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LOCAL STRATEGIES FOR HOUSING CHOICE AND STABILITY

DISPLACEMENT PREVENTION TOOLS FOR FAIR HOUSING
IMPLEMENTATION COUNCIL JURISDICTIONS

REPORT TO THE FHIC BY THE HOUSING JUSTICE CENTER



EXECUTIVE SUMMARY

As cities and counties in the Twin Cities Region look for ways to effectively further fair housing, these jurisdictions are increasingly focusing on involuntary displacement of tenants as a fair housing issue where they can play a constructive role. In fact, there are a number of useful actions local jurisdictions can take, to minimize or prevent displacement into an increasingly unforgiving rental market. In some cases, this means governments reviewing and updating long recognized policy tools while in other cases newly emerging strategies are called for.

The largest current displacement threat facing Twin Cities Region lower income renters is the rapid erosion in affordability of naturally occurring affordable housing (NOAH), due to the sale and conversion/upscaling of these buildings, or simply the large and widespread rent increases occurring across the region. But vulnerable residents face other threats as well, from expiring use restrictions to redevelopment/demolition of housing to slumlord practices which exploit tenants. This report is an attempt to catalogue the range of policies or strategies local governments can adopt to minimize harm and stabilize families. We include initiatives enacted or being considered locally as well as state or local legislation adopted elsewhere around the country. This report also acknowledges that market conditions and displacement threats vary widely across the region, and that FHIC jurisdictions include both cities and counties, which have different authorities and programs touching on these issues.

Acquiring NOAH to preserve affordability. The first topic addressed is how local governments can facilitate the acquisition of NOAH properties by mission driven preservation providers. The most aggressive approach is to create on behalf of residents or the city a Right of First Refusal (ROFR) in which the residents or city have the opportunity to match a potential purchase price which has already been negotiated. This provides the preservation buyer maximum leverage but it often triggers resistance from parties who have already negotiated a sale. An Opportunity to Purchase (OTP) is another approach, in which owners are typically obligated to negotiate in good faith with a preservation purchaser. Finally, farther down the scale, a city can simply require an advance notice of the owner's desire to sell his property, so preservation purchasers at least have the opportunity to get to the table in any sales discussions. There are pros and cons to all three approaches. Also in this section several other ideas to encourage more of these sales to preservation buyers are discussed.

Incentives for NOAH owners to retain affordability. A second topic, also related to NOAH preservation, is how to create incentives for owners to keep their NOAH properties affordable, rather than maximizing rents available in the market or even repositioning the buildings to a higher income market segment. The most promising strategy here is cities or counties making expanded use of the Low Income Rental Classification (LIRC) program, popularly known as "4d," by offering property tax breaks to owners willing to agree to rent and income restrictions. Minneapolis recently rolled out a pilot program to do just this, and other cities are interested as well.

Redevelopment and other threats. Tenants can also be displaced because their buildings have expiring rent restrictions, or are converted, torn down or redeveloped, the next topic of the report. This can involve both publicly assisted properties, where cities or counties typically have attached restrictions, and the issues are effective monitoring and enforcement of those restrictions, as well as ensuring that with any new public assistance, the most effective and long lasting protections are obtained. In some cases city housing code enforcement can lead to displacement of innocent tenants, necessitating tenant protections. Even where displacement actions occur in the absence of any government assistance, however, a number of cities have turned to their basic police powers to enact protections. This may include imposing replacement housing obligations on private displacers, or relocation payments and assistance to displaced tenants, or temporary periods in which tenants are protected from rent increases or no cause evictions. In some cases these approaches raise novel legal questions about the extent of local government authority to act, which are discussed in this section.

Manufactured home parks. Next, manufactured home parks are discussed, and the unique existential threats many of them face, due most often to redevelopment pressures or deteriorating infrastructure systems. There are a number of different ways that cities and counties can encourage preservation of these valuable assets, from comprehensive plan commitments, enacting zoning protections, playing important roles in a park closing process, to providing financial assistance to upgrade either a community's infrastructure (sewer, roads) or to replacing older homes in the park with newer ones.

Homeowners threatened by property taxes. The FHIC also requested that the report address ways to minimize displacement of lower income homeowners facing unaffordable increases in property taxes. The next section of the report details a series of mostly state programs and provisions designed to reduce the property tax burden for certain eligible taxpayers. We recommend that the most useful thing cities and counties can do in this area is to ensure vulnerable homeowners are aware of the opportunities that already exist to minimize their tax burden. In some cases homeowners should automatically benefit, in others they will have to apply.

Just Cause eviction. Lastly, the report addresses an important but often misunderstood tenant protection measure, which is good cause or just cause eviction. By establishing a good cause requirement, a city simply extends the protections typically available to tenants in publicly assisted housing to tenants in private housing. Tenants would finally know why they are being asked to vacate, and although they would likely accept that outcome in most cases, they would then have the opportunity to challenge baseless or retaliatory actions in such cases. Good cause protections have been enacted in a number of jurisdictions, either for tenants generally or for certain subgroups of tenants.

INTRODUCTION

In 2017, federal entitlement jurisdictions in the Twin Cities region as well as other regional cities and counties, operating through the Fair Housing Implementation Council (FHIC), sponsored the creation of an Addendum to the 2014 Regional Analysis of Fair Housing Impediments (RAI). A prominent theme that surfaced in the Addendum was a recognition that when lower income households (often households of color) are involuntarily displaced, that presents a Fair Housing issue. This is because protected class groups face restrictions on housing choice—in this case, the choice to remain in their housing. In response, the FHIC sought proposals on the development of strategies on housing displacement prevention. The Housing Justice Center (HJC) was awarded a contract to do this work.¹ This report is the result of that work.

The report addresses some strategies that the FHIC voiced a particular interest in, as well as additional strategies or policies HJC has identified in the course of this work. Most of the strategies or policies relate to cities as they most often touch on traditional areas of local government activity such as land use. In some cases counties are relevant as well, however, and we have tried to identify those instances, while acknowledging that the level of county involvement in housing varies considerably across the seven county metro area.

This report comes out as the Twin Cities region faces an unprecedented threat to its supply of affordable housing, and in particular, to its supply of naturally occurring affordable rental housing, often referred to by the shorthand NOAH. The erosion in affordability of the supply of NOAH housing due to an accelerated rate of acquisitions and repositioning of buildings has been well documented.² Many of the strategies discussed below relate to this threat to NOAH housing, though the strategies address other displacement threats as well.

Because a number of these strategies are new policy innovations, the legal landscape around these ideas is not always settled. Below we briefly touch on some of the most significant legal issues. In many cases HJC has conducted more detailed legal research and analysis which we will share upon request.

ASSISTING PRESERVATION BUYERS IN ACQUIRING NOAH PROPERTIES

One of the proven strategies for preserving the affordability of NOAH housing is through the acquisition of these properties by mission driven nonprofit and for-profit housing providers committed to keeping these properties affordable over the long term. The Twin Cities has been fortunate to benefit from the decision of affordable housing providers like Aeon and CommonBond to target the acquisition of at-risk NOAH housing, as well as through the development of lower cost financing through the NOAH Impact Fund, developed by Greater Minnesota Housing Fund.

In addition, some local public agencies have been actively attempting to purchase NOAH properties. Both the Carver County CDA and the CAP Agency for Scott County have been

¹ The Housing Justice Center is a Minnesota based public interest law firm dedicated to preserving and expanding the supply of affordable housing. For more information, see www.hjcmn.org.

² Cite to MHP reports: ATTICUS JARAMILLO & CHIP HALBACH, MINN. HOUSING PARTNERSHIP, SOLD OUT (2016), http://www.mhponline.org/images/Sold_Out_final_revised_small.pdf.

purchasing NOAH properties. The CAP agency has focused on smaller buildings, mostly duplexes to eight plexes, with the idea of housing county clients. Acquiring smaller NOAH properties can be a special challenge, because groups like Aeon and CommonBond are mostly looking for larger properties where economies of scale make acquisition more feasible. In Minneapolis, however, smaller rental properties predominate. The City is proposing a Small and Medium Multifamily Land Banking Pilot (SMMF Pilot) in which the Twin Cities Land Bank, Twin Cities LISC, and Family Housing Fund, in partnership with the City, have developed a program to help stabilize 2-49 unit buildings that are occupied by low to moderate income tenants throughout Minneapolis and that are particularly susceptible to market pressures. The goal of the program is to remove these properties from the speculative market and restrict them as affordable for the long-term.

Huge challenges remain, however, in moving a significant share of NOAH housing into the hands of owners committed to long term affordability. The competition among market rate developers to purchase these properties is intense, and requires not only the ability to compete on price but on timeliness of performance, as many investor-purchasers are prepared to pay cash and close quickly. One set of strategies to avoid displacement of low income renters and preserve affordable housing involves facilitating purchase of threatened affordable properties by preservation buyers. These strategies have proved effective in a number of places and circumstances. The strategies lie along a spectrum of obligations imposed on a prospective seller from providing preservation buyers with the right to match another buyer's offer (known as a right of first refusal, "ROFR") to requiring potential sellers to negotiate with preservation buyers prior to consummating a sale to another buyer (Opportunity to purchase, "OTP") to provisions requiring notice to residents and affected local governments prior to completing a sale. What follows are descriptions of a variety of circumstances for which such laws have been adopted and of key elements of such laws. Public officials thinking about enacting one of these strategies should familiarize themselves with comparable laws and policies currently in use. We've provided footnotes with citations to each.

Preserving assisted lower income housing. There are quite a number of such state and local laws aimed at preserving federally and locally subsidized housing. Chicago,³ Denver,⁴ and

³ CHI., ILL. CODE OF ORDINANCES § 2-45-140; see *Affordable Housing Preservation Ordinance*, CITY OF CHI., https://www.cityofchicago.org/city/en/depts/dcd/supp_info/affordable_housingnotificationordnance.html (last visited July 6, 2018). Note that the Illinois Federally Assisted Housing Preservation Act (310 ILL. COMP. STAT. 60/) imposes an opportunity to purchase duty on an owner intending to sell or opt out requiring an offer to residents. The Chicago ordinance goes beyond that to require a ROFR. It provides for a private right of action and for fines.

