PRESERVING PROJECT-BASED HOUSING IN MASSACHUSETTS: WHY THE VOUCHER DISCRIMINATION LAW FALLS SHORT

MICHAEL QUIRK*

I. Introduction

Located in the Boston neighborhood of Roslindale, the townhouses at Stony Brook Commons "are nestled among rolling acres of landscaped grounds and bordered by reservation woodlands that provide easy access to miles of walking trails, fish ponds, and picnic areas."[1] Replete with the usual amenities typical to market-rate condominiums,[2] one might not realize that for forty years the picturesque Stony Brook Commons was an affordable housing development known as High Point Village, financed through federal subsidies with many units being leased to tenants receiving project-based Section 8 rental assistance.[3] The conversion of the publicly-subsidized housing development at High Point Village to market-rate units—and the resulting litigation—is an unequivocal illustration of the expiring use crisis[4] and the contentious legal battles[5] that often result from expiration and conversion.

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* Boston University School of Law (J.D. 2011); San Francisco State University, Business Administration (B.S. 2006). The author thanks the Stern family, Professor Cornelius Hurley and the staff of the Boston University Center for Finance, Law & Policy and the staff of the *Review of Banking and Financial Law* for their support.

[1] Stony Brook Commons Home Page, http://www.stonybrookcommons.com (last visited May 29, 2011).

[2] *Id.* ("Our beautifully renovated townhomes come with both gorgeous plank flooring and [B]erber carpeting . . . . The gorgeous eat-in kitchen is fully-applianced and includes a breakfast bar.").

[3] Amended Complaint at 6-7, High Point Families United v. Stony Brook Commons Co., No. 07H84CV000779 (Boston Housing Court Feb. 29, 2008) [hereinafter Highpoint Amended Complaint].

[4] *See* Press Release, Office of Governor Deval Patrick, Governor Patrick Highlights 'Expiring Use' Rental Housing Law, Announces $150M Fund to Preserve Long-Term Affordable Housing (Nov. 30, 2009) http://www.mass.gov/?pageID=gov3pressrelease&L=1&L0=Home&sid=Agov3&b=pressrelease&f=113009_expiring_use_law&csid=Agov3 ("An estimated 90,000 units could be affected, with about 17,000 of those units at-risk of losing their affordability through expiring use over the next three years.") [hereinafter Press Release]; Highpoint Amended Complaint, *supra* note 3.

It is no secret that the United States has long had a precarious shortage of affordable housing.[6] A lack of available affordable units means that low income families unable to secure affordable housing struggle to make rent because of the dramatic gap between income and housing costs—a gap which continues to grow as income distribution inequality in the United States steadily increases.[7] Often these families will sacrifice basic needs such as food and medical care in order to put a roof over their heads.[8] Additionally, providing affordable housing in stable neighborhoods is often crucial to successful racial and class integration.[9] But affordable housing in stable neighborhoods is extremely scarce in most areas, thus exacerbating racial and economic segregation and perpetuating poverty.[10]

The current unequal economic stratification in the United States, combined with the lack of affordable housing, means that there is a strong need to preserve project-based housing which often solves both problems by providing affordable units in racially and

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[5] *See generally* Highpoint Amended Complaint, *supra* note 3.

[6] The housing shortage has persisted long enough that some now consider the term "affordable housing crisis" a cliché. *See* Rusty Russell, *Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia?*, 30 B.C. ENVTL. AFF. L. REV. 437, 450 n.82 (2003).

[7] *See* Crisis in Affordable Housing, http://www.afhh.org/comm_ar/comm_ar_crisis.htm (last visited May 29, 2011). According to the CIA World Factbook, the United States ranks 39th out of 136 countries in terms of the country with the most unequal income distribution among families, ranking worse than 97 countries including Iran, Cambodia, Uzbekistan and Egypt. Central Intelligence Agency, The World Factbook, Country Comparison: Distribution of Family Income—Gini Index, https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html?countryName=United%20States&countryCode=us&regionCode=na&rank=39#us (last visited May 29, 2011).

[8] *See* Crisis in Affordable Housing, *supra* note 7.

[9] *See* Ankur J. Goel, *Maintaining Integration Against Minority Interests: An Anti-Subjugation Theory for Equality in Housing*, 22 URB. LAW. 369, 390 (1990).

[10] Dr. Patricia Simmons, Mayo Clinic, Keynote Speech at the Greater Minnesota Housing Fund Forum: The Importance of Stable, Affordable Housing for Families with Children (May 17, 2004) http://www.gmhf.com/Home/EventInvites/Dr_Simmons_Rochester.pdf) (last visited May 29, 2011).

economically diverse mixed-income communities.[11] Yet many of the restrictions that allow project-based units to remain affordable are expiring.[12] In Massachusetts, many properties approaching expired status are located in high priced areas where their continued operation is necessary to maintain economic and racial diversity.[13] If too many property owners simultaneously prepay their subsidized mortgages[14] and decline to renew their expiring project-based subsidy contracts,[15] an abrupt decline in the number of stationary affordable housing units could result, worsening the current housing crisis.

Moreover, the preservation of nearly-expired properties in suburban and rural Massachusetts is essential to maintaining affordable housing levels above the ten percent level required by Massachusetts General Law Chapter 40B.[16] While falling out of

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[11] *See* Emily Achtenberg, *Maturing Subsidized Mortgages: The Next Frontier of the Expiring Use Crisis* 5 (Univ. of Massachusetts Boston, McCormack Graduate School of Policy Studies, CSP Working Paper No. 2009-8, 2009), *available at* http://www.mccormack.umb.edu/centers/csp/documents/working_papers/2009_8_Maturing_Subsidized_Mortgages.pdf.

[12] *Id.*

[13] *Id.* at 3.

[14] For maturing mortgages this is also known as "The 40 Year Problem." *See* Report from Bill Brauner, Community Economic Development Assistance Corporation, The Year 40 Problem in Massachusetts—Analysis of the First Wave of Housing Projects (http://www.chapa.org/files/The%20Year%2040%20Problem.pdf) (last visited May 29, 2011) (analyzing data through Sept. 2010).

[15] Achtenberg, *supra* note 11, at 7. ("While Massachusetts has had a strong track record historically in preserving at-risk subsidized housing, recent experience with maturing mortgage properties suggests that circumstances may be changing. Now that the oldest properties are reaching the end of their subsidized mortgage terms, affordable units (with both mortgage and rental subsidies) are being lost at a rate not seen since repeal of the prepayment moratorium in 1995.").

[16] MASS. GEN. LAWS ANN. ch. 40B §§ 20-23 (West 2011). Chapter 40B is a Massachusetts statute which allows developers to override local zoning rules in municipalities where the number of affordable housing units falls below 10% of the total local housing stock. At least 20-25% of the new units must have long-term affordability restrictions. *Id.* The law is controversial, and as recently as November 2010, 40B opponents attempted to have the law repealed. *See* Steve Adams, *Chapter 40B Affordable Housing Law Avoids Repeal Effort*, PATRIOT LEDGER, Nov. 3, 2010, *available at* http://www.wickedlocal.com/nantucket/news/business/x4796

compliance could theoretically result in new 40B projects, practically, 40B ventures are controversial, and it would cause less public backlash to preserve expiring properties—which are already established and accepted in the community—than to create new projects.[17] There is currently a lack of sustained affordable housing production in Massachusetts and affordable project-based units lost today will be difficult, if not impossible, to recover.[18] Clearly there is an extreme need to protect project-based tenants from displacement.

Some plaintiffs in Massachusetts are attempting to use the state voucher discrimination statute as a means to preserve expiring project-based housing.[19] This approach, however, is problematic. While the Massachusetts voucher discrimination law might be an effective tool to combat voucher discrimination toward individual tenants in the open market, it cannot be interpreted to apply to expiring project-based housing contracts. Moreover, the regulatory regime governing both mortgage prepayment and failure to renew Section 8 contracts is extensive, and there is some authority to suggest that federal law might preclude utilizing state anti-discrimination law to require a developer to renew a federal contract.

Part II of this note summarizes the history of the relevant federal housing programs and Congress' periodic attempts to adjust and maintain these programs. It also summarizes Ch. 151B subsection 4(10), the Massachusetts voucher discrimination law, and cases interpreting that legislation. Part III discusses whether application of the Massachusetts voucher discrimination law to expiring project-based contracts is a viable cause of action. Part IV analyzes the interaction of the Massachusetts voucher discrimination law with federal statutes and regulations, and whether federal law precludes application of the voucher discrimination law. Part V discusses alternative means of preserving expiring project-based

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449/Chapter-40B-affordable-housing-law-avoids-repeal-effort#axzz1MEy WlGS8. *Compare* Kara L. Dardeno, *Chapter 40b Should Buy the Farm*, 42 SUFFOLK U. L. REV. 129 (2008), *with* Theodore C. Regnante & Paul J. Haverty, *Compelling Reasons Why the Legislature Should Resist the Call to Repeal Chapter 40b*, 88 MASS. L. REV. 77 (2003).

[17] *See* Achtenberg, *supra* note 11, at 10.

[18] *See id.* at 3 ("Over the next decade, close to 17,000 units in 130 federally and state-financed developments in Massachusetts could be lost as affordable housing as they reach the end of their 40-year subsidized mortgage terms.").

[19] *See* Highpoint Amended Complaint, *supra* note 3, at 22-24.

units. Part VI concludes that while the voucher discrimination law may not be an effective tool for preserving project-based contracts, other alternatives may be applied with some success.

II. Statutory History and Case Law

A "use restriction" is a contractual condition placed on a federal subsidy or contract—often either a subsidized mortgage or a project-based rental subsidy—which functions as a developer's promise to set aside a portion of housing units at affordable levels for a fixed term.[20] There are typically three distinct situations when an affordable housing developer will agree to use restrictions: (1) accepting a federally subsidized mortgage with a below-market interest rate or interest subsidy; (2) receiving federally subsidized rents through the Section 8 program; and (3) accepting tax credits under the LIHTC program[21]—though the issues discussed in this note revolve primarily around the former two categories. Although a federally subsidized mortgage contract and a subsidized rental contract are distinct, an owner of a federally subsidized mortgage will typically also apply to participate in the Section 8 program.[22] Thus, nearly always, owners will participate in both programs concurrently.[23]

From the time the federal government first began subsidizing affordable housing developments in the 1930s, and up until the 1970s, the federal government played a central role in providing affordable housing units.[24] Since the 1980s, the federal government has generally "reduced its role in maintaining the nation's affordable housing supply."[25] Nonetheless, Congress has periodically attempted to stem the loss of affordable housing projects due to mortgage

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[20] *See* Memorandum from Citizens Housing and Planning Association, Summary of Changes to Chapter 40B Regulations (Feb. 22, 2008) (http://www.chapa.org/pdf/Final_40B_revisedregs_summary.pdf).

