Fed. Cl. 142 (Fed. Cl. 2006) (finding government's refusal to accept prepayment of RD Section 515 mortgage loans, pursuant to ELIHPA, was breach of loan agreements).

[14] *See* ELIHPA, *supra* note 12, at § 221.

[15] In addition to challenges based on constitutional theories, RD owners have brought quiet title actions to avoid complying with federal statutory schemes for prepayment. Courts have thus far rejected such claims. *See, e.g., Schroeder v. United States*, 2007 WL 3028432 (D. Or. Oct. 17, 2007) (unreported) (reversing magistrate's recommendation that RD Section 515 owner be granted quiet title, holding that owner could not prepay loan without first complying with federal statutory restrictions). *But see also Meadowfield Apts., Ltd. v. United States*, 2008 WL 63413 (11th Cir. Jan. 7, 2008) (unreported) (holding that RD Section 515 tenants had no right to intervene in owner's quiet title action against RD involving rejection of owner's prepayment offer because residents lacked sufficient interest in proceedings, and no judgment would defeat their leaseholder rights), *aff'g* 2007 WL 1752271 (M.D. Fla. June 15, 2007) (unreported).

[16] 53 Fed. Reg. 11,224 (Apr. 5, 1988).

[17] 24 C.F.R. § 248, Subpart B (1992), 55 Fed. Reg. 38,944 (Sept. 21, 1990) (redesignated as Subpart C at 57 Fed. Reg. 12,041 (Apr. 8, 1992)). HUD amended the regulations at 24 C.F.R. §§ 248.201, 248.211, 248.213 and 248.217 (1992) to conform to the 1992 Housing Act on July 13, 1993. 58 Fed. Reg. 37,816-17 (July 13, 1993). The regulations are now found at 24 C.F.R. § 248, Subpart C (2003).

The projects potentially covered by ELIHPA included Section 221(d)(3) BMIR projects, Section 221(d)(3) projects assisted with Rent Supplement or Section 8 Loan Management Set-Aside (LMSA), Section 236 projects and all projects with HUD-held mortgages that were either assisted or formerly assisted under one of the foregoing programs. Eligibility for ELIHPA was further conditioned on the mortgage having been originally eligible for prepayment without HUD approval within one year of the filing date, but in any event by December 31, 1992.[18]

The 1990 Act. In late 1990, Congress passed legislation to replace ELIHPA[19] and regulate the conversion of projects with HUD-subsidized mortgages to market-rate use.[20] This preservation law is called the Low-Income Housing Preservation and Resident Homeownership Act of 1990 ("LIHPRHA" or "Title VI").[21] Although no longer federally funded to preserve additional at-risk developments, this program still governs thousands of units that were preserved under its terms from 1991 through 1997.

Essentially, from 1991 through 1996 (when Congress restored prepayment rights), Title VI established a qualified mandatory preservation program for eligible low-income housing. Many subsidized project owners who, in the absence of statutory restrictions, could have prepaid their HUD-subsidized mortgages without HUD approval (because they had reached the end of their restricted use period), sought preservation benefits in one of two ways. Most often, preservation resulted from the owner's decision to remain in the program for the property's useful life, in exchange for higher rents and other federal financial benefits. Other times, preservation resulted from an owner's sale of the project to a purchaser who committed to remain in the subsidized housing program with the aid of similar federal financial assistance. Of course, owners who took no action to terminate the mortgage and regulatory agreement could continue to operate under the original HUD-subsidized program until the original maturity date of the loan.

The major similarities between ELIHPA and LIHPRHA were the type of projects covered (with a slight timing variation), both used essentially the same restrictive statutory standard for HUD's approval of prepayments, both provided a plan of action process for evaluating owners' proposals to prepay, to stay in with incentives or to sell, and both restricted future rent increases for current tenants and authorized Section 8 assistance and other federal resources to fund a preservation plan.