⁴ Denver City and County Municipal Code §§ 27-45 to 27-52 requires notice of loss of subsidy and provides the City with a ROFR if the owner decides to sell. The ROFR allows the City or a preservation designee to purchase the project "on terms that are economically substantially identical" to the terms agreed to with a buyer. Any purchase agreement with a buyer must be contingent on the City's ROFR. Section 27-49 provides a similar ROFR regarding city-funded projects.

San Francisco⁵ have right of first refusal ordinances covering subsidized properties; Washington, D.C. provides for a City OTP like that described below;⁶ and Portland,⁷ Denver,⁸ and San Francisco⁹ require notice prior to loss of affordability of federally or locally subsidized projects. City and resident rights are typically triggered in these statutes by a Section 8 opt out notice or loss of affordability in the case of local subsidies. Periods in which to exercise ROFR or OTP rights typically run from 60 to 120 days. Notice statutes generally require a one year notice for loss of Section 8 housing, matching the federal opt out notice requirement.

A number of states also have ROFR or OTP rights with respect to subsidized properties¹⁰ and many states have notice requirements, generally matching the federal requirements. Minnesota has a one year notice requirement for Section 8 owners who intend to opt out.¹¹ Preemption by federal preservation statutes is a concern if state or local statutes conflict with federal laws, and the Minnesota statute was held preempted as it applied to Section 236 prepayments.¹²

Manufactured home park preservation laws. Several states have ROFR or OTP statutes aimed at allowing non-profit or cooperative purchase of manufactured home parks and/or preventing them from closing. See, “Promoting Resident Ownership of Communities,” for a good description of how ROFR and OTP laws work, where they’re in effect, and for a model ROFR/OTP statute.¹³ Minnesota has a ROFR law aimed at preserving manufactured home parks

⁵ S.F., CAL., ADMINISTRATIVE CODE §§ 60.1-60.14. The ordinance is somewhere between a ROFR and OTP law. Section 60.8(d) provides that an owner who has notified the city of the intent to opt out must also provide a notice of intent to sell and then must accept an offer from a qualified buyer proposing “commercially reasonable” terms and a price defined by the ordinance. That’s not exactly a ROFR because there is not an existing offer to match. Further, § 60.8(j) provides that if the owner accepts, the parties must negotiate a purchase agreement, and § 60.8(k) indicates that the owner need not close the deal if good faith negotiations do not produce an agreement.

⁶ D.C., CODE § 42-2851.04 (2018).

⁷ PORTLAND, OR., CITY CODE & CHARTER §§ 30.01.010-30.01.80 (requiring notice to City and residents before Section 8 opt out or to City before loss of City subsidy rent restrictions).

⁸ DENVER, COLO., REV. MUNICIPAL CODE §§ 27-45 to 27-52 requires notice to City and residents of section 8 opt outs or loss of affordability in locally subsidized projects.

⁹ S.F., CAL., ADMINISTRATIVE CODE §§ 60.5, 60.9.

¹⁰ See 310 ILL. COMP. STAT. 60/; MD. CODE ANN., HOUS. & CMTY DEV. tit. 7; CAL. GOV’T CODE, tit. 7, §§ 65863.10-.11; ME. REV. STAT. tit. 30-A, §§ 4972-73; 34 R.I. GEN. LAWS § 34-45-4.

¹¹ MINN. STAT. § 504B.255.

¹² In *Forest Park II v. Hadley*, 336 F.3d 724 (8th Cir. 2003), the Court held that this statute was preempted by federal law as it related to termination of Section 236 contracts, for which federal law required only a shorter notice period. The statute continues to apply to Sec. 8 opt outs. See, *Mother Zion Tenant Ass’n v. Donovan*, 865 N.Y.S.2d 64 (N.Y. App. Div. 2008), holding a New York City right to purchase law preempted by federal statutes governing Section 8 opt outs.

¹³ 2015 by the National Consumer Law Center, available at:

https://www.nclc.org/images/pdf/manufactured_housing/cfed-purchase_guide.pdf

when they are threatened by a sale followed by park closure.¹⁴ The first attempt, in 2008, to use the statute led to an injunction prohibiting the park owner from closing a sale without complying, but ultimately failed because of the park's infrastructure needs. A similar effort might well now succeed given public support for infrastructure needs. The second attempt, to purchase the Lowry Grove Park in St. Anthony Village in 2016, failed when the offer of a preservation purchase was not made until the last possible day. The owner's failure to accept the offer led to litigation which demonstrated a number of problems with the way the statute was drafted,¹⁵ as well as some problems which unfortunately may be inherent in ROFR statutes.¹⁶

Minnesota's Other ROFR statute for agricultural property. Minnesota also has a right of first refusal statute which applies to agricultural property.¹⁷ Aimed at farm foreclosures, it requires that an owner of farm land, who acquired the property by enforcing a debt, and who wishes to sell or lease the property must offer it first to the immediately preceding owner at a price no higher than that offered by a third party which is acceptable to the seller.

Other City and County laws more generally address loss of rental housing.

Washington D.C. has three laws of this sort. The Tenant Opportunity to Purchase Act (TOPA)¹⁸ provides that owners, prior to consummating the sale of rental property, must provide a tenants' organization with an offer of sale. If no contract with a third party exists, the owner and tenants are to negotiate in good faith. If a contract with a third party already exists, the tenants have a right of first refusal and must meet its material terms. The tenants' opportunity may be assigned to another party. The District also has an opportunity to purchase (DOPA),¹⁹ subordinate to the tenants' rights, but only if at least 25% of the units are affordable, with rents no more than 30% of 50% of area median income. Finally, the District also has the same opportunity to purchase rights with respect to Section 8 properties when the sale of such properties will lead to discontinuation of its use as federally assisted low income housing.²⁰ The D.C. ordinances are considered quite successful, in part because the District has set aside substantial funds to aid the acquisitions.

A number of Maryland cities and counties have ROFR laws. The Montgomery County law, for instance, provides the County and tenant organizations with a ROFR, but the ROFR may be avoided through an agreement that prohibits the buyer from converting to a non-residential use for 5 years and limits rents for 3-5 years.²¹ The County may enforce through injunction,

¹⁴ MINN. STAT. § 327C.095 subdvs. 6-11.

¹⁵ Subdiv. 9 deprives residents of their ROFR right if the owner violates the statute by selling the park without complying with the ROFR requirement, thus undercutting the primary goal of the statute.

¹⁶ See discussion below.

¹⁷ MINN. STAT. § 500.245

¹⁸ D.C. CODE, tit. 42, §§ 42-3404.01 to 24-3404.13.

¹⁹ D.C. CODE, tit. 42, §§ 42-3404.31 to 24-3404.37.

²⁰ D.C. CODE, tit. 42, §§ 42-2851.01 to 42.2841.08.

²¹ MONTGOMERY COUNTY, MD., COUNTY CODE §§ 53A-1 to 53A-11; for a City code example, see TAKOMA PARK, MD., MUNICIPAL CODE ch. 6.32.

revocation of rental license, or fines. A Baltimore ordinance provides for a ROFR for tenants of single family homes.²²

Chicago has an OTP statute for single room occupancy (SRO) units.²³ The law requires that an SRO owner seeking to sell must either: 1) provide the City and residents a 180 day notice of intent to sell and enter into good faith negotiations with a preservation buyer agreeing to keep the unit affordable for 15 years; or 2) pay the City \$20,00 per unit. In addition, residents displaced as a result of demolition, conversion, or sale of an SRO unit are entitled to relocation payments of the greater of \$2,000 or three months rent, or if the owner has opted to pay the \$20,000/unit, the relocation fee is \$8,600. In addition to city enforcement, tenants have a private right of action to enforce with an action for an injunction. In addition, the City may impose a fine for each unit for each day a violation continues. As of Fall 2016, there had been no legal challenges and the ordinance had been credited with saving 8 out of 10 SRO buildings.

As noted above, several city ordinances aimed at preserving publicly assisted housing require advance notice of events which will terminate affordability. And all of the laws providing for ROFR or OTP also require provision of advance notice to residents and government entities, so that even if a purchase does not result, at least residents have received advance notice. The only statute we are aware of that requires only advance notice to unsubsidized properties is in Seattle.²⁴ Seattle requires 60 days notice of sales of buildings with at least one unit with rents affordable to 80% AMI. Administration is passive, applies only to buildings “listed” (not privately sold), and violation leads to a \$500 fine. It doesn’t appear that this policy as structured is having much impact.

ROFR Laws

The essence of a first refusal requirement is that a prospective purchaser exercising the ROFR must match the terms of a sale proposed by another prospective buyer. The seller is required to give notice, typically to residents and a city agency, of the proposed sale and make the terms that must be matched available. The statutes discussed above typically provide a preservation buyer with 60 to 180 days to match all or part of the other buyer’s offer. The fact that the seller and buyer have had opportunity for extensive discussions prior to an offer or agreement that must be matched means that whatever the preservation buyer must match may disadvantage it relative to the other buyer. For instance, if a purchase agreement must be matched, the buyer will typically have had time to perform some due diligence prior to its execution and the ROFR period will be running at the same time as additional due diligence period in the purchase agreement. The preservation buyer will necessarily have less time for due diligence than the market rate buyer. A number of ROFR laws try to address specific problems of this type by requiring, for instance, a minimum due diligence period for the preservation buyer or by limiting the earnest money required. But it is probably the case that a buyer and seller determined to frustrate a ROFR could come up with a way to do it.

²² BALTIMORE, MD., CITY CODE art. 13, subtit. 6.

²³ CHI., ILL., MUNICIPAL CODE §§ 5-15-010 to 5-15-100.

²⁴ SEATTLE, WASH., MUNICIPAL CODE §§ 22.907.030-.100.