[21] The LIHTC currently plays an important role in affordable housing production, but this note does not require a thorough examination of the LIHTC program.

[22] *See* Brauner, *supra* note 14.

[23] *See id.*; *see also* Michael Freedman, Note, *In Search of Congressional Intent: Does LIHPRHA Restrict State and Local Governments from Preserving Affordable Housing?*, 13 J.L. & POL'Y 741, 750-52 (2005).

[24] Freedman, *supra* note 23, at 741-43.

[25] *Id.*

prepayment and expiring rental subsidy contracts.[26] To understand the issues to be discussed, a summarized history of relevant federal affordable housing law is necessary, as well as a summary of the Massachusetts laws at issue.

A. History of Federal Affordable Housing Programs

The federal government began to play a central role in developing and supporting affordable housing production when Congress passed the Housing Act of 1937, a major initiative which provided federal funds to public housing agencies in an effort to promote affordable housing development.[27] Congress continued to concentrate on producing publicly owned and operated affordable housing well into the 1940s and 1950s.[28]

1. 1960s—Subsidized Mortgage Programs

Starting in 1961, however, Congress shifted its focus toward the production of privately-owned affordable housing projects.[29] To create incentives for private property developers to build and operate affordable housing projects, the Housing Act of 1961[30] authorized the Federal Housing Administration[31] to provide mortgage insurance

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[26] *See infra* Part II.A.5-10.

[27] 42 U.S.C. § 1437 (2000); *see* Paulette J. Williams, *The Continuing Crisis in Affordable Housing: Systemic Issues Requiring Systemic Solutions*, 31 FORDHAM URB. L.J. 413, 427 (2004) ("Beginning in the 1930s, in response to the dramatic increase in homelessness arising out of the Great Depression, Congress enacted the first of many public housing programs. The 1937 Housing Act provided for the federal funding of local public housing agencies to develop, construct, and manage housing for low income people.").

[28] *See e.g.* United States Housing Act of 1949, ch. 338, 63 Stat. 413 (1949) (codified as amended at 42 U.S.C. § 1441 *et seq.* (2000)).

[29] United States Housing Act of 1961, Pub. L. No. 87-70, § 101, 75 Stat. 149 (1961) (codified as amended at 12 U.S.C. §§ 1715l, 1715n, 1720 (2000)).

[30] *Id*.

[31] In 1965 the Federal Housing Administration became a part of the U.S. Department of Housing and Urban Development Office of Housing. *See* 24 C.F.R. § 200.1 (2010).

to approved lenders.[32] This in turn allowed private lending institutions to offer low-interest mortgages to developers.[33] In addition to mortgage insurance, the federal government offered federally subsidized mortgages at attractive financing terms in order to encourage affordable housing construction.[34] In exchange for favorable financing, project owners agreed to certain use restrictions such as minimum property standards, rental to low-income tenants, limited profits and charging only HUD-approved rent levels, all for a fixed term.[35]

The first federally-subsidized mortgage program was a below-market interest rate program known as the "221(d)(3) program."[36] To federally subsidize under the 221(d)(3) program, private lenders offered mortgages with below market interest rates to developers, and those mortgages were then purchased by the federal

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[32] *See* Cienega Gardens v. United States, 194 F.3d 1231, 1234 (Fed. Cir. 1998).

[33] *Id.*

[34] *Id.* Affordable housing developers also realized several tax benefits when participating in these programs. *See* Lawrence Geller, Note, *Expiring Use Restrictions: Their Impact and Enforceability*, 24 NEW ENG. L. REV. 155, 162 n.68 (1989) ("Prior to the Tax Reform Act of 1986, no limitations were placed upon the ability of a taxpayer to use deductions from one activity to offset income from other activities.").

[35] *Cienega Gardens*, 194 F.3d at 1234-35 ("Generally, when obtaining a HUD-insured mortgage . . . an owner executed a deed of trust note payable to a private lending institution. The note evidenced a loan made to the owner pursuant to a loan agreement between the owner and the lending institution that contemplated advances to the owner. Payment of the indebtedness evidenced by the note was secured by a deed of trust, or a mortgage, on the subject property. The note and deed of trust were printed on forms approved by HUD, and HUD endorsed the note as part of its mortgage insurance. The repayment term of the loan was generally forty years. Simultaneously, in exchange for HUD's endorsement for insurance (pursuant to a commitment for insurance), the owner entered into a "regulatory agreement" with HUD, under which the owner agreed, among other things, to certain "affordability restrictions," including restrictions on the income levels of tenants, restrictions on allowable rental rates, and restrictions on the rate of return the owner could receive from the housing project. The regulatory agreement and the mortgage insurance provided by HUD were to remain in effect so long as the loan remained outstanding.") (internal citations omitted).

[36] Pub. L. 83-560, 68 Stat. 590, 597 (1954), *amended by* Pub. L. 87-70, 75 Stat. 149 (1961).

government.[37] The 221(d)(3) program saw limited success, mainly because it depended on the availability of federal funds.[38]

Recognizing this capital limitation, in 1968, Congress amended the National Housing Act to include section 236, which supplanted the 221(d)(3) program.[39] Under the 236 program, the federal government subsidized the interest rates on private market-rate mortgages, often to as low as one percent, while developers continued to receive federally insured mortgage insurance.[40] As before, owners were still required to agree to use restrictions.[41] The 236 program built on the strengths of 221(d)(3), but it carried more potential for lasting success since the mortgages were financed privately.[42]

As an additional incentive, HUD added a prepayment option to the 221(d)(3) and 236 mortgage contracts.[43] The prepayment option allowed developers to prepay their mortgage loans after twenty years, which would consequently free the developer from all use restrictions associated with the mortgage.[44] The danger of the prepayment option was that if too many developers decided to prepay their mortgages and exit the affordable housing market, then the affordable housing stock would suddenly be depleted. But at the time when these agreements were being signed, HUD assumed that either most developers would not exercise their prepayment options or that new units would continue to be built so that prepaying developers would not disrupt the affordable housing stock.[45] With all of these incentives, many developers participated in the 221(d)(3) and 236

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[37] *Id.*; *see also* Brauner, *supra* note 14.
[38] *See* Geller, *supra* note 34, at 158.
[39] 236 Program of the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 201, 82 Stat. 476, 498 (1968) (codified at 12 U.S.C. § 1715z-1 (2000)).
[40] *Id.*
[41] *See* 24 C.F.R. § 221.532(a) (2010) ("[T]he amount of any allowable distribution or disbursement from surplus cash shall not exceed in any one fiscal year more than 6 percent of the mortgagor's initial equity investment as determined by the Commissioner.").
[42] *See* Geller, *supra* note 34, at 158.
[43] *See* 12 U.S.C. §§ 17151, 1715z-1, 1715z-15, 4101-4124 (2010); *see also* 42 U.S.C. § 3535(d) (2010).
[44] *See* 12 U.S.C. §§ 17151, 1715z-1, 1715z-15, 4101-4124 (2010); *see also* 42 U.S.C. § 3535(d) (2010).
[45] *See* Geller, *supra* note 34, at 160-62.

programs, and more than two million affordable units were created under these types of project-based programs.[46]

2. 1970—Experimental Housing-Allowance Program

In 1970, Congress instructed HUD to implement an experimental housing program to determine whether assisted low-income families might "upgrade their housing standards" with a financial allowance program.[47] The study, described as "one of the largest social experiments ever undertaken in the United States," was divided into three experiments: (1) the "Demand Experiment" to determine how households respond to various types of voucher programs; (2) the "Supply Experiment" to examine the effect of a housing allowance program on the housing market; and (3) the "Administrative Agency Experiment" to determine how to best administer a voucher program and to evaluate the accompanying administrative costs.[48] The positive results of these experiments led Congress to enact the precursor to the current tenant-based and project-based voucher programs.

3. 1974—The Housing and Community Development Act

The Housing and Community Development Act of 1974 created the Section 8 rental assistance program, which authorized HUD to subsidize, for qualifying participants, rents to private property owners.[49] The program is designed to "aid low-income families in obtaining a decent place to live and [promote] economically mixed housing."[50] To accomplish this goal, HUD

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[46] Freedman, *supra* note 23, at 742.

[47] Harvey S. Rosen, *Housing Behavior and the Experimental Housing Allowance Program: What Have We Learned?*, *in* SOCIAL EXPERIMENTATION 55, 55 (Jerry Hausman & David Wise, eds., 1985).

[48] U.S. General Accounting Office Report to the Congress, Observations on Housing Allowances and the Experimental Housing Allowance Program 7, 11-14 (Mar. 23, 1974), *available at* http://archive.gao.gov/f0202/094255.pdf.

[49] 42 U.S.C. § 1437f (2010). The Section 8 voucher program is codified at 42 U.S.C. § 1437f(o) (2010).