The major differences between the two laws included: (1) ELIHPA required a continuing use restriction only for the *remaining mortgage term* (usually 15-20 years), whereas LIHPRHA restricted the use of the property for its *remaining useful life*; (2) under ELIHPA, Section 8 assistance was generally

[18] *See* ELIHPA, *supra* note 12, at §§ 233 and 235, 101 Stat. at 1885-86, and the transition rule contained in § 604 of the National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079 (Nov. 28, 1990). Projects that had already prepaid by November 1, 1987 were not eligible for the program, and those that prepaid prior to the statute's effective date (Feb. 5, 1988) are not covered. *See Orrego v. 833 West Buena Joint Venture*, *supra* note 10.

[19] Since ELIHPA, *as amended by* the HUD Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 1987 (1991), was set to expire on September 30, 1990, Congress had to pass two extensions of that law to avoid a break in the statutory restriction. *See* Pub. L. No. 101-402, 104 Stat. 866 (Oct. 1, 1990) (extending ELIHPA to October 31, 1990), and Pub. L. No. 101-494, 104 Stat. 1185 (Oct. 31, 1990) (extending ELIHPA until the earlier of the President's signature on the permanent statute or November 30, 1990).

[20] Pub. L. No. 101-625, tit. VI, §§ 601-605, 104 Stat. 4079, 4249 (Nov. 28, 1990), *codified at* 12 U.S.C.A. §§ 4101 *et seq.* (West 2001).

[21] Pub. L. No. 101-625, tit. VI, § 601, 104 Stat. 4079, 4275 (Nov. 28, 1990). This law actually consists of a wholesale amendment of subtitles A and B of ELIHPA, but is codified elsewhere (at 12 U.S.C.A. §§ 4101 *et seq.*). The Manager's Report (Joint Explanatory Statement or Conference Report) explaining it is found in H.R. REP. NO. 101-943 (Oct. 25, 1990). HUD's interim implementing regulations are set forth at 24 C.F.R. § 248, Subpart B (2003), 57 Fed. Reg. 11,992 (Apr. 8, 1992). You can find more information about the LIHPRHA program from § 15.3 of the 1994 second edition of this Manual. For more on the technical aspects of the LIHPRHA program, *see Summary of the "Low-Income Housing Preservation and Resident Homeownership Act of 1990" and Interim Regulations — An Update*, 22 HOUS. L. BULL. 54 (May/June 1992); and E. Achtenberg, PRESERVING EXPIRING USE RESTRICTION PROJECTS: A HANDBOOK FOR TENANT ADVOCATES, COMMUNITY GROUPS AND PUBLIC OFFICIALS IN MASSACHUSETTS, Ch. 6, (rev. ed. July 1992, available from Citizens' Housing and Planning Association (CHAPA), 16 North Street, 3rd Floor, Boston, MA 02109). HUD amended the interim regulations several times. *See* 24 C.F.R. § 248.5 (election to proceed under ELIHPA or LIHPHRA), § 248.101 (definitions), 58 Fed. Reg. 37,814 (1993) and 59 Fed. Reg. 14,369 (1994), § 248.111 (appraisals), § 248.135 (notice and copies of plans of action), § 248.141 (criteria for prepayment), § 248.145 (criteria for incentives), § 248.157 (sales within the federal cost limits), § 248.173 (resident homeownership), § 248.177 (state agency responsibilities), and § 248.183 (preemption of state laws).

made available only for current very low-income tenants in the project, whereas under LIHPRHA, Section 8 eligibility (until capital grant funding was substituted for additional Section 8 in 1996) extended to all current lower-income tenants; (3) the plan of action process was far more detailed under LIHPRHA; (4) the owner received incentives based upon an appraised preservation value under LIHPRHA[22], subject to certain federal cost limits, rather than those based on the project's statutorily restricted rental income under ELIHPA; (5) unlike ELIHPA, LIHPRHA contained an explicit sales program emphasizing nonprofit ownership for those owners intending to terminate their participation, including a resident homeownership program; (6) tenant participation received greater emphasis under LIHPRHA; and (7) LIHPRHA explicitly preempted certain state and local laws, but ELIHPA did not.