OTP Laws

OTP laws also require notice to residents and a government agency prior to a sale. The notice then provides a period, similar to that in ROFR laws, in which the seller is required to negotiate in good faith with a preservation buyer. The good faith negotiation requirement addresses the problem described above of a ROFR buyer having to meet a set of pre-arranged conditions. The trade-off is that there is no requirement of a sale to the preservation buyer. Nevertheless, at least some OTP programs seem to be quite successful. The D.C. law covering all rental housing²⁵ and the New Hampshire manufactured home park statute²⁶ are often cited as examples.

Requiring Advance Notice of Sale

Laws which simply provide advance notice of sale provide would-be preservation purchasers fewer rights and less leverage but are designed to at least get these parties to the table earlier in the sale process. Perhaps unfortunately, they are the variety most under discussion in the Twin Cities. Advance notice requirements like this are common with respect to sales or expiring affordability controls for subsidized rental housing. The notice period in these cases is typically at least a year, matching federal requirements, and these statutes have often been very useful in allowing preservation buyers to strike a deal. The ROFR and OTP laws described above also have notice provisions and these also serve the function of alerting residents, even if a preservation purchase does not result.

One proposal under active discussion in some cities in the region is a local government requirement that before an owner can sell a NOAH property, they must provide the city 90 days advance notice of the sale. The primary purpose is to allow the cities to post this information to give preservation purchasers the chance to bid on the property. An additional goal is to give residents advance notice that their status at the property might be affected due to a sale. This also helps service agencies to plan and provide help to tenants who will eventually face displacement.

One example illustrates how advance could make a difference in the Twin Cities region. In 2015, the Crossroads Apartments in Richfield were sold, resulting in an upscaling of the complex and the displacement of 700 households. In 2017, advocates learned at nearly the last minute that the purchasers of Crossroads were about to sign a purchase agreement for another similar Richfield complex, Seasons Park, presumably to undertake the same business plan, leading to the displacement of several hundred additional households. Advocates, city officials, Aeon, and even the Governor raced to push the seller to back out of the deal and instead sell to Aeon. Due to these heroic last minute efforts, the owner agreed to back off on the sale to the Crossroads owners, and instead transferred the property to Aeon. It was pure luck, however, that this sale was uncovered at the last minute. Ninety days advance notice that Seasons Park was up for sale would have made this considerably easier.

²⁵ D.C., CODE § 42-2851.04.

²⁶ N.H. REV. STAT. § 205A:21.

A city considering an advance notice of sale requirement has to decide a number of issues. It makes most sense to apply such a policy just to NOAH properties, rather than to all properties including high end rental housing. However, this means the city has to be able to know when a building is NOAH (as the city defines it) or has to be comfortable with NOAH owners deciding to comply with the requirement on their own. Enforcement of the requirement can also be challenging, since if the property is sold without complying with the notice requirement, the sale can't be undone as a practical matter and the city would be left imposing a penalty either on the seller who is no longer licensed by the city or on a buyer. It is probably reasonable to assume, however, that most owners would comply, since neither buyer nor seller would want to risk a potential cloud on title due to noncompliance with a legal requirement. Finally, defining what is considered a NOAH property is key. Most often buildings that are affordable to 60% AMI have been considered to qualify, but when buildings have a mix of rents above and below that line, it's necessary to identify what share of the units at qualifying rents qualify the building. Finally, the size of the building is critical. In some suburban communities, most of the NOAH housing is in large complexes, whereas in the central cities and also in some older towns now considered exurban communities, NOAH buildings tend to be smaller properties.

It's important to understand that residential properties are typically sold in one of two ways: through bidding processes generally handled by brokers, and through informal "off market" negotiations where discussions are initiated privately by either the owner or a would-be buyer. Potential preservation purchasers like Aeon and CommonBond normally follow buildings for sale through the broker process, so advance notice is less important to them in those cases, but the off market sales, is where the advance notice requirement would have its greatest value. Even in the case of brokered sales, however, the advance notice provision throws a public light on potential sales and provides residents with an advance warning. The concern has been raised that an advance notice requirement could actually harm a preservation buyer by creating more competition from other bidders taking advantage of the notice. This is a valid concern but can be addressed by creating an exemption from the advance notice requirement in the case of a sale to a preservation buyer (that is, a transaction which will preserve affordability for the longer term). We'd suggest a process where cities would pre-qualify preservation buyers whose approach to potential sellers would then be exempt from the notice requirement. In order to so qualify the preservation buyers would have to contractually agree with the City on key terms of the sale and future operation of the property. Property owners have also voiced the concern that advance notice would slow down transactions and cause problems in some cases as a result. But in part the point is to slow down a market that moves too fast to make preservation work.²⁷

Although some local cities, are considering an advance notice requirement, none have adopted it to date. As of this writing, it appears that an advance notice requirement will likely be introduced this fall by a city councilmember in Minneapolis.

Related Legal Issues

²⁷ Some have also argued that an advance notice requirement (and presumably ROFR and OTP) would violate private contract rights by interfering with the ability of a buyer and seller to negotiate a sale. But Minnesota courts have determined that a party's constitutional right to contract will yield to a city's legislative action as long as the city's action is reasonable.

We're aware of only one case in which a statutory right of first refusal was declared unconstitutional. In *Manufactured Housing Communities of Washington v. State*, 13 P.3d 183 (Wash. 2000), the Court declared the state ROFR law affecting manufactured home parks to violate the state constitution takings clause. That clause, unlike either the U.S. or the Minnesota Constitution, prohibits private property from being taken for a private use. Washington Courts treat the provision very literally, so that taking private property and conveying it to another private party for a public purpose is viewed as violating the Washington Constitutional provision,²⁸ even though such transfers are routinely upheld under the U.S. Constitution.²⁹ Further, the Court held that the property taken was the owner's right to grant a first refusal right.³⁰ The U.S. Supreme Court has rejected this approach, holding that a takings analysis had to be applied to the whole of a property owners interest, not small pieces of it.³¹ The Massachusetts Supreme Court upheld a ROFR law against a takings challenge in *Greenfield Country Estates Tenants Assoc., Inc. v. Deep*, 666 N.E.2d 988 (Mass. 1996), representing the likely outcome outside of Washington State. If ROFR laws withstand federal and state constitutional challenges, then it is hard to see how OTP and Notice laws could constitute takings at all.

Additional Policies to Promote Preservation Sales

Three other ideas to encourage preservation acquisitions have been discussed and would be useful. First, it can be really useful for the city to develop a relationship with its NOAH owners; city staff do not want to be the last to know when major changes happen to NOAH buildings. The City of St. Paul, for example, is currently working on developing a NOAH inventory. Second, The City of St. Louis Park sponsored discussions on how to more effectively market preservation buyers to NOAH owners. The notion being explored is that an appeal could be made to owners nearing retirement to create a legacy for future residents by transferring their inventories to preservation buyers, akin to the Minnesota Public radio legacy idea. Several preservation buyers are working on such a campaign, with the idea being that cities could help promote the campaign with their NOAH owners. Finally, discussions have occurred around creating tax incentives to encourage preservation sales. For example, CommonBond has negotiated sales at a reduced purchase price, in which the owner takes a lower price in the form of a charitable deduction. Is there a way to encourage more of these "win/win" outcomes? This would probably require changes in state or federal tax law, however.

CREATING INCENTIVES FOR NOAH OWNERS TO KEEP THEIR BUILDINGS AFFORDABLE

²⁸ 13 P.3d at 190.

²⁹ See, for instance, *Kelo v. City of New London*, 545 U.S. 469 (2005) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

³⁰ 13 P.3d at 193.

³¹ *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 319 (2002).

Restraining rents on NOAH properties can be accomplished not only by getting more of those properties in the hands of mission driven housing providers but also by providing good reasons for existing owners to keep their rents affordable rather than taking full advantage of strong market conditions that allow for large and repeated rent increases.

The prime means under discussion to accomplish this goal is through an expanded use of the Minnesota Low Income Rental Classification program (LIRC), also commonly referred to as “4d.” This program provides a 40% tax break to rental properties which receive financial assistance from federal, state or local government, and whose owners agree to rent and income restrictions at 60% AMI and below on at least 20% of the units in a building. Mostly this program has been applied to subsidized rental properties, but as HJC pointed out in a 2015 report, local governments could easily extend it to NOAH properties by providing minimal financial assistance (as low as \$1) so long as owners agreed to the necessary rent and income restrictions.³²

At the time HJC issued its report in 2015, there existed a significant gap between the per unit per month tax savings with 4d and the amount the savings would have to be to get owners to sign up and agree to the rent and income restrictions. Therefore, we concluded that the 4d tax break would probably have to be combined with some additional financial incentive to attract substantial owner interest. But conditions have changed since then. With rising property values have come rising property taxes and increasing landlord concerns about the property tax burden. It now appears that the gap between the 4d savings and what landlords need to get interested in the program has narrowed. This year, Minneapolis rolled out a pilot program for 4d tax relief for NOAH properties and got a strong response. Owners are qualified for the program if they commit to at least 20% of the units at rents at 60% AMI or below, and the building has at least ten units. The City intends to expand the program in the coming year. A number of other cities have expressed similar interest in creating a “local 4d” program.³³

Note that this is an area where there could be a role for counties as well. Hennepin County, for example, has granted 4d tax status to several NOAH properties recently acquired by Aeon. There may be some value in county administered NOAH 4d programs, either because of limited local government capacity or because the 4d benefit could be combined with county programs, such as favorable financing for rental rehab or energy efficiency investments. The Minneapolis pilot program offers owners a menu of 4d only or 4d combined with rehab or energy efficiency investments.

These ideas also overlap with concerns on behalf of a number of cities that have NOAH properties perceived as being badly in need of physical rehab. Discussions continue among

³² http://hjcmn.org/docs/LISC_4d_final_report_1-9-2015.pdf

³³ Of course, there is no free lunch here. Expanded use of 4d reduces tax payments coming in, which shifts the tax burden to the rest of the tax base. For many cities the impact is negligible, but some smaller cities with limited tax bases have expressed concern about the impact of expanded 4d for their tax base.

metro cities on how to structure rehab programs that would attract owner interest. Minnesota Housing is considering extending its multifamily rehab program for Greater Minnesota, the Rental Rehabilitation Deferred Loan program,³⁴ to cover the metro area as well.