[50] *Id.* § 1437f(a).

contracts with public housing agencies ("PHA") to provide services.[51]

Under the Section 8 program, HUD enters into Housing Assistance Payment ("HAP") contracts with private property owners and sets the maximum rent—also known as the "Fair Market Rent" ("FMR")—an owner may charge for each unit.[52] The property owner makes units available to Section 8 renters and in exchange receives rent payments from both the tenants and HUD.[53] The low-income tenants pay the owner a percentage of their income as rent—usually 30% of adjusted income.[54] HUD then pays the remaining rent difference to the property owner.[55]

Today, the primary Section 8 program is the voucher program, which can be either tenant-based or project-based.[56] Tenant-based vouchers are portable and a recipient is free to choose an eligible individual unit anywhere in the United States where a PHA operates.[57] Project-based vouchers are not portable and may be used only at specific participating developments.[58] Participating properties typically sign up to provide project-based housing as a requirement of their federally subsidized mortgage contract.[59] Many states have their own voucher programs that work concurrent with the Section 8 program.[60]

If a property owner decides not to renew an expired project-based contract, HUD will "provide tenant-based rental assistance to all eligible residents, enabling them to choose the place they wish to rent, which is likely to include the dwelling unit in which they

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[51] *Id.* § 1437f(o)(1)(A).
[52] *Id.* § 1437f(o).
[53] *Id.*
[54] *Id.* § 1437f(o)(2)(A)(1).
[55] *Id.* § 1437f(o)(10)(D).
[56] *See* 24 C.F.R. § 982.1(b)(1) (2010).
[57] *See id.*
[58] *Id.*
[59] *See* Brauner, *supra* note 14.
[60] The Massachusetts equivalent to the Section 8 program is the Massachusetts Rental Voucher Program ("MRVP"). The MRVP offers both tenant-based and project-based subsidies and currently assists approximately 5,200 households. *See* ANN VERRILLI, CITIZENS' HOUSING AND PLANNING ASSOCIATION, THE MASSACHUSETTS RENTAL VOUCHER PROGRAM: MAINTAINING THE STATE'S PRIMARY HOMELESSNESS PREVENTION TOOL 3-4 (2009), http://www.mahomeless.org/publications/Publications%20-%20MRVPreportJune09FINAL.pdf.

currently reside."[61] If a tenant decides to stay in the same unit, HUD will issue an "enhanced voucher."[62] An enhanced voucher keeps a tenant's rent at a stable level by covering the cost of any rent increases that may result from an "eligibility event" enumerated by the statute.[63] Eligibility events include either expiration of a project-based contract or prepayment of a subsidized mortgage.[64]

4. 1986—The Low-Income Housing Tax Credit

A major change in affordable housing policy occurred in 1986 when Congress shifted its production focus from direct subsidization to federal tax legislation by enacting the Low-Income Housing Tax Credit ("LIHTC") as part of the Tax Reform Act.[65] Tax laws favorable to affordable housing developers, including accelerated depreciation provisions, had already existed prior to the LIHTC.[66] Attempting to better assist low-income families, the Tax Reform Act replaced many of these existing incentives with the LIHTC.[67] To receive tax credits under the LIHTC program, a developer must set aside at least twenty percent of the applicable development's units as affordable for an initial fifteen year compliance period and a subsequent fifteen year extended use

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[61] 42 U.S.C. § 1437f(c)(8)(A) (2010).
[62] *Id.* Affordable housing advocates argue that even with enhanced vouchers, tenants still risk displacement. *See* Achtenberg, *supra* note 11, at 3.
[63] 42 U.S.C. § 1437f(t)(1)(A).
[64] *Id.* § 1437f(t)(2).
[65] *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 252, 100 Stat. 2095, 2189-2208 (1986) (codified as amended at I.R.C. § 42 (2006)); Myron Orfield, *Racial Integration and Community Revitalization: Applying the Fair Housing Act to the Low Income Housing Tax Credit*, 58 VAND. L. REV. 1747, 1777 (2005) ("Responding to increased demand for low-income housing and a series of HUD scandals, Congress almost entirely replaced direct subsidies for housing with the Low-Income Housing Tax Credit program in 1986[.]"). The LIHTC was later made permanent by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).
[66] David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL'Y 537, 538-39 (1998).
[67] *Id.*

period.[68] The enactment of the LIHTC was a notable juncture in the shift of responsibility for affordable housing production from the federal government to the private sector.[69]

5. 1987—The Emergency Low Income Housing Preservation Act

In the mid-1980s, a significant number of affordable housing mortgages were approaching their twenty-year mark, meaning developers could soon prepay and exit the affordable housing market. Additionally, tax reform had recently limited the amount a developer could claim as depreciation on a building to the amount of rent income derived from that building—i.e., affordable housing projects could no longer be used as tax shelters—making affordable housing a less attractive investment for some developers.[70] In response to the concern that projects would be converted to unrestricted market-rate units en masse, Congress amended the National Housing Act to make prepayment more cumbersome.[71]

The Emergency Low Income Housing Preservation Act of 1987 ("Emergency Act") was Congress's attempt to temporarily stall the first expiring use crisis so Congress could have time to devise a permanent solution.[72] The Emergency Act established comprehensive administrative procedures required for any developer attempting to prepay a subsidized mortgage.[73] Prepayment could not cause tenants' cost of living to rise, neither could it significantly alter the availability of affordable housing locally nor alter housing availability for minorities.[74] These procedures imposed considerable restraint and effectively prevented most 221(d)(3) and 236 mortgages from being prepaid. Upset at their inability to prepay their mortgages, many

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[68] I.R.C. § 42 (2006); Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 993 (2010).

[69] *See* Cohen, *supra* note 66. The LIHTC program is currently the primary source of affordable housing development in the United States. *See* Orfield, *supra* note 65, at 1749.

[70] Geller, *supra* note 34, at 162 ("Owners could no longer use these projects as tax shelters to avoid taxes on income derived from other sources.").

[71] *See generally* Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1877 (1988) (codified at 12 U.S.C 1715*l* (2010)).

[72] *See id.*

[73] *See id.*

[74] *See id.*

developers filed lawsuits claiming that the Emergency Act was unconstitutional.[75]

In an effort to increase the utility of the Section 8 program, Congress added two new provisions: a "take one, take all" provision and an "endless lease" provision, neither of which were popular with property owners.[76] The take one, take all provision prohibited any property owner who had entered into a rental agreement with a Section 8 tenant from denying any other Section 8 applicants solely on the basis of their Section 8 status.[77] The "endless lease" provision effectively prohibited property owners from terminating or failing to renew expiring Section 8 leases unless a statutory exception applied.[78] Congress eventually repealed both provisions.[79]

6. 1990—Low Income Housing Preservation and Resident Homeownership Act

The Emergency Act was only a temporary solution, and in 1990 Congress enacted the Low Income Housing Preservation and Resident Homeownership Act ("LIHPRHA") in place of the Emergency Act.[80] LIHPRHA maintained the Emergency Act's burdensome application process required for prepayment, but added additional incentives to encourage affordable housing owners to refinance their units and to maintain their units as affordable. In exchange, HUD could then offer the owner an increase in rent ceilings, an increase on returns, capital improvement financing and

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[75] *See* Freedman, *supra* note 23, at 753.

[76] Paula Beck, *Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier*, 31 HARV. C.R.-C.L. L. REV. 155, 167 (1996).

[77] 42 U.S.C. § 1437f(t)(1)(A) (amended 1998); *see* Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 297 (2d Cir. 1998) ("The clear purpose of [the provision] was to prevent landlords from picking and choosing from the pool of Section 8 applicants who apply to rent apartments, and thereby to promote access to decent and affordable housing for lower income households.").

[78] 42 U.S.C. § 1437f(d)(1)(B)(ii) (1988) (amended 1998). ("[T]he owner shall not terminate the tenancy except for serious or repeated violation of the terms and conditions of the lease, for violation of applicable Federal, State, or local law, or for other good cause.").

[79] *See infra* Part II.A.8-10.

[80] Pub. L. No. 101-625, tit. VI, 104 Stat. 4249 (codified at 12 U.S.C. § 4101 *et seq.* (2000)).

equity loan funds.[81] If an owner still did not want to maintain use restrictions, strict procedures for prepayment still applied. If an owner intended to prepay a mortgage, the owner had to notify tenants, as well as the federal and local government.[82]

To prevent state and local governments from overwhelming owners with even more stringent prepayment restrictions, LIHPRHA also included an express preemption provision that prohibited state laws or regulations that would "restrict or prohibit" loans made under LIHPRHA's authority.[83] Laws of "general applicability," however, would not be preempted.[84] Congress eventually defunded LIHPRHA, and in 1996, HUD stopped reviewing LIHPRHA prepayment applications. Even though HUD no longer administers LIHPRHA's strict prepayment procedures, Congress never explicitly repealed LIHPRHA.

7. 1996—Housing Opportunity Program Extension Act

Congress passed the Housing Opportunity Program Extension Act of 1996 ("HOPE") to limit LIHPRHA funding and to shift resources away from mortgage subsidies and toward other subsidy programs, such as Section 8 vouchers.[85] HOPE also reinstated most of the original rights of eligible mortgagors to prepay their subsidized mortgages, including the ability to prepay without HUD approval.[86] HOPE did not contain a preemption provision like LIHPRHA, nor did it make any reference to LIHPRHA's preemption provision.[87] With LIHPRHA defunded but not repealed, the application of the seemingly dormant LIHPRHA preemption provision to subsequent housing acts has been frequently litigated.

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[81] 12 U.S.C. § 4109(b) (2010).
[82] *Id.*
[83] *Id.* § 4122.
[84] *Id.*
[85] Pub. L. No. 104-120, 110 Stat. 834 (1996) (codified at 12 U.S.C. § 1701 (2010), 42 U.S.C. § 1437f (2010), 12 U.S.C. § 4101 (2010)).
[86] *See* Freedman, *supra* note 23, at 759.
[87] *Id.*

8. 1997—Multifamily Assisted Housing Reform and Affordability Act

In 1997, Congress established new protocols specific to HAP contract renewals by enacting the Multifamily Assisted Housing Reform and Affordability Act ("MAHRA").[88] MAHRA was a response to the rapidly increasing cost—for both the federal government and property owners—of providing subsidized housing. Its primary purpose is to encourage preservation of expiring or troubled project-based properties through financial restructuring.[89] If the owner of an eligible project wishes to restructure, MAHRA requires HUD to create a restructuring plan.[90] The plan analyzes whether there is adequate alternative housing in that particular market and the applicant's rent levels, debt, expenses and repair needs.[91] Section 8 project-based rents must be equivalent to unsubsidized rents in the project's area.[92] Depending on the circumstances of the project, an owner may choose from six renewal options, including Mark-Up-to-Market ("MUM"), which encourages owners in strong market areas (such as Boston) to remain in the Section 8 program by increasing rents to market levels, or Mark-to-Market ("M2M"), in which rents are reduced.[93] HUD-insured and HUD-held financing is then restructured so that a mortgagor's monthly payments can be paid from the restructured—and now normalized—rental income.[94] In exchange, the owner must rehabilitate the property, if necessary, and "maintain affordability and use restrictions in accordance with regulations promulgated by [HUD], for a term of not less than 30 years."[95] If an owner decides not to