Generally speaking, until 1996, few projects with conversion potential[23] were able to convert to market-rate use because of the preservation programs. Under these programs, approximately 110,000 units were preserved, either until the end of their original mortgage terms, or for longer periods.

Advocates may represent tenants in ELIHPA or LIHPRHA developments where owners are seeking changes in the restrictions or subsidies governing the property, or where enforcement of the existing restrictions becomes necessary. You will need to obtain the recorded use agreements and applicable regulations to evaluate the legality of actions or proposed changes by the owner and HUD. In addition, some of these buildings were preserved through the provision of additional financial incentives that included new debt supported by additional Section 8 subsidies. If Congress ever fails to appropriate adequate funds to renew any expiring Section 8 contracts that were approved as part of a plan of action, owners may renegotiate agreements or convert to non-low-income use.

Developments since 1995. The preservation program, like other programs that use housing assistance tied to particular projects instead of tenant-based assistance, came under increased attack during the mid-1990s, as Congress looked for ways to reduce federal spending. Congress reauthorized prepayments starting in 1996,[24] and eventually deprived the program of any funds to preserve developments approved

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[22] Because incentives were based upon market appraisals, many owners were less inclined to challenge the law's constitutionality. However, owners did file breach of contract and other constitutional claims in the Claims Court, which finally bore fruit in 2003. *See, e.g., Cienega Gardens v. United States,* 38 Fed. Cl. 64 (1997), *vacated on other grounds*, 194 F.3d 1231 (Fed. Cir. 1998), *cert. denied sub nom. Sherman Park Apts. v. U.S.*, 528 U.S. 820 (1999), *on remand sub nom. Cienega Gardens v. U.S.,* 46 Cl. Ct. 506 (2000) *rev'd in part, aff'd in part,* 265 F.3d 1237 (Fed. Cir. 2001), *appeal after remand*, 33 F.3d 1319 (Fed. Cir. 2003). *See also Atwood-Leisman v. United States*, 72 Fed. Cl. 142 (Fed. Cl. 2006) (finding government's refusal to accept prepayment of RD Section 515 mortgage loans, pursuant to ELIHPA, was breach of loan agreements); *CCA Assocs. v. United States*, 284 Fed.Appx. 810 (Fed.Cir. 2008), *aff'g in part, rev'g in part, and remanding* 75 Fed. Cl. 170 (Fed. Cl. 2007) (holding that taking claim was ripe for adjudication, even though owner never sought HUD permission to prepay mortgage, and remanding in light of *Cienega Gardens*). As of January 2010, further proceedings have produced additional rulings that applicable local rent control is not preempted and must be considered in determining damages. *Independence Park Apartments v. U.S.*, 449 F.3d 1235 (Fed. Cir. 2006) and 465 F.3d 1308 (Fed.Cir. 2006) (local rent control not preempted and must be considered in determining damages from regulatory taking), *rev'g* 61 Fed.Cl. 692 (Fed.Cl. 2004). *See also City Line Joint Venture v. U.S.*, 503 F.3d 1319 (Fed. Cir. 2007) (finding that HUD waived sovereign immunity for breach of contract claim by developer for denial of prepayment right, where developer was in privity of contract with HUD by virtue of private lender's assignment of mortgage and note to HUD after default; because of possible contract claim, declining to review trail court's ruling that diminution in value from restrictions was insufficient to constitute a regulatory taking), *on remand*, 82 Fed. Cl. 312 (Fed. Cl. 2008) (granting summary judgment to owner and commencing process of determining damages).

[23] Both ELIHPA and LIHPRHA required that a participating project have economic value beyond its current use in order to receive additional federal incentives: ELIHPA had a "higher and better use" requirement (24 C.F.R. § 248.233(b) (2003)), and LIHPRHA required the project to have "preservation equity" (57 Fed. Reg. 12,005 (Apr. 8, 1992)).