Note that 4(d) may also play a useful role in helping preservation buyers keep buildings affordable, so cities should be responsive to requests for investment of at least modest funds and 49d) agreements. Finally, 4(d) combined with city investments may be a way to encourage market rate purchasers to keep some of their units affordable – especially, affordable to housing choice voucher tenants. Relatively modest investments in these buildings, as non-amortizing loans repayable only when 4(d) is no longer in effect, could be attractive even to market rate buyers, as the City money would replace equity requirements.

MINIMIZING DISPLACEMENT FROM REDEVELOPMENT

Minimizing Displacement from Public Projects and Activities

Given the metro area’s very tight rental housing market, failure to come close to meeting the annual need for new affordable housing, and large backlog of severely cost burdened households, it is critical that public projects and activities minimize displacement where possible and provide adequate relocation assistance where displacement is necessary. Lower income households displaced by public projects typically face very large rent increases in the metro area’s difficult rental market. This section summarizes the federal public policy consensus on what relocation protections and assistance should be provided, discusses gaps in when such assistance is legally required, and suggests voluntary city policies which address those gaps.

Displacement and Relocation Assistance under the Uniform Relocation Act and Related Statutes

There are two considerations for local governments here. One is simply to make sure they are in full compliance with any relocation obligations their activities may trigger, but an additional consideration is to provide for relocation assistance in situations where the city or county is not legally obligated but where a clear and compelling need for assistance is present.

The federal act providing for Uniform Relocation Assistance, 42 U.S.C. §§ 4601-4655 (the URA), was adopted in 1970 after extensive study of the “inequitable distribution of hardship”³⁵ associated with federally funded projects. Under the statute, the Department of Transportation has adopted regulations implementing the URA at 49 C.F.R. Chapter 24. The statute and regulations have been regularly updated, most recently in 2014.³⁶ They represent a

³⁴ *Rental Rehabilitation Deferred Loan (RRDL)*, MINN. HOUSING, <http://www.mnhousing.gov/wcs/Satellite?c=Page&cid=1358905404900&pagename=External%2FPage%2FEXTStandardLayout> (last visited July 9, 2018).

³⁵ *Moorer v. HUD*, 417 F. Supp. 1261,1267 (W.D. Mo. 1976).

³⁶ For some reason, the updated relocation payment standards made effective as of 2014 by P.L.112-141 have not yet made it into the Dept. of Transportation’s regulations.

decades-long Congressional and federal agency consensus on the protections and compensation necessary to protect people involuntarily displaced by public action. Unfortunately, state statutes largely ignore a key requirement of the URA and no local government comes even close to providing URA protections. Key provisions of the URA are: 1) substantial advance notice of the need to move; 2) no one is required to move until referral to adequate replacement housing; 3) provision of relocation counseling services; 4) payment of moving costs; and 5) replacement housing payments. The maximum replacement housing payments are 42 months of increased rent, up to \$7,200, for renters and \$ 31,000 for a replacement home for homeowners. These payments can be increased over these maximums by the “last resort” provision of the URA if adequate replacement housing cannot otherwise be found.³⁷ Such increased payments are required with regularity in the metro area housing market, where rent increases after displacement from a lower rent apartment can easily eat up \$7,200 in a year or so.

There are six other statutes which might apply to metro area projects: Section 104(d) of the 1974 Community Development Act³⁸ requires that recipients of HUD CDBG and HOME funds have a Residential Anti-displacement and Relocation Assistance Plan. Under this Plan, any lower income person displaced by demolition or conversion of a lower income dwelling “in connection with” a CDBG- or HOME-assisted activity” may choose assistance under the URA or 104(d). Assistance required under 104(d) differs from the URA requirements by allowing displaced persons to choose assistance which reduces rental payments to 30% of income for 60 months or a somewhat similar payment to be applied to a purchase. These payments would be substantially more useful to low income metro area renters than URA payments to extremely low income households. Section 104(d) also requires replacement of lower income units lost to demolition or conversion. The replacement requirement is typically meaningful only for jurisdictions which are not otherwise regularly producing affordable housing. The Community Development Act and related regulations also require jurisdictions receiving CDBG and HOME funds to certify that they “will minimize displacement of persons as a result of assisted activities.”³⁹

Minnesota has a state URA, for situations in which no federal funds are involved, which incorporates the requirements of the federal URA.⁴⁰ Minn. Stat. §§ 469.126 Subd. 1 and 469.133 require that in City Development Districts, persons displaced must be relocated in accordance with the provisions of the state URA. This is the only state statute that requires URA-level protections when local funds cause displacement.

Minn. Stat. § 327C.095 Subds. 4 and 13 provide for at least a portion of the costs of moving a manufactured home or payment for at least a portion of the appraised value of a home that can't be moved when a manufactured home park closes.

³⁷ Pursuant to § 4626 of the Act.

³⁸ 42 U.S.C. § 5304(d) and regulations at 24 C.F.R pt. 42.

³⁹ 42 U.S.C. § 5304(a)(2)(A) and regulations at 24 C.F.R. §§ 42.325(a)(2), 91.225(a)(2), 570.606(a).

⁴⁰ MINN. STAT. §§ 117.50-117.56.

Finally, Minn. Stat. § 469.030 requires that an HRA must, before approving a redevelopment plan, be satisfied that families to be displaced will be temporarily relocated and that there is sufficient decent affordable housing for them to relocate to.

Gaps in Coverage of Relocation Requirements

Unfortunately, there may be no relocation requirements in connection with most locally funded government projects. The federal URA covers persons displaced as a direct result of acquisition, demolition, or rehabilitation of their homes by a federally assisted project.⁴¹ The state URA is more limited. It applies only when an agency with eminent domain powers acquires or demolishes a property.⁴² Unlike the federal statute, it requires the displacing activity to be “undertaken” by a public body. It does not generally apply when people are displaced by private actors even though their projects include public financing. One case decided under the state URA expanded relocation protections somewhat. The court in *In Re Wren*, 699 N.W.2d 758 (Minn. 2005), held the Richfield HRA responsible for URA protections for an owner whose home was acquired by a private developer. The Court held that the test for whether a public body had “undertaken” activities causing displacement was whether activities of the public body and the developers were sufficiently “intertwined.” The court held they were in that case because the HRA had planned and initiated the redevelopment project, selected and entered into a contract with the developer requiring the developer to pursue acquisitions in the area, and permitting the developer to request HRA use of eminent domain to acquire holdouts. It’s unclear the extent to which this “intertwined” test might extend to other publicly planned and subsidized projects. It would seem that the “but for” test required for approval of tax increment projects demonstrates that the project and the public financing are “intertwined” in that it requires a finding that the development would not happen without the financing.

The City Development District statute described above is the only one which applies URA requirements to projects carried out by private actors with public funding.⁴³ That leaves a huge gap in coverage, as the typical tax increment project, for instance, provides funding for acquisition and displacement, but does not require any relocation provisions. In the recent “Residence at Discovery Square” project in Rochester, for instance, low income residents were displaced for a tax increment-funded development with no relocation assistance at all, even though the project was going to generate several million in increment beyond what was needed by the developer.

Another gap results from city code enforcement-related efforts. The Minneapolis licensing ordinance, for instance, results in all of an owner’s licenses being revoked if two are revoked for cause.⁴⁴ The ordinance requires that residents be displaced when a license is revoked. In at least two recent cases, that has meant large numbers of tenants, living in housing that does not otherwise require displacement based on health and safety concerns, being

⁴¹ 49 C.F.R. § 24.2, definition of displaced person.

⁴² MINN. STAT. § 117.50; programs of area wide code enforcement are also covered, but that term referred to an obsolete HUD program; it’s not clear whether it still has meaning.

⁴³ MINN. STAT. §§ 469.126 subdiv. 1, 469.133.

⁴⁴ MINNEAPOLIS, MINN., CODE OF ORDINANCES § 244.1910(13)(a).

threatened with displacement. The City has regularly spent CDBG funds on these “problem properties,” but HUD has gone back and forth over the decades on whether Section 104(d) requires relocation caused by code enforcement-related activity. Such ordinances would appear to conflict with the CDBG requirement that displacement by CDBG-funded activities be minimized and certainly raise serious fair housing issues.⁴⁵

Local Relocation Policies Should Be Adopted

Minneapolis’ Relocation Policy may be as useful as any in the Metro area but even it falls short of providing URA protections. It calls for replacement housing payments, at least partially funded by the developer, of 24 months equal times the difference between the old rent and the lesser of the new rent or rent for comparable housing. This is significantly short of the 42 months URA rent, especially when URA payments are regularly increased based on the “last resort” provision.

If public funds are used to displace low income households, then the City should require URA levels of protection, otherwise the City’s activity adds to the huge number of low income households in the metro area paying far more than they can afford for housing.

Minimizing Displacement when No Public Funds Are Involved

How can cities influence private development causing displacement where no public funds have been provided? There are at least three ways this could happen. First, cities could call for displacement prevention commitments when developers seek land use approvals from cities. These opportunities typically are limited to new construction/redevelopment, however, and may less often apply to the kind of NOAH housing most at risk currently. Note, however, that new owners do sometimes need to seek additional land use or regulatory approvals (e.g., adding a swimming pool), and cities should be prepared to take advantage of the leverage this provides. Secondly, public officials should not underestimate informal intervention with respect to particular owners or properties. The quick action by Richfield city councilmembers with respect to Seasons Park (described above) in mobilizing support for a preservation acquisition was very effective. Finally, there are multiple examples from around the country where cities have exercised their traditional police powers to regulate displacement activities.