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[88] Multifamily Assisted Housing Reform and Affordability Act, Pub. L. No. 105-65, 111 Stat. 1344 (1997) (codified at 42 U.S.C. § 1437f (2010)).
[89] Multifamily Assisted Housing Reform and Affordability Act, Pub. L. No. 105-65, § 511(b)(1), 111 Stat. 1344 (1997).
[90] Multifamily Assisted Housing Reform and Affordability Act, Pub. L. No. 105-65, § 514(a)(1), 111 Stat. 1344 (1997).
[91] 24 C.F.R. 401.410-11,401.451-53 (2010).
[92] Multifamily Assisted Housing Reform and Affordability Act, Pub. L. No. 105-65, § 511(b), 111 Stat. 1344 (1997).
[93] Multifamily Assisted Housing Reform and Affordability Act, Pub. L. No. 105-65, § 524(a)(3)-(4), 111 Stat. 1344 (1997).
[94] *See* Multifamily Assisted Housing Reform and Affordability Act, Pub. L. No. 105-65, § 511(b), 111 Stat. 1344 (1997).
[95] Multifamily Assisted Housing Reform and Affordability Act, Pub. L. No. 105-65, § 514(e)(6), 111 Stat. 1344 (1997)

renew a project-based contract, eligible tenants receive enhanced vouchers.[96]

9. 1998—Quality Housing and Work Responsibility Act

The Quality Housing and Work Responsibility Act ("QHWRA") of 1998 made several changes to improve the quality of the Section 8 voucher program.[97] One of these changes was the consolidation of separate certificate and voucher programs into one tenant-based program. Also, to encourage increased owner participation in the voucher program, QHWRA removed the controversial "take one take all" and "endless lease" provisions.[98]

10. Proposed Legislation—Section 8 Voucher Reform Act

Many housing advocates are pushing Congress to pass the Section 8 Voucher Reform Act ("SEVRA").[99] One of the proposed reforms is to increase the supply of project-based vouchers.[100]

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[96] Multifamily Assisted Housing Reform and Affordability Act, Pub. L. No. 105-65, § 514(d)(1), 111 Stat. 1344 (1997).

[97] Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105-276, tit. V, 112 Stat. 2461, 2518-2607 (1998) (codified at 42 U.S.C. § 1437g(n) (Supp. 1998)).

[98] *Id.*

[99] *See* Will Fischer, "SEVRA" Housing Voucher Reform Bill Would Update and Streamline Program, CENTER ON BUDGET AND POL'Y PRIORITIES, May 13, 2010, http://www.cbpp.org/files/9-22-09hous.pdf; The Section 8 Voucher Reform Act of 2009, NAT'L ASS'N OF HOUSING AND REDEVELOPMENT OFFICIALS, Mar. 2010, http://www.indyhousing.org/nahro2010/reference%20files/Section%208%20Voucher%20Reform%20Act%20of%202009%20-%20Legislative.pdf.

[100] *See* Housing Subcommittee Holds SEVRA Hearing, NAT'L COUNS. OF ST. HOUSING AGENCIES, June 30, 2009, https://www.ncsha.org/blog/housing-subcommittee-holds-sevra-hearing ("On June 4, the House Financial Services Subcommittee on Housing and Community Opportunity held a hearing on the below-linked draft Section 8 Voucher Reform Act (SEVRA) of 2009. The legislation would increase to 25 percent, from the current 20 percent, the percentage of an agency's voucher funds that can be project-based. SEVRA would also reduce the frequency of required income recertifications, simplify deductions, and base rent on a tenant's income from the previous year. Under SEVRA, inspections would be required

SEVRA has been introduced to several sessions of Congress over the last several years and "has received bipartisan support in past sessions," but the bill has yet to be passed.[101]

B. Massachusetts: Affordable Housing Preservation and Discrimination Laws

1. Massachusetts Law Chapter 40T

Recognizing the potentially dangerous effect that the expiring use crisis could have on the local affordable housing stock, Massachusetts enacted its own affordable housing preservation law in 2009.[102] The law, officially titled "An Act Preserving Publicly Assisted Housing," is known colloquially as Chapter 40T, and imposes notice requirements on landlords[103] and grants purchase rights to the Massachusetts Department of Housing and Community Development ("DHCD").[104]

The Chapter 40T procedures apply to a wide range of state and federal programs, and most HUD programs are covered, including properties with federal mortgage insurance, federally subsidized mortgages and Section 8 assisted housing.[105] Landlords planning to prepay or opt-out of their Section 8 contracts must provide notice of intent to terminate affordability restrictions at least two years prior to the termination date.[106] Notice must be provided to a variety of parties, including DHCD, the municipality the property is located in, tenants and tenant organizations.[107] A second set of notices must be sent out at least one year prior to the termination date.[108] These notice requirements apply regardless of whether the

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biennially instead of annually, as currently required."); s*ee also* Fischer, *supra* note 99.

[101] Laurent F. Gilbert Sr., Mayor of Lewiston, Maine, Housing Voucher Programs Need Support, SUN J., Feb. 27, 2011, http://www.sunjournal.com/guest-columns/story/991894; *see also* The Section 8 Voucher Reform Act (SEVRA): An Overview, Apr. 23, 2007, http://www.nlihc.org/doc/SEVRA-fact-sheet.pdf.

[102] MASS. GEN. LAWS ANN. ch. 40T (West 2011).

[103] *Id.* § 2.

[104] *Id.* § 3(a).

[105] *Id.* § 1.

[106] *Id.* § 2.

[107] *Id.*

[108] *Id.*

owner intends to sell or keep the property.[109] For a period of three years following the termination, tenants cannot be evicted except for cause and tenants' rents can be raised only by minor increments allowed by the statute.[110]

Additionally, DHCD has both a right of first offer and a right of first refusal.[111] Chapter 40T requires that an owner who intends to sell his qualifying property must first provide DHCD with an opportunity to purchase the property.[112] If the owner and DHCD fail to reach an agreement and the owner finds another buyer, the owner must again provide DHCD with a second opportunity to either match the offer or negotiate terms that the owner and DHCD find mutually agreeable.[113] The DHCD maintains both the right of first offer and the right of first refusal for four years after the termination date. [114] Because DHCD has indicated it does not want to own or manage property, DHCD is permitted to assign its right of first offer and right of first refusal to a city, a public housing authority or any other DHCD approved entity that regulates housing.[115] There are exceptions, however, to the rights of first offer and first refusal, including both a sale to a purchaser that will preserve the affordability of the units and a sale where the purchaser agrees to renew a Section 8 rental contract.[116]

2. Massachusetts 151B § 4—Discrimination Law

Federal law protects tenants and prospective tenants from housing discrimination on the basis of race, color, national origin, ancestry, religion, creed, sex, familial status and handicap or disability.[117] Massachusetts discrimination law is broader and also

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[109] *Id.*
[110] *Id.* § 7.
[111] *Id.* §§ 3-4.
[112] *Id.* § 3.
[113] *Id.* § 4.
[114] *Id.* § 10.
[115] *See id.*
[116] *Id.* § 6.
[117] Fair Housing Act of 1968, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73, 81-89 (1968) (codified at 42 U.S.C. §§ 3601-19 (2006)) [hereinafter Fair Housing Act]. The Equal Credit Opportunity Act (ECOA) prohibits discrimination against those who receive public assistance, but it does not apply to Section 8 recipients. 15 U.S.C. § 1691 (2006); Laramore v. Ritchie

protects tenants on the basis of sexual orientation, marital status, age, veteran or military status, and under subsection 4(10), source of income and receipt of public assistance or rental subsidies ("voucher discrimination").[118] Voucher recipients have been a protected class in Massachusetts since 1971.[119] Several states, including Massachusetts, decided to enact voucher discrimination laws primarily because landlords were refusing to rent to Section 8 voucher holders.[120] Since its enactment, several Massachusetts cases have interpreted the scope of protection against voucher discrimination offered by subsection 4(10).

C. Massachusetts Voucher Discrimination Caselaw

1. Attorney General v. Brown—1987

The first Massachusetts case to discuss voucher discrimination was *Attorney General v. Brown*.[121] In *Brown*, the Attorney General brought suit against a landlord who allegedly discriminated against an applicant by refusing to rent an apartment to the applicant because she was a Section 8 certificate recipient.[122] The defendant-landlord claimed that subsection 4(10) was preempted by federal law.[123] The court held that subsection 4(10) was not preempted, but also went on to hold that the Attorney General had not shown that the defendant's decision was based solely on the Section 8 certificate, and that the defendant's defense of "legitimate business reasons" was

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Realty Mgmt. Co., 397 F.3d 544, 548 (7th Cir. 2005) (holding that residential leases are not covered by ECOA and consequently section 8 recipient had no ECOA discrimination claim).

[118] *See* MASS. GEN. LAWS ANN. ch. 151B § 4 (West 2011).

[119] MASS. GEN. LAWS. ANN. ch. 151B § 4(10) (West 1971) (adding subsection 4(10) making it illegal "[f]or any person furnishing credit, services or renting accommodations to discriminate against any individual who is a recipient of federal, state or local public assistance, including medical assistance, or who is a tenant receiving federal, state or local housing subsidies, including rental assistance or rental supplements, *solely because the individual is such a recipient*.") (emphasis added).

[120] *See* Mark A. Malaspina, Note, *Demanding the Best: How to Restructure the Section 8 Household-Based Rental Assistance Program*, 14 YALE L. & POL'Y REV. 287, 288 (1996).

[121] 511 N.E.2d 1103 (Mass. 1987).

[122] *Id.* at 1105.