[24] Pub. L. No. 104-134, § 101(e), Title II, paragraph entitled Annual Contributions for Assisted Housing, 110 Stat. 1321 (Apr. 26, 1996). Although the funds were provided by the appropriations act, the substantive changes were first made by Pub. L. No. 104-120, § 2(b), 110 Stat. 834 (1996), which in turn incorporated by reference and thus enacted the preservation program "reforms" included in H.R. 2099, 104th Cong. (Dec. 7, 1995), which the President had vetoed. Owners with equities less than $5,000 per unit or $500,000 per project were made ineligible for preservation incentives. The FY '96 Act also directed the appropriated funds first to buildings which the owners were willing to sell to nonprofits and tenants' organizations. HUD placed highest priority on vouchers for tenants whose landlords prepay their mortgages and capital grants (rather than insured loans supported by additional Section 8) for nonprofits and tenant organizations to purchase buildings from owners who are willing to sell. Memorandum from Chris Greer, Acting Deputy Assistant Secretary, HUD, to Directors of Housing, *et al.*, Re: Implementation of H.R. 2099) (Apr. 12, 1996). *See also* Memorandum from Nicholas P. Retsinas, Assistant Secretary, to All Housing Directors *et*

for incentives, beginning in FY 1998. However, the LIHPRHA program has never been formally repealed.

The major attacks were that the program was too expensive and unfairly restricted owners' private property interests. Criticisms of the preservation program came from many quarters, including the Office of Management and Budget, HUD itself, some private owners and some members of Congress. The attacks began before the 1994 Congressional elections, but that shift of power increased the opposition. In its "Reinvention" process, launched soon after the 1994 elections, HUD proposed termination of the preservation program and the provision of vouchers to any tenants who would lose their homes because of an owner's prepayment.[25] Congress then began to back away from its preservation commitment.[26] In Fiscal Year 1996, while making $625 million available for preservation, Congress transformed the program into a purely voluntary one, i.e., permitting owners of "eligible low-income housing" to prepay without any substantial restrictions, and made other substantial changes.[27] HUD sought no funding for Fiscal Year 1997 for the preservation program,[28] but Congress provided $350 million.[29] Finally, beginning in FY 1998, HUD and other program opponents convinced Congress to provide *no* funding, and Congress subsequently enacted a statute authorizing prepayments that survived the annual appropriations process.[30]

Since Congress restored most owners' unrestricted ability to prepay, many owners that did not

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al., Re: Waiver of Certain Requirements for a Sales Transaction Under the Preservation Program) (Apr. 12, 1996). The Act also authorized HUD to stop taking applications for future participation in the program and directed that processing suspend on September 30, 1996. Prepayments of HUD-subsidized properties after the restricted use period without any further HUD approval were first clearly authorized by the Appropriations Act for FYs 1996 and 1997, Pub. L. No. 104-134, 110 Stat. 1321-267 (Apr. 26, 1996); Pub. L. No. 104-204, 110 Stat. 2874 (Sept. 26, 1996). The only restriction imposed by these laws was that the owner could not increase rents for 60 days following prepayment. In 1998, Congress reauthorized prepayments and added a prior notice requirement. Pub. L. No. 105-276, § 219, 112 Stat. 2461 (Oct. 21, 1998).FN FY 1996 Approps 3 FNs infra.

[25] Department of Housing and Urban Development, *Reinvention Blueprint*, Dec. 19, 1994. In its Fiscal Year 1996 Budget proposal, the Administration, in a compromise between HUD and OMB, proposed that all owners be allowed to prepay without any restrictions, that owners with equity beneath $10,000 per unit not be eligible for any preservation incentives, and that the incentives themselves be limited by the building value that the Section 8 existing housing Fair Market Rents could support.

[26] In the 1995 Rescissions Act, Congress deferred spending $406 million of the previously appropriated preservation funds until Fiscal Year 1996, with authorization for HUD to suspend taking applications until then and directions to the authorizing committee to reform the program by then. Pub. L. No. 104-19, 109 Stat. 194, 233 (July 27, 1995).