In addition to the range of policies requiring rights of purchase/advance notice of sale, cities have provided for relocation benefits for displaced residents and placed temporary limits on excessive rent increases or evictions without cause, designed to soften the blow when buildings get converted or upscaled. As described above, Chicago’s SRO ordinance is designed to encourage preservation acquisitions, but failing that, relocation benefits are provided.⁴⁶ Seattle entitles tenants to 90 days notice in the event of displacement caused by demolition, change of use, substantial rehabilitation, or removal of a use restriction (but apparently not the

⁴⁵ Providing relocation assistance to tenants displaced by code enforcement is not the only solution to the problem. The City of Brooklyn Park’s procedure for suspending rental licenses for failure to maintain the property allows current tenants to remain in place but bars the landlord from re-renting vacant units until the license is restored.

⁴⁶ CHI., ILL., MUNICIPAL CODE §§ 5-15-010 to 5-15-100.

imposition of unaffordable rent increases)⁴⁷. Low income tenants are eligible for a relocation assistance payment of \$2000,⁴⁸ shared equally by the landlord and the city.⁴⁹ Portland, Oregon provides that landlords must provide all tenants with 90 days notice, either of intent to evict without good cause or if the landlord seeks to increase rent by more than 5% in one year⁵⁰. In addition, as a temporary measure in response to the housing crisis, Portland enacted a requirement of the payment of relocation benefits of between \$2900 and \$4500 for any evictions without cause or rent increases of over 10% in a year⁵¹.

Legal Issues

In some cases these measures have created questions about the extent of the cities' legal authority to enact these policies. Several lawsuits in Oregon have helped somewhat to clarify these legal questions. Landlords challenged the 90 day delay on rent increases over 5% on the grounds that it was preempted by the state law limits on rent control. This is relevant here because Minnesota has similar limitation on local rent control measures.⁵² In the Oregon case, the city argued that the rent control statute bars limits on the amount of rent charged but not the notice period for rent increases. This case was mooted out, however, by a change in state law, so the issue was not decided. In another case arising out of Portland, the landlord argued that imposing relocation obligations in the case of no cause evictions or certain rent increases effectively amounted to rent control barred by state law. The Court of Appeals rejected that argument, holding that a local law is only preempted to the extent it cannot operate concurrently with state law. In this case, an owner could easily pay locally required payments and still comply with the lesser requirements of state law. The Court also rejected two other arguments of the landlord, holding that the relocation requirement did not amount to an unconstitutional impairment of contract, and that the City had the authority under its local powers to create a private right of action in state court for tenants to enforce the ordinance.⁵³

This last issue is particularly important for enforcement of these types of measures. A local government should have provisions to enforce any of its ordinances, of course, but there are good reasons to also empower tenants to enforce when their rights have been violated—particularly where cities enforcement is hampered or where cities are unaware of violations or where city enforcement can't fully restore tenants' rights and benefits. Broadly speaking, courts across the country are divided into three groups when it comes to the question of whether local governments can create private rights of action in state courts. One group of states permits this,

⁴⁷ SEATTLE, WASH., MUNICIPAL CODE § 22.210.120. Section 22.210.136 prohibits rent increases for the purpose of avoiding the application of Chapter 22.210.

⁴⁸ The amount of the payment increases annually. As of April 7, 2018, the amount is \$3,848. CITY OF SEATTLE DEP'T OF CONSTR. & INSPECTIONS, DIRECTOR'S RULE 11-2018 (2018), <http://www.seattle.gov/dpd/codes/dr/DR2018-11.pdf>.

⁴⁹ SEATTLE, WASH., MUNICIPAL CODE § 22.210.130.

⁵⁰ PORTLAND, OR., CITY CODE & CHARTER § 30.01.085(B)-(C).

⁵¹ PORTLAND, OR., CITY CODE & CHARTER § 30.01.085(B)-(C). The temporary measure was made permanent in March 2018. Portland, OR., Ordinance 188849 (Mar. 7, 2018), <https://www.portlandoregon.gov/phb/article/676253>.

⁵² MINN. STAT. § 471.9996.

⁵³ For a more detailed analysis of the Portland court rulings, contact www.hjcmn.org.

one group bars it, and one group of states has not clearly resolved the question. Minnesota falls into this last group.⁵⁴ Note, however, there are several examples of where local ordinances have created these rights, which to our knowledge, have not been legally challenged to date.

Locally, the City of St. Louis Park has enacted a Tenant Protection Ordinance which provides that when NOAH properties are sold, the new owner must provide 90 days notice of evictions without cause, rescreenings of tenants, or rent increases, or else pay relocation benefits if the owner does not want to wait 90 days.⁵⁵ NOAH properties are defined as those where at least 18% of the units' rents are affordable to households at 60% AMI. Relocation payments are set at \$2600-4100, depending on the size of the unit. The ordinance is enforceable through a penalty of \$500 plus the applicable relocation payment, which is to be passed on to the tenant.⁵⁶

Several other cities in the Metro area are considering ordinances modeled closely on the St Louis Park ordinance.

Maximizing the Effectiveness of Public Use Restrictions

Government agencies providing public funding to housing developments typically require commitments to affordability restrictions, through contracts and often through restrictive covenants filed against the property. The extent of the affordability restrictions (how many units, at what affordability levels) and their duration over time usually depend upon the extent of the public funding; the more funding, the greater the restrictions the public agency will expect. Local governments may be directly involved through funding they have provided, but they should also pay attention to threats to subsidized housing that they are not funding.

At the federal level, private owners of buildings with Section 8 contracts (project-based, as opposed to tenant-based) will have opportunities to “opt out” or non-renew their Section 8 contract. When owners opt out, they are required by federal law to provide a one year notice to the State and to the tenants. During that year Minnesota Housing typically engages the owner in conversation and in some cases, the owner decides to accept assistance from Minnesota Housing and withdraw the opt out. In other cases, the owner proceeds with the opt out. In that event, the tenants receive a type of Tenant Protection Voucher called an Enhanced Voucher, which usually allows the tenant to stay despite the opt out. Over time, however, due to the opt out, the building typically becomes no longer available as a home for the very low income tenants typically supported by the Section 8 program. For that reason, it is important to avoid opt outs wherever possible.

There can be a role for local governments in this process. First, cities and counties should maintain a complete list of developments with affordability restrictions, the type of

⁵⁴ “The City and the Private Right of Action,” Paul Diller, 64 Stanford Law Review 1109 (2012).

⁵⁵ ST. LOUIS PARK, MINN., Ordinance 2534-18 (Apr. 16, 2018).

⁵⁶ Minnesota statutes 471.9996 prohibits rent control, subject to certain exceptions. The TPO approach does not violate this statute, however, because the landlord is free to raise the rent at any point—as long as he is willing to pay relocation benefits. The argument has also been made that this statute bars limits on the amount of rent that can be charged, but not on the period of time required for a notice of rent increase. We are unaware of this argument having been resolved by a court.

restrictions that exist, and when they are due to expire.⁵⁷ Second, local officials can play a useful role in persuading owners to not opt out. There have been several occasions where local officials directly intervened with the owner or participated in coalitions seeking to influence the owner that produced positive results. Third, the city or county should be alert to opportunities presented by virtue of its own funding. With respect to funding previously provided, the expiration of the funding and the restrictions can provide an opportunity in some cases to reopen discussions about extending funding and restrictions. Recently the City of Eden Prairie took advantage of the opportunity to extend 15 year tax increment financing (TIF) restrictions on several properties by adding as a condition the owner's commitment to accept Section 8 Housing Choice Vouchers. A second lesson from the Eden Prairie experience is that the TIF restrictions should have been longer in the first place. Our extensive experience with preservation of federally subsidized projects leads us to believe that 15 years is never long enough for affordable housing use restrictions. The facts that developers are never entitled to TIF funding and that Cities have to find that a project could not proceed but for the TIF funding gives cities a lot of leverage.

Low Income Housing Tax Credit (LIHTC) restrictions can also be temporary. A few LIHTC projects have been able to exercise their rights to opt out at year 15 through the Qualified Contract process, but in most cases this will not become an issue until projects reach the end of their 30 year use restrictions. This time will come for many projects in the early to mid 2020s. In some cases, projects will seek further tax credits extending their affordability, which is particularly likely in the case of mission-driven owners. In other cases, owners will simply want to convert to market rate properties. The consequences from expiration of rent and income restrictions will vary. In a number of cases, the LIHTC rents will probably already be at market levels for that community, so there will not be an immediate impact on rents due to the expiration of restrictions. However, in some cases, particularly in higher income communities, rents at expiration may be below market, threatening the tenants with significant increases. Equally importantly, with the expiration of LIHTC restrictions comes the expiration of the owner's obligation to accept Section 8 vouchers, which potentially shrinks the number of rental opportunities in the community for voucher-holders.

The implications from the wave of tax credit expirations coming in the mid-2020s and beyond is a larger problem that needs further attention from multiple layers of government and policymakers. Cities and counties, however, should be alert to opportunities they may have to induce owners to extend rent and income restrictions or at the very least, willingness to continue taking Section 8.

Finally, restrictions accompanying local funding such as TIF or housing revenue bonds will also expire. Cities need to pay attention to these and consider opportunities to extend and renegotiate terms. Public funders should also review the use restrictions that accompany new

⁵⁷ Maintaining good records in the case of larger cities that have been funding affordable developments in a number of ways for a long time can be challenging. A city or county does not want to be in a position where the expiration of its use restrictions come as a surprise, or where they expire without the agency even being aware. This is all apart from the challenge of ensuring ongoing compliance with restrictions over what can be a 30 year period.

funding decisions: is the funder getting as much as is feasible to further public interests in exchange for funding? Shouldn't restrictions be for 30 years rather than 15 years, for example? New restrictions should also include not only a commitment to accept Section 8, which necessarily requires keeping rents within Section 8 limits, but also affirmative marketing to Section 8 and public housing waitlists, such as Minneapolis does.⁵⁸ Hennepin County requires a 30 year commitment for housing projects it provides, and awards additional points in its competitive scoring for projects committing to longer than 30 years.