[123] *Id.*

relevant to that determination.[124] In other words, a landlord could not discriminate solely because of an applicant's status as an aid recipient, but a landlord could escape liability by showing that the requirements of an aid program would render a subsidized rental contract a disadvantageous business decision.[125] In 1990, subsection 4(10) was amended in response to the *Brown* decision.[126] To strengthen subsection 4(10), the word "solely" was removed, and language making it illegal to deny housing "because the individual is such a recipient" or "because of any requirement" of a subsidy program was added to the statute.[127]

2. Hennessey v. Berger—1988

Approximately one year after *Brown*, the Supreme Judicial Court decided a second subsection 4(10) case: *Hennessey v. Berger*.[128] Plaintiff Hennessey sued an ophthalmologist who was not enrolled in the federal Medicaid program, and who allegedly refused to treat Hennessey because she was a Medicaid recipient.[129] The court concluded that subsection 4(10) could not "mandate enrollment" in the federal Medicaid program.[130] A physician may refuse to accept Medicaid as a source of payment, though if he accepts Medicaid from one patient he must accept Medicaid from all patients.[131] The court disagreed with the plaintiff's argument that *Brown* required the defendant to enroll in the federal program: "We

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[124] *Id.* at 1109. This note argues that the facts of *Brown* are distinguishable from a case involving project-based vouchers, and does not discuss whether the *Brown* court ruled properly on the issue of federal preemption. *But see* Jenna Bernstein, Note, *Section 8, Source of Income Discrimination, and Federal Preemption: Setting the Record Straight*, 31 CARDOZO L. REV. 1407, 1418 (2010) (arguing that federal law preempts subsection 4(10) and that the Supreme Judicial Court reached the wrong result in *Brown*).

[125] *See Brown*, 511 N.E. 2d at 1109.

[126] *See* DiLiddo v. Oxford St. Realty, Inc., 876 N.E.2d 421, 428 (Mass. 2007) ("Two years after the *Brown* decision, the General Court sought to amend G.L. c. 151B, § 4 . . . .").

[127] *Id.*

[128] 531 N.E.2d 1268 (Mass. 1988).

[129] *Id.* at 1269.

[130] *Id.* at 1269-70 ("Absent a specific repeal . . . an explicit statement of legislative intent . . . we will not assume that the Legislature intended to mandate that health care providers enroll in the Medicaid program.").

[131] *Id.* at 1270.

did not state [in *Brown*], as the plaintiff here argues, that the decision not to enroll in a voluntary governmental program by itself constitutes unlawful discrimination under G.L. c. 151B, § 4(10)."[132] What makes the ophthalmologist's action in *Hennessey* permissible, and the landlord's action in *Brown* impermissible, is that in *Hennessey* the ophthalmologist refused all federal aid recipients, whereas in *Brown*, the landlord singled out an *individual* who received federal aid.[133]

3. DiLiddo v. Oxford Street Realty—2007

In 2007, the Supreme Judicial Court clarified the purpose of the 1990 amendment to subsection 4(10) in *DiLiddo v. Oxford Street Realty*,[134] a case with facts very similar to *Brown*.[135] The plaintiff in *DiLiddo* brought her suit after a property owner refused to sign a lease because he thought the mandatory provisions required by the plaintiff's housing voucher were unreasonable.[136] The defendant-property owner claimed that he could refuse to participate in the voucher program because he had a legitimate business reason for not accepting the voucher's provision.[137] The court looked at the recent amendment to subsection 4(10), compared its language to the prior version of the statute and concluded that the amended statute now clearly prohibited both status-based and requirement-based discrimination.[138] As a result, even if a voucher requirement would render a lease economically disadvantageous to an owner, an owner cannot refuse to rent a unit to a voucher recipient because of the voucher's requirements.[139]

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[132] *Id.* at 1271.
[133] *See id.*
[134] 876 N.E.2d 421, 427-30 (Mass. 2007).
[135] *Id.* at 429.
[136] *Id.* at 425.
[137] *Id.* at 429.
[138] *Id.*
[139] *Id.*

III. Chapter 151B § 4(10) Should Not Operate Where Property Owners Prepay Mortgages or Discontinue Participation in a Project-Based Section 8 Program

Though neither *Brown*, *Hennessy* nor *DiLiddo* address the issue of whether subsection 4(10) should apply to property owners that prepay their mortgages or fail to renew their project-based voucher contracts,[140] subsection 4(10) cannot be interpreted to apply to project-based property owners in these instances. Even if a court were to find such an interpretation, it is not a practical cause of action. When deciding to either prepay a mortgage or not renew a project-based contract, an owner can point to the issuance of enhanced vouchers that effectively prevent tenants from displacement.[141] This consideration can then be included as part of the reasonable business decision calculus, which consequently makes a successful discrimination claim far less likely.[142] Nonetheless, for the following reasons subsection 4(10) cannot be interpreted to apply to property owners who prepay their mortgages or fail to renew their project-based contracts.

A. The Massachusetts Legislature did not intend for § 4(10) to apply to project-based contracts

Statutes must be construed to preserve as much "legislative intent as is possible."[143] And though its authors intended Chapter 151B subsection 4(10) to be construed "liberally,"[144] the Massachusetts legislature did not intend for subsection 4(10) to apply when an owner chooses to either prepay a mortgage or not renew a project-based voucher contract.

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[140] *Contra* Highpoint Amended Complaint, *supra* note 3, at 22-24.

[141] *See* 42 U.S.C. § 1437f(c)(8)(A). The counterargument is that since enhanced vouchers are not directly authorized tenants still run a substantial risk of being displaced, hence the importance of preservation efforts. *See* Achtenberg, *supra* note 11, at 3.

[142] *See* City of Salem v. Salem Heights Apartments Co., No. 00-CV-00165, 2001 WL 1562418, at *17 (Mass. Housing Ct. Nov. 30, 2001).

[143] Duracraft Corp. v. Holmes Products Corp., 691 N.E.2d 935, 943 (Mass. 1998).

[144] MASS. GEN. LAWS. ANN. ch. 151B § 9 (West 2011) ("[C]hapter [151B] shall be construed liberally for the accomplishment of its purposes . . . ."); Turnley v. Banc of Am. Inv. Services, Inc., 576 F. Supp. 2d 204, 219 (D. Mass. 2008).

Subsection 4(10) states that it is illegal for "any person furnishing . . . rental accommodations to discriminate against any *individual* . . . ."[145] The seminal subsection 4(10) cases illustrate that the legislature only intended to address discrimination against *individual* tenant-based voucher recipients. The defendant in *Brown* was accused of discriminating against a Section 8 certificate holder, and the court properly applied subsection 4(10) to those facts.[146] Similarly, in *DiLiddo*, the defendant refused to rent to an AHVP voucher recipient.[147] Again, the court properly applied subsection 4(10) and stated that the facts of *DiLiddo* were "squarely within the ambit of the prohibition of the statute as amended."[148] In both of these cases, an owner was discriminating against an "individual" who received assistance very similar to the current tenant-based voucher program. These cases indicate that the legislature intended to address discrimination at the beginning of the rental stage—specifically to individual renters—and not at the closing stages of a long-term project-based contract.

Moreover, Massachusetts caselaw does not compel an owner to renew a project-based contract. The decision to prepay a mortgage or not renew a project-based contract is distinguishable from the individual leases at issue in cases such as *Brown* and *DiLiddo*.[149] In *Brown* and *DiLiddo*, both landlords owned units that were eligible for rent under the applicable fair housing laws. And once a voucher applicant applied for those units, the choice not to rent to the applicant—not enrollment in the program—was the issue. Deciding whether to renew or terminate a project-based contract, however, is most analogous to deciding whether to reenroll in a voluntary government program. Therefore, deciding whether to renew a project-based contract is more similar to the Medicaid program at

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[145] MASS. GEN. LAWS ANN. ch. 151B § 4 (West 2011) (emphasis added).
[146] *See* Attorney Gen. v. Brown, 511 N.E.2d 1103, 1110 (Mass. 1987). *But see* Bernstein, *supra* note 124, at 1418 (arguing that federal law preempts subsection 4(10) and that the Supreme Judicial Court reached the wrong result in *Brown*).
[147] *See* Dillido v. Oxford St. Realty, Inc., 876 N.E.2d 421, 425 (Mass. 2007). The AHVP program is a Massachusetts program, and an AHVP voucher is transferable and similar to a Section 8 tenant-based voucher. *Id.* at 423.
[148] *Id.* at 429.
[149] *Brown*, 511 N.E.2d at 1105; *DiLiddo*, 876 N.E.2d at 425-26.

issue in *Hennessy*, which expressly held that subsection 4(10) did not "mandate enrollment."[150]

Brown prohibits refusal to rent because of status, and *DiLiddo* prohibits refusal to rent because of a voucher's requirement; but *Hennessy*, which is still good law, makes clear that refusal to enroll—or in this case, renew—by itself does not fall within the ambit of subsection 4(10).[151] The statute permits a "good faith" business decision to prepay a mortgage or not renew a project-based program,[152] and even if the associated use provisions expire, assisted residents may generally continue living at the property by using enhanced vouchers.[153]

B. The structure of Chapter 151B § 4 dictates that § 4(10) should be construed to apply only to tenant-based voucher contracts

Chapter 151B section 4, the full discrimination statute, contains other provisions banning housing discrimination. Several of these provisions specifically mention "publicly assisted" housing accommodations,[154] whereas subsection 4(10) applies to "rental accommodations."[155] The *expressio unius est exclusio alterius* maxim of statutory construction may "aid in construction where other clearer indications are lacking."[156] The text of subsection 4(10) is ambiguous, and utilizing the *expressio unius* rule here is proper

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[150] *See* Hennessey v. Burger, 531 N.E.2d 1268, 1269 (Mass. 1988).
[151] *See id.*
[152] City of Salem v. Salem Heights Apartments Co., No. 00-CV-00165, 2001 WL 1562418, at *17 (Mass. Housing Ct. Nov. 30, 2001) (stating that § 4(10) does not broadly prohibit "a good faith economic based business decision to change or withdraw from participation in a particular rental assistance or housing subsidy program.").
[153] *Id.* ("The plaintiffs' contention about unlawful discrimination against recipients of rental assistance seems particularly untenable, where the law governing the Section 236 program itself allows an owner to prepay its mortgage note and withdraw from the program, and where the summary judgment record in this case shows that the owners here propose to substitute Section 8 tenant-based housing subsidies for the presently existing Section 236 project-based subsidies.").
[154] MASS. GEN. LAWS ANN. ch. 151B §§ 1, 6-7 (West 2011).
[155] *Id.* §§ 4, 10.
[156] Iannelle v. Fire Com'r of Boston, 118 N.E.2d 757, 759 (Mass. 1954).

because the result does not conflict with the legislature's intent.[157] Because subsection 4(10) refers simply to "rental accommodations," the legislature's deliberate decision not to include a reference to publicly assisted rental accommodations infers that rental accommodations are individual units in the open market, and not the project-based properties referred to elsewhere in chapter 151B section 4. Thus, subsection 4(10) applies only to tenant-based voucher contracts.