[27] Pub. L. No. 104-134, § 101(e), Title II, paragraph entitled Annual Contributions for Assisted Housing, 110 Stat. 1321 (Apr. 26, 1996). Although the funds were provided by the appropriations act, the substantive changes were first made by Pub. L. No. 104-120, § 2(b), 110 Stat. 834 (1996), which in turn incorporated by reference and thus enacted the preservation program "reforms" included in H.R. 2099, 104th Cong. (Dec. 7, 1995), which the President had vetoed. Owners with equities less than $5,000 per unit or $500,000 per project were made ineligible for preservation incentives. The FY '96 Act also directed the appropriated funds first to buildings which the owners were willing to sell to nonprofits and tenants' organizations. HUD placed highest priority on vouchers for tenants whose landlords prepay their mortgages and capital grants (rather than insured loans supported by additional Section 8) for nonprofits and tenant organizations to purchase buildings from owners who are willing to sell. Memorandum from Chris Greer, Acting Deputy Assistant Secretary, HUD, to Directors of Housing, *et al.*, Re: Implementation of H.R. 2099) (Apr. 12, 1996). *See also* Memorandum from Nicholas P. Retsinas, Assistant Secretary, to All Housing Directors *et al.*, Re: Waiver of Certain Requirements for a Sales Transaction Under the Preservation Program) (Apr. 12, 1996). The Act also authorized HUD to stop taking applications for future participation in the program and directed that processing suspend on September 30, 1996. Prepayments of HUD-subsidized properties after the restricted use period without any further HUD approval were first clearly authorized by the Appropriations Act for FYs 1996 and 1997, Pub. L. No. 104-134, 110 Stat. 1321-267 (Apr. 26, 1996); Pub. L. No. 104-204, 110 Stat. 2874 (Sept. 26, 1996). The only restriction imposed by these laws was that the owner could not increase rents for 60 days following prepayment. In 1998, Congress reauthorized prepayments and added a prior notice requirement. Pub. L. No. 105-276, § 219, 112 Stat. 2461 (Oct. 21, 1998).

[28] Department of Housing and Urban Development, Fiscal Year 1997 Budget (Mar. 19, 1996).

[29] Pub. L. No. 104-204, 110 Stat. 2874 (Sept. 26, 1996). HUD issued numerous "Preservation Letters" during 1996 and 1997, as well as some more formal Notices, to address the mechanics of the funding closeout, as well as the prepayment and voucher substitution processes.

[30] Pub. L. No. 105-65, 111 Stat. 1343 (Oct. 27, 1997) (providing no preservation funds, but $10 million to reimburse owners for transaction costs in pursuing unfunded plans). In the fiscal year 1999 Appropriations Act, Pub. L. No. 105-276, § 219, 112 Stat. 2461 (Oct. 21, 1998), Congress reauthorized prepayments, under modified conditions, and provided no funds for the LIHPRHA program. This prepayment right was not subject to the sunset of an ordinary provision in an annual appropriations law and remains effective. No appropriation for LIHPRHA was made for fiscal year 2000, Pub. L. No. 106-74, 113 Stat. 1047 (Oct. 20, 1999), fiscal year 2001, Pub. L. No. 106-377, 114 Stat. 1441 (Oct. 27, 2000), or subsequently.

execute agreements under the preservation programs have prepaid and withdrawn their buildings from the original HUD-subsidized program. Although the Title VI program has still not been formally repealed, there are no federal resources currently appropriated to preserve eligible properties, even those that had approved but unfunded preservation incentive plans. For approved properties that did receive LIHPRHA funding, Congress has so far continued to provide appropriations for the renewal of any expiring project-based Section 8 contracts that were used to support preservation incentives. Congress has also so far provided tenant-based assistance via "enhanced vouchers" for certain residents whose rents increase as a result of prepayment.[31]

[31] *See* § 12.6.2 of the Green Book, 4th ed. (2012).