Minneapolis has one of the more detailed policies in this area.⁵⁹ Affordable housing requirements apply to projects developed on property purchased from the city or with city financial assistance (including TIF, land write-downs, and bond issuance). Owners must accept Section 8 Housing Choice Vouchers, but also HOME tenant based assistance and Group Residential Housing. The demolition or removal of SRO housing for covered projects is generally prohibited.⁶⁰

One of the most challenging displacement problems arises when large multifamily complexes decide to no longer accept Section 8 Housing Choice Vouchers. Local Section 8 programs will typically attempt to engage owners to reconsider these decisions but are limited by a lack of tools to address the problem. Cities and counties should consider a combination of carrots and sticks to address this issue. A city, for example, could offer an owner an incentive package such as a 4d tax break or tax abatement, with perhaps funds to write down rents on a share of the units for a period of time, in exchange for an ongoing commitment to take Section 8. Cities should also consider adopting ordinances protecting against owners discriminating against Section 8 voucher-holders, such as was recently adopted in Minneapolis.⁶¹

PROTECTING MANUFACTURED HOME PARKS

⁵⁸ Minneapolis' Unified Housing Policy also provides for a penalty on future LIHTC applications if Section 8 tenants are displaced or the owner violates CPED policies. The policy also commits the City staff to investigating LIHTC developments where Section 8 voucher-holders are significantly underrepresented.

⁵⁹ Amended and Restated Unified Housing Policy of the City of Minneapolis (12-15-17).

⁶⁰ The Unified Housing Policy also establishes priorities for preservation : first, federally subsidized rental housing; second, LIHTC or locally assisted housing reaching the end of the affordability period, and NOAH housing at risk of experiencing significant rent increases. Section 5.

⁶¹ The Minneapolis ordinance has been challenged in the *Fletcher* case where the trial court recently enjoined the ordinance on the grounds it violated equal protection and substantive due process. The Court found that because violating the ordinance unfairly painted the housing providers as "unfair discriminators", the City's ordinance was arbitrary and violated the Constitution. The Court also found that the exemption for owner occupied duplexes was not rationally related to a genuine distinction relevant to the purpose of the law. The City is planning to appeal the decision. While the appeal process is unfolding, cities should look closely at the trial court's reasoning, which explicitly suggests there may be ways to structure this protection so it does not run afoul of what the court thought was the defect in the Minneapolis ordinance. One suggestion proposed by the Court was to put a requirement to accept vouchers into the city's licensing ordinance.

Manufactured home parks are an important affordable housing resource that are increasingly at risk. In a number of cases, these communities are located in suburban areas where encroaching development pressures can lead to park closure and redevelopment.⁶² Transportation projects can threaten all or parts of manufactured home communities as well. In other cases, park owners have failed to make necessary infrastructure investments leading to systems that are either failing or require large investment due to deferral. There are actions cities and counties can take, however, which can help protect these assets and increase the likelihood they will remain affordable homes well into the future.

The first thing to consider is what signals the city is sending the development community with respect to these land uses. In its 2008 comprehensive plan, St. Anthony repeatedly recommended the Lowry Grove manufactured home park as an area of likely redevelopment. This sent a signal to developers which led to multiple bids to purchase which resulted in the closure of the park for redevelopment, displacing approximately a hundred households. A more constructive approach would mean a statement from cities in their comprehensive plans that manufactured home park communities are an asset to the community which the city values.

The city could go farther with its land use policies, however. In Washington State, several cities have enacted local zoning ordinances which bar the rezoning of a manufactured home park unless there is no longer an economically viable means to operate as a manufactured home park. Such a protection at least ensures that when redevelopment threatens a manufactured home community, the City Council will have some say. This ordinance was challenged by a park owner and has been upheld as a valid measure by the Ninth Circuit Court of Appeals.⁶³

When a MH park is closed pursuant to a nine months notice from the park owner, state law provides for partial relocation benefits for displaced residents. The local governing body plays an important role in the closure process.⁶⁴ If the closure requires a variance or zoning change, the local agency must notify all park residents. Upon receipt of the nine month park closure notice the local planning agency must request the governing body to hold a public hearing. That hearing is an opportunity for the local government to review the closure statement and consider the impact of the closing on the park residents and the park owner. This is an important opportunity for the local government to ensure the notice is in compliance with the law (which is not always the case) and that the residents are adequately protected. The locality also has responsibility for appointing a neutral third party to serve as paymaster and arbitrator when it comes to relocation payments to residents. The statute establishes a Trust Fund to cover relocation payments, which is funded by contributions from all park owners and residents. The other authority the local government has is to provide for additional compensation for displaced residents where appropriate. The locality cannot increase the park owner's financial obligation for relocation payments but it can impose additional contributions on other parties including the

⁶² Greta Kaul, *Trailer Parks May Be the Twin Cities' Most Endangered Form of Affordable Housing*, MINNPOST (May 31, 2018), <https://www.minnpost.com/politics-policy/2018/05/trailer-parks-may-be-twin-cities-most-endangered-form-affordable-housing>.

⁶³ *Laurel Park Community LLC v. City of Tumwater*, 698 F 3d 1180 (9th Cir. 2010).

⁶⁴ Minn. Stat. 327C.095.

local government itself. This can be important because the Trust Fund payments may not be adequate to ensure adequate relocation for some residents.

The two other ways that cities and counties have provided assistance to these communities is through park infrastructure investments and through financial assistance to homeowner residents either to fix up their homes or down payment assistance to purchase newer manufactured homes. Hennepin County, for example, provides homeowner rehab loans (forgiveable if you remain in the home) which manufactured home park residents are eligible for.

PROTECTING LOWER INCOME HOMEOWNERS THREATENED BY RISING PROPERTY TAXES

From our interviews with local officials for this report, it does not appear that low income homeowners are threatened by displacement due to unaffordable property taxes to the same degree tenants are threatened by escalating rents. Still, there are many individual instances where fixed income and lower income homeowners feel stretched by rising property taxes, particularly if they live in neighborhoods with rising values.

Cities or counties could in theory create tax relief measures for people in this situation, but we recommend that the first course of action is to make sure homeowners are taking full advantage of the multiple state programs designed to address unaffordable property taxes. Set out below are a number of programs which could help people. To date, we have not discovered any public education materials that collect all these programs and provide citizens with a simple, easy to understand handout which cities and counties could provide their residents. If in fact no such materials exist, we recommend that they be created.

Minnesota offers a combination of credits, refunds, exclusions, and deferrals to limit the impact of property taxes on low-income residents. Cities and counties could explore other tools, like the targeted partial deferral of property tax increases proposed by the “Save Our Homes” campaign in 2010. However, funding relief programs at the state-level, rather than at the municipal or county level, avoids shifting the tax burden to other local taxpayers, enables residents of under-resourced areas to benefit from aid beyond what the locality could offer, and avoids inequities among communities.⁶⁵ Taxpayers receive the benefit of some programs, such as tax credits, more or less automatically. For others, taxpayers must file paperwork with either the local county assessor or the Commissioner of Revenue. Fair Housing Implementation Council members should conduct public outreach to increase participation in such programs.

Minnesota residents that own and occupy their homes should confirm that their property is classified as a residential homestead property.⁶⁶ If not, eligible homeowners should file an

⁶⁵ Daphne A. Kenyon, Adam H. Langely & Bethany P. Paquin, *Property Tax Relief: The Case for Circuit Breakers*, Land Lines, Apr. 2010, at 8, 9.

<https://www.lincolnst.edu/publications/articles/property-tax-relief>

⁶⁶ MINN. DEP’T OF REVENUE, PROPERTY TAX FACT SHEET 10 (2018).

http://www.revenue.state.mn.us/propertytax/factsheets/factsheet_10.pdf

application with the local county assessor. Once approved, homeowners do not need to apply again. The property remains homesteaded until it is sold, transferred, or no longer used as the owner's homestead.

Once approved for homestead status, homeowners can benefit from the lower class 1a tax rate.⁶⁷ The Residential Homestead Classification reduces the property tax classification rate on the first \$500,000 of market value to 1.00%. Any market value exceeding \$500,000 has a class rate of 1.25%.

Certain blind and/or disabled owner-occupants may qualify for the even lower class 1b rate.⁶⁸ The Special Homestead Classification reduces the property tax classification rate on the first \$50,000 of market value to 0.45%. Any market value exceeding \$50,000 is treated the same as class 1a property. To receive the classification, eligible homeowners must apply with the county assessor.⁶⁹ Once approved, the taxpayer does not need to apply again. Unlike other classifications, the class 1b homestead follows the individual from one property to another.

Homestead status also allows taxpayers to benefit from the Homestead Market Value Exclusion.⁷⁰ The exclusion reduces the taxable value of homesteads with market value of \$76,000 or less by 40%, yielding a maximum exclusion of \$30,400. For homesteads valued between \$76,000 and \$413,800, the exclusion is reduced by 9% of the value over \$76,000. Homesteads that exceed \$413,800 in value do not qualify for the exclusion.