C. Interpreting Chapter 151B § 4(10) to require property owners to renew project-based contracts would be an absurd result

A statute's literal meaning does not have to be accepted if that interpretation would lead to an absurd result.[158] Tenant-based leases are relatively short compared to the long term rental contracts typical to project-based voucher programs. Requiring project-based owners to continually renew their HAP contracts is akin to the endless lease provisions that were repealed by Congress, who found such tactics counterproductive to the program's purpose.[159] The purpose of the voucher discrimination statute is to prevent owners from treating voucher recipients differently from other tenants.[160] With tenant-based vouchers, the recipient family will choose a housing unit themselves, hence the danger of an owner refusing to rent in a discriminatory fashion. But in a project-based development, an owner has already agreed to accept a set number of voucher recipients, so the rationale for tenant-based discrimination does not apply. Forcing property owners to renew their project-based contracts against their will is illogical and ultimately counterproductive to the goal of providing affordable housing.

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[157] *See* Ciampi v. Comm'r of Correction, 892 N.E.2d 270, 276 (Mass. 2008) (*expressio unius* is not followed where it would frustrate general beneficial purpose of statute).

[158] Comm. v. Millican, 867 N.E.2d 725, 728 (Mass. 2007); *see Helvering v. Hammel*, 311 U.S. 504, 510 (1941).

[159] *See* Quality Housing and Work Responsibility Act of 1998, Pub. L. No. 105- 276, tit. V, 112 Stat. 2461, 2518-2607 (1998) (codified at 42 U.S.C. § 1437g(n) (Supp. 1998); *see also* Bernstein, *supra* note 124.

[160] *Cf.* Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 297 (2d Cir. 1998).

D. Chapter 40T indicates the limits of the discrimination law

Legislative intent can also be determined in light of the "whole system" of laws governing affordable housing, including other statutes on the same subject.[161] In 2009 the legislature enacted chapter 40T as the primary means to preserve expiring affordable units.[162] Chapter 40T appears to be the legislature's first true response to the expiring use crisis, and there is no indication that this new legislation was enacted to function in tandem with the Massachusetts voucher discrimination law.[163] That's because the two laws serve different purposes: the language and structure of subsection 4(10) make it clear that subsection 4(10) is meant to protect individual renters from discriminatory landlords in the open market, not to preserve expiring project-based units.

IV. Does Federal Housing Law Preclude Chapter 151B § 4(10) From Application?

The First Circuit has held that *federal* law does not require HUD or property owners to renew Section 8 contracts after they expire.[164] Federal and state courts are split, however, on the question of whether *state* law can require an owner to renew a Section 8 contract or a mortgage contract. As discussed forth below, preemption appears not to be a strong argument for preventing the voucher discrimination statute from applying to property owners that prepay their mortgages or fail to renew their project-based contracts.

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[161] *See* Killam v. March, 55 N.E.2d 945, 947 (Mass. 1944) (citing Armburg v. Boston & M.R., 177 N.E. 665, 670 (Mass. 1931)).

[162] *See generally* MASS. GEN. LAWS ANN. ch. 40T; Press Release, *supra* note 4 ("The Governor's signing of the 'expiring use' bill . . . creates a regulatory framework to preserve affordable rents in properties where long-term, publicly subsidized mortgages are paid off and affordability restrictions can then expire.").

[163] *See* Summary of S. 782, http://www.chapa.org/pdf/S782summary.pdf (last visited May 29, 2011).

[164] *See* People To End Homelessness, Inc. v. Develco Singles Apartments Assocs., 339 F.3d 1, 7 (1st Cir. 2003).

A. Federal Preemption Doctrine

The Supremacy Clause of the United States Constitution provides Congress with the authority to preempt state law.[165] The key inquiry when determining preemption is the legislature's intent,[166] and in the absence of express statutory language, a court will analyze a statute's explicit language, structure and purpose using principles of statutory construction to determine intent.[167] A court begins by assuming that Congress did not intend to preempt state law unless Congress clearly indicated to the contrary.[168] One way that a federal statute can preempt state law is conflict preemption. Conflict preemption occurs when a direct conflict exists between state law and federal law and compliance with both laws would be impossible, either because compliance is a "physical impossibility"[169] or because compliance with both laws obstructs "the accomplishment and execution of the full purposes" of Congress.[170] The same analysis that applies to federal laws preempting state laws also applies to federal regulations promulgated by a federal agency acting within the scope of its delegated authority.[171] Preemption advocates argue that any attempt to apply subsection 4(10) to expiring project-based contracts is preempted by federal law because that application of the

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[165] U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[166] Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994).

[167] Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996).

[168] *Id.* at 485 ("First, because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.").

[169] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143 (1963).

[170] Michigan Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

[171] Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 369 (1986); Norfolk Elec., Inc. v. Fall River Hous. Auth., 629 N.E.2d 967, 972 (Mass. 1994).

statute would frustrate Congressional purpose, thereby creating conflict preemption.[172]

B. Preemptive Provisions and the Voluntary Nature of the Section 8 Program Do Not Necessarily Preclude the State Discrimination Statute From Requiring Project-Based Renewal

Preemption appears to not be a strong argument for preventing the state voucher discrimination statute from applying to expiring use cases. State courts have overwhelmingly held that voucher discrimination laws are not preempted. Federal courts have not explicitly preempted state voucher discrimination laws, but have noted that using state voucher discrimination law to force owners to renew federal housing assistance contracts is "questionable" and "absurd." Two separate federal housing laws enacted in the 1990s each contain similar preemption provisions, but both provisions allow local laws of "general applicability," which could mean voucher discrimination laws. It appears that federal statutes and regulations do not preclude state voucher discrimination law from being applied to expiring contracts.

1. The Argument Against Preemption of State Voucher Discrimination Law

Several state courts, including Massachusetts, have concluded that state voucher discrimination laws and regulations are not preempted by federal law.[173] These decisions have been based on several conclusions. *Brown* addressed the preemption issue and concluded that the Section 8 statute envisioned state participation, and that the state voucher discrimination statute and the Section 8

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[172] *See* Bernstein, *supra* note 124. *But see* Comm'n on Human Rights & Opportunities v. Sullivan Assocs., 739 A.2d 238, 246 (Conn. 1999) (stating that the section 8 program does not preempt state law through express or field preemption).

[173] Attorney Gen. v. Brown, 511 N.E.2d 1103, 1126 (Mass. 1987); Edwards v. Hopkins Plaza Ltd. P'ship, 783 N.W.2d 171, 176 (Minn. Ct. App. 2010); Montgomery County v. Glenmont Hills Assocs. Privacy World at Glenmont Metro Ctr., 936 A.2d 325, 338 (Md. 2007); Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1113 (N.J. 1999); Comm'n on Human Rights & Opportunities v. Sullivan Assocs., 739 A.2d 238, 246 (Conn. 1999).

statute both share the same goal—production of affordable housing.[174] Additionally, federal regulations governing the Section 8 program have expressly stated that "[n]othing in [the federal Section 8 regulation] is intended to pre-empt operation of State laws that prohibit discrimination against a Section 8 voucher-holder."[175] Courts have also noted that while HUD has expressly preempted state law in other federal housing programs, it has failed to do so for the Section 8 program.[176]

2. The Argument for Preemption of State Voucher Discrimination Law

The state cases interpreting voucher discrimination preemption deal only with some form of tenant-based vouchers and do not distinguish between tenant-based and project-based vouchers. Therefore, an argument could be made that those cases are distinguishable from a case involving withdrawal from a project-based program. Further, federal courts have commented that allowing state voucher discrimination law to force owners into contracts is "absurd."

In *Knapp v. Eagle Property Management Corp.*, the Seventh Circuit declined to find that a state source-of-income discrimination law covered Section 8 vouchers and indicated in dicta that "it seems questionable . . . to allow a state to make a voluntary federal program mandatory."[177] When discussing the Congressional intent behind the Section 8 program, the Second Circuit noted that forcing an unwilling owner to contract with a voucher recipient is an "absurd result" contrary to Congressional intent.[178] The Court also noted that under federal law the program was voluntary and that owners "lawfully may refuse to accept applications from Section 8

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[174] *Brown*, 511 N.E.2d at 1126.
[175] *Montgomery*, 936 A.2d at 333 (quoting 24 C.F.R. § 982.53(d) (2010)).
[176] *Franklin Tower One*, 725 A.2d at 1113.
[177] 54 F.3d 1272, 1282 (7th Cir. 1995). *But see Comm'n on Human Rights & Opportunities*, 739 A.2d at 246 (stating that the section 8 program does not preempt state law).
[178] Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 298 (2d Cir. 1998).

beneficiaries."[179] Nevertheless, as noted above, state courts have held the opposite.[180]

In 2008, in an attempt to resolve what they saw as a conflict between state and federal court decisions, several *amici curiae* requested the U.S. Supreme Court to consider whether the Section 8 program preempted state voucher discrimination laws. The National Association of Home Builders, the California Apartment Association and the National Association of Residential Property Managers all filed *amici curiae* briefs on the preemption issue but the Supreme Court denied their petition for writ of certiorari.[181] A petition for rehearing was denied on August 18, 2008.[182]

3. LIHPRHA Preemption

LIHPRHA contains a preemption provision that protects property owners from states or localities attempting to burden owners with additional regulation.[183] Federal regulation expressly states that any state or local law or regulation that attempts to restrict mortgage prepayment or mortgage insurance termination on LIHPRHA housing developments is preempted by federal law.[184] State or local laws preventing owners of LIHPRHA projects from receiving authorized annual returns are also preempted.[185] This express preemption, however, does not apply to laws of "general applicability" that are "not inconsistent" with LIHPRHA.[186] Examples of laws of general applicability include laws regulating "building standards, zoning limitations, health, safety, or habitability standards for housing, rent

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[179] *Id.* at 296.

[180] Attorney Gen. v. Brown, 511 N.E.2d 1103, 1126 (Mass. 1987); Edwards v. Hopkins Plaza Ltd. P'ship, 783 N.W.2d 171, 176 (Minn. Ct. App. 2010); Montgomery County v. Glenmont Hills Assocs. Privacy World at Glenmont Metro Ctr., 936 A.2d 325, 338 (Md. 2007); Franklin Tower One, L.L.C. v. N.M., 725 A.2d 1104, 1113 (N.J. 1999); Comm'n on Human Rights & Opportunities v. Sullivan Assocs., 739 A.2d 238, 246 (Conn. 1999).

[181] Glenmont Hills Assocs. Privacy World at Glenmont Metro Ctr. v. Montgomery County, Md., 553 U.S. 1102 (2008) (granting leave to file *amicus curiae* but *cert. denied*).

[182] Glenmont Hills Assocs. Privacy World at Glenmont Metro Ctr. v. Montgomery County, Md., 129 S. Ct. 20, 171 L. Ed. 2d 923 (2008).

[183] 12 U.S.C. § 4122 (2010); 24 C.F.R. § 248.183(a)(1) (2010).

[184] 12 U.S.C. § 4122(a)(1) (2010); 24 C.F.R. § 248.183(a)(1) (2010).

[185] 12 U.S.C. § 4122(a)(2) (2010); 24 C.F.R. § 248.183(a)(2) (2010).

[186] 12 U.S.C. § 4122(b) (2010); 24 C.F.R. § 248.183(c) (2010).

control, or conversion of rental housing to condominium or cooperative ownership, to the extent that such law or regulation is of general applicability to both projects receiving Federal assistance and non-assisted projects."[187] Voucher discrimination is not mentioned.

Even though Congress eventually defunded LIHPRHA and removed the prepayment restrictions it formerly imposed, LIHPRHA's preemption provision is still applicable to owners prepaying their mortgages under the HOPE Act.[188] Litigants have attempted to use the dormant LIHPRHA preemption provision to preempt state preservation statutes, with varying degrees of success.[189] There are two reasons, however, why depending on the LIHPRHA preemption may not be an effective defense. First, LIHPRHA's preemption provisions will only apply to mortgages renewed while LIHPRHA was in effect and funded by Congress, which limits the number of cases where this provision would apply. Further, though not specifically mentioned in the preemption provision, a voucher discrimination law does appear to be a law of "general applicability" that is "not inconsistent" with LIHPRHA and does not interfere with mortgage prepayment, and therefore the preemption provision would not apply to voucher discrimination laws.

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[187] 12 U.S.C. § 4122(b) (2010); 24 C.F.R. § 248.183(c) (2010).

[188] *See* Freedman, *supra* note 23, at 746.

[189] *Id.* ("Two recent cases considering the applicability of LIHPRHA's preemption provision to HOPE's prepayment provisions demonstrate the confusion surrounding this issue. The Eighth Circuit, in Forest Park II v. Hadley, and the Ninth Circuit, in Topa Equities v. City of Los Angeles, examined . . . whether the LIHPRHA provision preempts the respective [state] preservation statute challenged in the cases . . . . The Eighth Circuit employed a "practical effects" analysis, under which all state or local preservation laws that have the effect of limiting or delaying owners' expectations of converting their affordable housing projects to market rates are preempted. By contrast, the Ninth Circuit employed a "legal consequences" test, under which laws that "restrict or inhibit" the prepayment of federally subsidized mortgages are preempted. The result is that state or local laws (e.g., rent control regulations) in the Eighth Circuit that restrict owners from realizing the potential gains from market-rate rents following opt out are preempted, while those in the Ninth Circuit, according to the court in Topa Equities, are not.").

4. MAHRA Preemption

Like LIHPRHA, MAHRA contains express preemption provisions. And similar to LIHPRHA, these provisions apply only to state laws that limit or restrict owner distributions more than allowed by federal regulations.[190] In recent litigation on whether MAHRA preempts state law from exercising powers of imminent domain, the Seventh Circuit held that the "purpose" of MAHRA—to preserve the affordable housing stock—could not preempt state law.[191] While this case was not decided in the context of state voucher discrimination law, the Seventh Circuit's decision indicates that other courts would be willing to hold similarly on other types of MAHRA preemption claims.

V. Alternatives

Assuming that tenants in expiring properties do receive enhanced vouchers, the preservation of Massachusetts's project-based housing stock remains critically important to maintaining racial and economic diversity,[192] thus the attempt to utilize sub-section 4(10) to preserve expiring project-based units—while arguably not viable—is not without virtue. 40T is a creative effort from the legislature which could eventually be an effective solution, but the Commonwealth needs adequate funds for 40T to operate, funds which the Commonwealth currently cannot spare.[193] There are, however, other potentially useful theories by which to preserve expiring units.

A. Disparate Impact Claims Under the Fair Housing Act

Title VIII of the Civil Rights Act of 1968, the Fair Housing Act ("FHA"), prohibits housing discrimination on the basis of race,

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[190] 42 U.S.C. § 1437(f)(ee)(1)(F) (2010).

[191] City of Joliet, Ill. v. New W., L.P., 562 F.3d 830, 834 (7th Cir. 2009) *cert. denied*, 130 S. Ct. 1504 (U.S. 2010).

[192] *See* Achtenberg, *supra* note 11, at 3.

[193] *See* Mass. Budget and Policy Ctr., Fiscal Fallout: The Great Recession, Policy Choices, and State Budget Cuts—An Update for Fiscal Year 2012 (Apr. 3, 2011), http://www.massbudget.org/documentsearch/findDocument?doc_id=781.

color, national origin, ancestry, religion, creed, sex, familial status and handicap or disability.[194] There are primarily two theories under which a plaintiff may proceed with a FHA discrimination claim: disparate treatment (discriminatory intent)[195] and disparate impact (discriminatory effect).[196] Disparate treatment occurs when an owner or landlord intentionally treats a tenant or an applicant less favorably—and without a valid business reason—because that person is a member of a protected class.[197] Because a plaintiff may have difficulty obtaining direct evidence,[198] it is entirely permissible for a plaintiff to prove intentional disparate treatment by circumstantial

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[194] *See* Fair Housing Act, *supra* note 117.

[195] There are also "mixed motive" cases that involve a discriminating defendant motivated by both legitimate and illegitimate reasons. This distinction need not be discussed for the purpose of this note.

[196] The disparate treatment and disparate effect doctrines originated in Title VII employment discrimination cases but have since been applied to Title VIII housing cases. *See* Langlois v. Abington Hous. Auth., 207 F.3d 43, 49-50 (1st Cir. 2000) ("It is quite true that the Fair Housing Act provision in question uses language that could be thought to refer simply to intentional discrimination . . . [b]ut the consensus among the circuits that have discussed this issue in the housing context is that the Fair Housing Act prohibits actions that have an unjustified disparate racial impact, and we find their reasoning persuasive."); Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 934-35 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (per curiam); Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 146-48 (3d Cir.1977), *cert. denied*, 435 U.S. 908, (1978); Metropolitan Housing Dev't Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1288-90 (7th Cir.1977), *cert. denied*, 434 U.S. 1025 (1978); *see generally* Adam Gordon, Note, *Making Exclusionary Zoning Remedies Work: How Courts Applying Title VII Standards to Fair Housing Cases Have Misunderstood the Housing Market*, 24 YALE L. & POL'Y REV. 437, 437-48 (2006) (discussing the development of the disparate impact test in Title VIII cases); Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 422 n.38 (1998) (describing the disparate treatment doctrine as originating from employment decisions).

[197] *See* Int'l Broth. of Teamsters v. United States, 431 U.S. 324, 335-37 (1977) (describing the disparate treatment theory in an employment discrimination case).

[198] United States v. Badgett, 976 F.2d 1176, 1178 (8th Cir. 1992) ("[D]irect proof of unlawful discrimination is rarely available[.]").

evidence.[199] Even so, it can be difficult for a plaintiff to find even circumstantial evidence of a defendant's intent to discriminate.[200] Moreover, voucher recipients are not a protected class under the FHA.[201]

But even though voucher recipients are not a federally protected class, a voucher recipient may still bring a FHA claim premised on a disparate impact claim.[202] Disparate impact claims operate regardless of a defendant's motive:[203] a plaintiff may make a *prima facie* disparate impact case simply by showing that a facially neutral policy or decision has a discriminatory effect or perpetuated patterns of segregation against a FHA protected class of which the plaintiff is a member.[204] The burden then shifts to the defendant to show a valid justification for the policy or decision.[205] The next step varies by jurisdiction, but the First Circuit has adopted a "simple

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[199] Desert Palace, Inc. v. Costa, 539 U.S. 90, 91 (2003) ("This Court has often acknowledged the utility of circumstantial evidence in discrimination cases[.]").

[200] *See* Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1290 (7th Cir. 1977) ("As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared.").

[201] *See* Fair Housing Act, *supra* note 117.

[202] Graoch Associates # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n, 508 F.3d 366, 377 (6th Cir. 2007).

[203] *See* Int'l Broth. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. Either theory may, of course, be applied to a particular set of facts.") (internal citations omitted); Macone v. Town of Wakefield, 277 F.3d 1, 7 (1st Cir. 2002) ("The important distinction here is that we look only at the effect of the [defendant's] actions, not its motivation.").

[204] *Macone*, 277 F.3d at 7; Langlois v. Abington Hous. Auth., 207 F.3d 43, 49-50 (1st Cir. 2000) ("The Supreme Court has said that no single test controls in measuring disparate impact[.]"). Plaintiffs often show discriminatory effect through statistics. *See* MacDissi v. Valmont Indus., Inc., 856 F.2d 1054, 1058 (8th Cir. 1988) ("In disparate-impact cases, statistical patterns of disparity are typically the entire basis of the plaintiffs' claims[.]").