Alternatively, the Disabled Veteran Homestead Valuation Exclusion offers market value exclusion for homestead properties of honorably discharged veterans with service-connected disabilities with disability ratings of 70% or more.⁷¹ Surviving spouses and primary family caregivers can also receive the benefit in some circumstances. Depending on the disability rating, veteran homesteads qualify for market value exclusions of up to \$150,000 or up to \$300,000. Eligible taxpayers must apply with the county commissioner by July 1 to claim the exclusion the following year.⁷² Qualifying properties are not eligible for the preferential 1b classification.⁷³

⁶⁷ MINN. DEP'T OF REVENUE, PROPERTY TAX ADMINISTRATOR'S MANUAL (2017), module 3, at 5. http://www.revenue.state.mn.us/local_gov/prop_tax_admin/education/ptamanual_module3.pdf

⁶⁸ MINN. DEP'T OF REVENUE, PROPERTY TAX ADMINISTRATOR'S MANUAL (2017), module 3, at 6. http://www.revenue.state.mn.us/local_gov/prop_tax_admin/education/ptamanual_module3.pdf

⁶⁹ MINN. DEP'T OF REVENUE, PROPERTY TAX ADMINISTRATOR'S MANUAL (2017), module 3, at 7. http://www.revenue.state.mn.us/local_gov/prop_tax_admin/education/ptamanual_module3.pdf

⁷⁰ MINN. DEP'T OF REVENUE, PROPERTY TAX ADMINISTRATOR'S MANUAL (2017), module 2, at 143.

http://www.revenue.state.mn.us/local_gov/prop_tax_admin/education/ptamanual_module2.pdf

⁷¹ MINN. DEP'T OF REVENUE, PROPERTY TAX ADMINISTRATOR'S MANUAL (2017), module 2, at 124.

http://www.revenue.state.mn.us/local_gov/prop_tax_admin/education/ptamanual_module2.pdf

⁷² MINN. DEP'T OF REVENUE, PROPERTY TAX ADMINISTRATOR'S MANUAL (2017), module 2, at 125.

http://www.revenue.state.mn.us/local_gov/prop_tax_admin/education/ptamanual_module2.pdf

Homeowners can also appeal their classification and valuation. Each spring, the county assessor's office sends property owners a Notice of Valuation and Classification. The notice indicates the classification of the property, the estimated market value, and the taxable market value after any exclusions. It also contains information about the process for appealing the classification and valuation. Taxpayers have the option of appealing to the Local Board of Appeal and Equalization or going directly to the Minnesota Tax Court.

In addition, the state offers two property tax refunds to homeowners.⁷⁴ Homeowners may qualify for either or both in a particular year. To receive the refund(s), taxpayers must complete form M1PR when they file their state income taxes.⁷⁵ The Homestead Credit Refund, a circuit breaker program, aims to prevent property taxes from exceeding homeowners' ability to pay. The benefit increases in inverse proportion to income, with multiple thresholds and brackets determining the amount of the refund.⁷⁶ Homeowners with household income below \$110,650 can receive a refund of up to \$2,710.

The Refund for Significant Property Tax Increases (Special Tax Refund) is a targeted refund.⁷⁷ Though not connected to income, the refund helps insulate homeowners from sudden increases in property tax.⁷⁸ Homeowners whose tax on a homestead property increased by more than both 12% and \$100 over the previous year can receive a refund of 60% of the increase above the greater of the 12% or \$100 minimum, not to exceed \$1,000. The net tax after the refund becomes the basis for calculating the targeting refund the following year. As a result, the targeting refund phases in the large increase over several years.

Finally, the Senior Citizen Property Tax Deferral (SCPTD) program allows some residents to postpone payment of a portion of property taxes and special assessments.⁷⁹ Under the program, people age 65 or older, with total household income \$60,000 or less, can defer a portion of their property tax. Participating homeowners pay no more than 3% of their household

⁷³ MINN. DEP'T OF REVENUE, PROPERTY TAX ADMINISTRATOR'S MANUAL (2017), module 2, at 139.

http://www.revenue.state.mn.us/local_gov/prop_tax_admin/education/ptamanual_module2.pdf

⁷⁴ One, the Homestead Credit Refund, is also available for renters.

⁷⁵ *Filing for the Homestead Credit Refund*, MINN. DEP'T OF REVENUE, http://www.revenue.state.mn.us/individuals/prop_tax_refund/Pages/Electronic_Filing_for_the_Property_Tax_Refund.aspx (last updated Feb. 22, 2018).

⁷⁶ MINN. DEP'T OF REVENUE, PROPERTY TAX ADMINISTRATOR'S MANUAL (2017), module 6, at 35.

http://www.revenue.state.mn.us/local_gov/prop_tax_admin/education/ptamanual_module6.pdf

⁷⁷ MINN. DEP'T OF REVENUE, PROPERTY TAX ADMINISTRATOR'S MANUAL (2017), module 6, at 36.

http://www.revenue.state.mn.us/local_gov/prop_tax_admin/education/ptamanual_module6.pdf

⁷⁸ The increase cannot be due to improvements made to the property by the homeowner.

⁷⁹ MINN. DEP'T OF REVENUE, PROPERTY TAX ADMINISTRATOR'S MANUAL (2017), module 6, at 38.

http://www.revenue.state.mn.us/local_gov/prop_tax_admin/education/ptamanual_module6.pdf

income in property taxes. Importantly, the deferral operates as a low-interest loan from the state, not as a tax forgiveness program. A lien in the amount of the deferred taxes, plus interest,⁸⁰ attaches to the property, and must be repaid when the property is sold or when the estate is settled. Taxpayers meeting the qualifications may apply to the Commissioner of Revenue on or before July 1 for inclusion into the SCPTD program in the following year.

We suggest the role for cities and counties in this area is simply to make this information easily available to its citizens.

EXTENDING JUST CAUSE PROVISIONS/JUST CAUSE EVICTION

One of the anti-displacement ordinances FHIC jurisdictions have been exploring is what is known as “just cause eviction.” While this name is a bit misleading, as will be explained below, its purpose is to address what has become a commonplace occurrence in private landlord/tenant relationships – a failure to renew a lease for no stated reason, or no reason whatsoever. While this seems innocuous, this has resulted in nonrenewals for retaliatory purposes, as well as nonrenewals in order to “rescreen” tenants when ownership changes hands, resulting in the loss of housing for historically lease compliant tenants.

Current Minnesota law, as detailed below, leaves tenants in a precarious position if they receive a notice of nonrenewal or notice to terminate tenancy – they can either move quickly (usually within 30 to 60 days), or they can assert a defense in court if they believe the nonrenewal was for retaliatory or discriminatory reasons. Both are difficult and potentially risky for a tenant, particularly tenants needing affordable housing in a region that has an extremely tight rental market. It is unlikely that any headway could be made on this type of legislation at the state level, with a polarized legislature and very different concerns in greater Minnesota than in the larger metro areas. Cities are in the best position to recognize whether tenant protections are needed in their jurisdiction, and what are the best solutions to address their individualized issues.

Current Minnesota Law

During the term⁸¹ of a lease, private landlord can generally terminate the tenancy for two reasons – nonpayment of rent or a breach of the lease. However, current Minnesota law does not require private landlords to provide a reason for *nonrenewal* of a tenancy at the end of a term. As a result, landlords can – and do – refuse to renew a tenant’s lease for any (nondiscriminatory and non-retaliatory⁸²) reason or for no reason. This is in contrast to tenants in certain federally

⁸⁰ The interest rate may be adjusted annually but does not exceed 5 percent.

⁸¹ Terms can vary, though typically they are either for one year or month-to-month.

⁸² Minnesota Statute 504B.285 provides a defense to eviction when the landlord terminates a tenancy by notice to quit, increases rent, or decreases services in retaliation against a tenant’s good faith attempt to enforce the tenant’s rights. However, in order to raise the defense, an eviction action needs to be filed by the owner, a risk many tenants are not willing to take considering the damage an eviction filing can have on finding future housing.

subsidized housing, such as public housing, project-based Section 8, and Low-Income Housing Tax Credit properties, who have protections against nonrenewal without good cause.

Ordinances that are commonly known as “just cause eviction” would extend the rights currently afforded to tenants living in federally subsidized housing to those living in private housing. In other words, private landlords would have to give a “good cause” reason to not renew a lease at the end of a term, similar to how they would have to during the term of the lease. Minnesota Statute 504B.135 prescribes the process for terminating a tenancy at will but does not address the reasons why a party may terminate. As such, a city ordinance identifying acceptable reasons for termination would likely not conflict with state law.

Opponents argue that just cause ordinances will tie landlords up in the court system. However, the name “just cause eviction” is a misnomer in that it does not require court action. While “eviction” and “termination/ nonrenewal” are used interchangeably when referring to ending a tenant’s lease, they are actually two very different actions. Understanding the difference is critical to understanding the consequences of each.

An “eviction action” is a formal action taken by a housing provider, filed in court, demanding determination of possession of the property by the court. It generates a court record, and therefore appears on tenant screening report searches, as it is public data. It formerly was referred to as an “unlawful detainer”, or “UD”. A “termination” or “nonrenewal” of a lease is simply an action taken by a housing provider to end a tenancy. This is required to be in writing, but does not implicate a court. Because it is not a court record, it does not appear on tenant screening reports, and is generally considered a private matter.

To refer to just cause protections as “just cause eviction” is inaccurate in that they do not relate to any court action. Instead, a just cause ordinance would state that a private housing provider could no longer refuse to renew a lease or terminate a lease at the end of the term for no reason. A lease could only be terminated – or not renewed – if there was a “good cause” to do so. The just cause requirement is, in effect, an extension of the protections already afforded to private housing tenants during the term of the lease. Even with a just cause requirement, landlords may still initiate formal eviction proceedings if a tenant rejects the owners reasons for termination and holds over (stays in the property past the noticed vacate date) following receipt of a notice of termination or nonrenewal. In that case, the existence of cause meeting the standards of the ordinance would be litigated.

Recent scholarship has drawn attention to the prevalence and detrimental effects of both formal evictions and lease terminations, sometimes known as “informal evictions”. Dr. Matthew Desmond, Professor of Sociology at Princeton University and author of the Pulitzer Prize winning book, *Evicted: Poverty and Profit in the American City*, emphasizes the importance of addressing both formal and informal evictions.⁸³ The Milwaukee Area Renters Study (MARS)

⁸³ Andrew Flowers, *How We Undercounted Evictions by Asking the Wrong Questions*, FIVETHIRTYEIGHT (Sept. 15, 2016, 10:02 AM), <https://fivethirtyeight.com/features/how-we-undercounted-evictions-by-asking-the-wrong-questions/>

found that informal evictions accounted for twice as many forced moves as formal evictions.⁸⁴ Recent studies of eviction trends in Minneapolis and Greater Minnesota have focused exclusively on formal eviction, citing a lack of data sources tracking nonrenewals or lease terminations. According to a 2016 report, over 3,000 evictions are filed in Minneapolis each year.⁸⁵ Another report found that approximately 16,000 evictions were filed in Minnesota in 2017.⁸⁶ Anecdotal evidence suggests that the prevalence of lease terminations and nonrenewals in the metro area would mirror the findings of the MARS study.⁸⁷

In addition to the quantitative data, qualitative data from legal services agencies also bear out the need to consider extending good cause protections to the private market. In 2015, the Crossroads Apartment complex in Richfield, a multi-building community with almost 700 households, was sold. All residents were given notice that their leases would not be renewed, but they were told that they could reapply under the new screening criteria. Residents who had been lease compliant and were able to afford the new rents were denied the ability to stay in their apartments because they were not able to meet new credit or rental history standards.

Legal services staff have also relayed stories of retaliatory nonrenewal notices because of tenants contacting inspections or requesting repairs be made. While there are anti-retaliation laws in Minnesota's housing statutes, they are only able to be raised as a *defense* to an eviction action being filed. In other words, in order for a tenant to claim that a nonrenewal was due to retaliation, they would need to stay past the vacate date (hold over), have an eviction action filed against them, and then appear in court to raise retaliation as a defense to the eviction. According to legal services staff, most tenants are not willing to risk an eviction on their record in order to raise a retaliation defense, and instead simply move out.

The City's Role in the Process

Where cities choose to extend just cause protections to tenants, they are simply adopting an ordinance that sets the standard for determining good cause (valid reasons for lease termination). In any given eviction case, the City plays no role in determining just cause. In the event the tenant and landlord cannot ultimately agree on a resolution, it is up to the local eviction court to determine if just cause exists. Once the just cause ordinance is adopted, the City plays no further role in the process, nor does it incur any administrative costs.

Just Cause Protections in Other States (and Countries)

⁸⁴ Andrew Flowers, *How We Undercounted Evictions by Asking the Wrong Questions*, FIVETHIRTYEIGHT (Sept. 15, 2016, 10:02 AM), <https://fivethirtyeight.com/features/how-we-undercounted-evictions-by-asking-the-wrong-questions/>

⁸⁵ MINNEAPOLIS INNOVATION TEAM, EVICTIONS IN MINNEAPOLIS 2 (2016).

[http://innovateminneapolis.com/documents/Evictions in Minneapolis Report.pdf](http://innovateminneapolis.com/documents/Evictions%20in%20Minneapolis%20Report.pdf)

⁸⁶ HOME LINE, EVICTIONS IN GREATER MINNESOTA 2 (2018). <https://homelinemn.org/wp-content/uploads/2018/06/Evictions-in-Greater-Minnesota-Report-with-Appendix.pdf>

⁸⁷ HOME LINE, EVICTIONS IN GREATER MINNESOTA 4 (2018). <https://homelinemn.org/wp-content/uploads/2018/06/Evictions-in-Greater-Minnesota-Report-with-Appendix.pdf>

Cities around the country have explored just cause eviction ordinances as an anti-displacement tool.⁸⁸ Though they vary, eligible causes typically include nonpayment of rent; crimes on site; lease violations; denying reasonable access to make repairs; renovation or demolition; and conversion to non-rental use.⁸⁹ The extent of the protections also vary within and among the states and around the world. Some states, such as New Jersey and New Hampshire provide protection for all residents. The District of Columbia and cities in California, Maryland, New York, Washington, and Oregon do locally as well. Others, such as Rhode Island, Massachusetts, and Connecticut, offer protection only to a subset of vulnerable tenants.⁹⁰ Interestingly, almost all western European countries restrict evictions “without grounds” for a period of months or years.⁹¹ Nine countries prohibit such evictions indefinitely.

Policymakers often couple just cause protections with other tenant protection measures. Ideally, rent stabilization measures would bolster the effectiveness of just cause protections. Without such measures, landlords can evade eviction restrictions by raising the tenant’s rent to a prohibitive amount. However, Minnesota Statute 471.9996 prohibits city governments from adopting rent control unless the “ordinance, charter amendment, or law that controls rents is approved in a general election.” Nevertheless, FHIC members should consider local just cause ordinances to address issues cited above. Neither New Hampshire nor New Jersey has statewide rent control, and many cities offer just cause protections in the absence of rent stabilization.⁹²

FHIC members could also pursue other complementary measures. For example, a proposed Boston ordinance would have required landlords or foreclosing owners seeking to evict tenants to send any notice to quit to the City of Boston’s Office of Housing Stability within two days of sending it to the tenant.⁹³ Such reporting requirements allow proactive outreach by city

⁸⁸ While interest in just cause protections has increased recently, the concept has its (American) foundations in a 1921 Supreme Court decision upholding the District of Columbia Rents Act which prohibited a landlord from evicting a tenant, even after the expiration of a lease, without other good cause. *Block v. Hirsch* 256 U.S. 135 (1921).

⁸⁹ HOME LINE, ISSUE BRIEF: JUST CAUSE EVICTION (2015).

⁹⁰ Rhode Island and Massachusetts require just cause for the eviction of tenants in foreclosed residential properties. R.I. Gen. Laws § 34-18-38.2. Mass. Gen. Laws Ch. 186A. Connecticut requires just cause for eviction of tenants in buildings with 5 or more units or in manufactured housing who are 62 years or older, blind, or physically disabled. Conn. Ch. 832 Sec. 47a-23c.

⁹¹ SHELTER, TIME FOR REFORM: HOW OUR NEIGHBORS WITH MATURE PRIVATE RENTING MARKETS GUARANTEE STABILITY FOR RENTERS. (2016). https://england.shelter.org.uk/data/assets/pdf_file/0005/1289615/Time_for_reform_FINAL.pdf

⁹² URBAN HABITAT, STRENGTHENING COMMUNITIES THROUGH RENT CONTROL AND JUST-CAUSE EVICTIONS 3 (2018). https://urbanhabitat.org/sites/default/files/UH_2018_Strengthening_Communities_Through_Rent_Control_0.pdf

⁹³ The Boston City Council approved the ordinance in 2017 after removing the just cause requirements. A home-rule petition, the ordinance failed to get the required State approval in 2018. Meghna Chakrabarti & Jamie Bologna, *How Boston’s Big Attempt at Rental Law Reform Failed*, WBUR, May 16, 2018, <http://www.wbur.org/radioboston/2018/05/16/jim-brooks-housing-act-recap>.

government to share information and resources that may allow tenants to avoid eviction and displacement. They also allow enable real-time data collection to better understand where and why evictions are happening. Other ordinances connect just cause to relocation benefits. For example, San Francisco’s ordinance requires landlords to provide relocation benefits when they evict tenants for a subset of the just causes.⁹⁴ Uniquely, Portland allows no-cause evictions and non-renewals but only when landlords pay relocation fees.⁹⁵

Challenges to Just Cause Protections

There are many critics of extending just cause protections. The primary arguments for not passing just cause ordinances revolve around two issues – first, that just cause is not needed; and secondly, that it is an undue burden for housing providers.

Critics argue that just cause protections, particularly in a state that does not allow rent control, is not needed nor effective in reducing displacement of low income tenants. Opponents point to the fact that the majority of evictions are filed because of nonpayment of rent, a “just cause” for termination of tenancy, rather than retaliation or other issues that just cause protection would attempt to eradicate. However, as mentioned above, just cause protections are not directed at formal evictions, but are targeted at the “informal” lease termination or nonrenewal, the cases where court is not implicated. These are the cases where retaliation is most prevalent, and they are unlikely to make it to a courtroom. It is hard to estimate how many households this would affect, since it is hard to collect data on private housing provider notices of termination; however, the qualitative data from legal service providers demonstrates that the fact that a housing provider can give notice to tenants of a termination of lease without the requirement of a reason has a chilling effect on tenants asserting such rights as contacting inspections or making repair requests.

The second issue that opponents raise is that requiring good cause to end a lease may have the effect of housing providers taking less risks in renting to tenants that may not meet all screening standards. Providers argue that the ability to give a notice to terminate or not renew a lease without a reason allows an “out” when a tenant is not working out well, there are personality conflicts, or there are other issues that may not rise to the level of “good cause,” but that make it a difficult working relationship. If a city opts to create a just cause protection ordinance, there may be additional incentives that cities can provide to encourage housing providers to have more lenient screening standards, including Landlord Mitigation Funds, such as the one in Minneapolis. There are few counters to the fact that the ability to give a notice of nonrenewal without a reason is easier for housing providers; however, proponents of just cause protections would argue that it shouldn’t be “easy” to require a family to vacate; instead, particularly in a very low vacancy market, a reason should be required in order for households to

⁹⁴ CAREY LUCIA DUNFEY, *WE SHALL NOT BE MOVED: ADVOCACY AND POLICY IN A RAPIDLY CHANGING BOSTON* 45 (2017).

<https://dspace.mit.edu/bitstream/handle/1721.1/111387/1003291719-MIT.pdf?sequence=1>

⁹⁵ Portland Housing Bureau, *Mandatory Renter Relocation Assistance*, CITY OF PORTLAND OREGON, <https://www.portlandoregon.gov/phb/74544>.

lose their homes. Additionally, based on housing provider feedback, cities can adjust the list of “just cause” to reflect what is needed in their specific jurisdiction.

Critics also suggest that just cause protections will lead to more tenants fighting the termination of their leases, leading to more eviction filings. We do not currently have data to support or deny this assertion. However, it is likely that most cases would not go to court if there was a stated reason that comported with the ordinance. There would be cases where a housing provider’s stated cause was weak, but cities would not be involved in these determinations. These cases would proceed as a “holdover” eviction case, and would be determined by the court.

CONCLUSION

Not all of the policies and strategies discussed are relevant to each jurisdiction. We suggest that cities and counties review this report for ideas that are most relevant for their circumstances. Some of these problems and strategies are particularly urgent, most notably those relating to the loss of affordability in NOAH housing. HJC would welcome the opportunity to work with any local governments interested in exploring these strategies further.

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