[205] *Langlois*, 207 F.3d at 49-50.

justification test" to evaluate a defendant's proffered justification.[206] A policy or decision with a demonstrated discriminatory effect must "be justified by a legitimate and substantial goal of the measure in question[.]"[207] If the defendant satisfies the simple justification test, a plaintiff can still succeed by showing that the defendant's justification was a pretext for discrimination or that there was a less discriminatory practice that would have achieved the defendant's same goal.[208] If the plaintiff cannot offer such evidence, the disparate impact claim fails.[209]

There is a split among circuit courts on whether to allow voucher holders to assert disparate impact claims against private landlord-defendants. The Seventh and Second Circuits have both rejected disparate impact claims for voucher holders and categorically exempted landlords from liability.[210] The Fourth Circuit permits voucher holders to bring FHA claims against landlords and has applied a two-part burden shifting test,[211] while the Tenth Circuit allows its FHA plaintiffs to bring the same claims, subject to a multi-factor balancing test.[212] And most recently, in *Graoch Associates* the Sixth Circuit held not only that voucher holders may assert disparate

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[206] *Id.* at 51 (adopting the simple justification test used by the Second and Third Circuits and rejecting the Seventh Circuit balancing test); *see generally* Evan Forrest Anderson, Case Note, *Vouching for Landlords: Withdrawing from the Section 8 Housing Choice Voucher Program and Resulting Disparate Impact Claims*—Graoch Associates #33, L.P. v. Louisville/Jefferson County Metro Human Relations Commission 78 U. CIN. L. REV. 371, 376-82 (2009) (discussing the various disparate impact tests employed by the circuit courts).

[207] *Langlois*, 207 F.3d at 51.

[208] *See id.*; E.E.O.C. v. S.S. Clerks Union, Local 1066, 48 F.3d 594, 602 (1st Cir. 1995) (Title VII plaintiff offering proof of pretext or less discriminatory practice may prevail in spite of legitimate justification proffered by defendant); *see also* Langlois v. Abington Hous. Auth., 234 F. Supp. 2d 33, 70 (D. Mass. 2002) ("Even if I were to find that the defendants rebutted the *prima facie* case . . . the defendants would still have to show that no less discriminatory alternative is available to meet its justified ends.").

[209] *See Langlois*, 207 F.3d at 51.

[210] *Knapp v. Eagle Prop. Mgmt. Corp.*, 54 F.3d 1272, 1275 (7th Cir. 1995); Salute v. Stratford Greens Garden Apartments, 136 F.3d 293, 295 (2d Cir. 1998).

[211] *Betsey v. Turtle Creek Associates*, 736 F.2d 983, 985 (4th Cir. 1984).

[212] *Mountain Side Mobile Estates P'ship v. Sec'y of Hous. & Urban Dev.*, 56 F.3d 1243, 1251-52 (10th Cir. 1995).

impact claims against private defendants, but that landlord withdrawal from the Section 8 program can constitute disparate impact discrimination under the FHA.[213]

The facts in *Graoch* are as follows: Autumn Run Apartments had notified the local PHA that it intended to leave the Section 8 program and that it would not be renewing or signing new leases.[214] Seventeen of the eighteen affected Section 8 voucher holders were black.[215] A federal district court, ruling in favor of defendant's motion for declaratory judgment that its withdrawal did not violate the FHA, found that since the Section 8 program is voluntary, withdrawal cannot be discrimination.[216]

On appeal, the Sixth Circuit reversed the district court and held that a landlord's withdrawal from the Section 8 program can violate the FHA simply by having a discriminatory effect.[217] The court then considered the standard for measuring disparate impact claims against private defendants.[218] The court started by considering three other frameworks: (1) the three-part *McDonnell Douglas* burden shifting test adopted from Title VII cases and used by Title VIII plaintiffs in disparate treatment claims against private defendants; (2) the three-part burden-shifting framework used by Title VII plaintiffs in disparate impact cases against private defendants; and (3) the multi-factor test used to analyze Title VIII disparate impact claims against government defendants.[219]

The court ultimately adopted a three-part burden-shifting test: first, a plaintiff makes a prima facie case by offering statistical evidence sufficient to show that the challenged housing practice has an adverse effect on a FHA-protected class.[220] Next, the defendant must offer a "legitimate business reason" to survive the prima facie case.[221] Finally, if the defendant can offer a legitimate business reason, then the plaintiff must show that the defendant's reason is

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[213] Graoch Associates # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n, 508 F.3d 366, 377 (6th Cir. 2007).
[214] *Id.* at 369-70.
[215] *Id.* at 370.
[216] *Id.*
[217] *Id.* at 369.
[218] *Id.* at 371-77.
[219] *Id.* at 371.
[220] *Id.* at 374.
[221] *Id.*

pretextual or that a less discriminatory housing practice exists that can achieve the same ends as the challenged business practice.[222]

The First Circuit and the Sixth Circuit use different tests to analyze Title VIII disparate impact claims against government defendants, but the three-part burden-shifting test adopted by the Sixth Circuit for disparate impact claims against private defendants is very similar to the First Circuit's analysis for claims against government defendants.[223] In fact, the Sixth Circuit cited the First Circuit's *Langlois* decision in its burden-shifting discussion.[224] If a project-based landlord withdrawal case were to come before the First Circuit, it would be a natural extension for the First Circuit to either apply its existing analysis for FHA claims against government defendants to private defendants, or to adopt the Sixth Circuit's three-part test for private defendants. Furthermore, the categorical exemptions set forth by the Second and Seventh Circuits should not apply to a project-based landlord withdrawal case in the First Circuit—as the Sixth Circuit correctly identified when it distinguished the facts in *Graoch* from the Second and Seventh Circuit cases, there is a clear difference between (a) a landlord's withdrawal from the Section 8 program and (b) a landlord's decision to not participate in the Section 8 program at all.[225]

B. Public Emergency

Under the police power, states have the authority to enact emergency housing laws that regulate "the landlord-tenant relationship" without having to compensate owners "for all economic injuries that such regulation entails."[226] The Commonwealth exercised this power in the 1970s, after a public emergency was

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[222] *Id.*

[223] *See Langlois*, 207 F.3d at 49-50. The primary difference between the two tests is that the second step in the *Graoch* case requires a defendant to proffer a "legitimate business reason," *Graoch*, 508 F.3d at 374, while the second step in *Langlois* requires the defendant to proffer a "simple justification." *Langlois*, 207 F.3d at 51.

[224] *Graoch*, 508 F.3d at 372. ("Relying on the analogy between Title VII and the FHA, several other circuits have applied essentially this approach to disparate-impact claims under the FHA.").

[225] *Id.* at 377.

[226] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982); Edgar A. Levy Leasing Co. v. Siegel, 258 U.S. 242, 245 (1922) (proper for state to enact emergency housing laws).

declared due to a shortage of low and moderate income housing. [227] The Commonwealth is currently facing a similar housing shortage, albeit one where the circumstances are steadily worsening. Nationwide, from 2001 to 2008 there was a thirty-five percent increase in the number of people paying fifty percent or more of their income for rent.[228] Further, only one quarter of qualifying low-income families receive federal housing assistance.[229] Based on increasing housing costs, the lack of available housing subsidies and the severely strained affordable housing stock, the legislature could again find and declare a public emergency to regulate "the landlord-tenant relationship" between landlords with expiring units and their project-based tenants.[230] Although technically an open question in Massachusetts, a by-law that aims to prohibit conversion-seeking owners from indirectly displacing tenants during an emergency would likely be found constitutional.[231]

An emergency housing law would have to avoid federal preemption. HUD has clearly promulgated regulations that preempt state and local rent control laws that conflict with prepayment and the administration of federal housing programs.[232] But since continued participation in the project-based Section 8 program is the primary concern, the legislature need not enact an unduly interfering prepayment or rent control law to preserve units—rents can basically remain at HUD-approved levels, thus avoiding express and conflict preemption issues.[233] Moreover, landlord-tenant laws of "general applicability" are not preempted by federal law.[234]

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[227] *Cf.* Mayo v. Boston Rent Control Adm'r, 314 N.E.2d 118, 121-22 (1974) (substantial shortage of low and moderate income housing necessitated public emergency declaration).

[228] *See* JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING: 2010, at 5 (2010).

[229] *Id.*

[230] *See Mayo*, 314 N.E.2d at 121-22.

[231] A similar by-law was upheld in Loeterman v. Town of Brookline, 524 F.Supp. 1325 (D.Mass.1981), but the decision was vacated after the appeals court held that the issues in the case were moot. Loeterman v. Town of Brookline, 709 F.2d 116 (1st Cir. 1983).

[232] City of Boston v. Harris, 619 F.2d 87, 93-95 (1st Cir. 1980);

[233] *Cf.* Kargman v. Sullivan, 552 F.2d 2, 6 (1st Cir. 1977) ("[T]his is not a case posing the difficulties, nationwide, of federally subsidized housing co-existing with local rent control.")

[234] *See* Topa Equities, Ltd. v. City of Los Angeles, 342 F.3d 1065, 1072 (9th Cir. 2003).

An example of a possible emergency housing law would be a by-law requiring developers to extend their project-based contracts for the duration of the housing emergency, which would likely remain in effect until a proper balance of affordable housing costs, stock and subsidies is achieved. Such a by-law would survive HUD's rent control regulations and would probably not be precluded by federal preemption doctrine, so long as LIHPRHA and MAHRA developers could still prepay their mortgages.[235] Moreover, extending a contract only temporarily for the duration of a housing emergency would generally avoid the "endless lease" conundrum,[236] though such a timeframe does not necessarily guarantee a short-term extension due to the current economic environment, nor does it ultimately solve the systemic expiring use problem.

The enactment of such an emergency housing law would be difficult. Housing is an important and hotly debated issue for many people in Massachusetts,[237] and lawmakers might not want to take the extraordinary—and probably unpopular— step of enacting an emergency law to preserve subsidized housing through contract regulation. Opponents would argue that the current housing shortage is not sufficient to establish a public emergency,[238] or possibly challenge a preservation by-law on constitutional grounds.[239] Any combination of these factors would greatly reduce the likelihood of an emergency housing law. Political support could be found, however, with 40B opponents in communities where without soon-to-be-expired project-based developments, local affordable housing stock levels would make the area vulnerable to new 40B projects.[240]

VI. Conclusion

Project-based housing fulfills an important role in the current housing stock; perhaps more important than the affordable units they

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[235] *See supra* Part IV.B.3-4; *see also Topa Equities*, 342 F.3d at 1069-73.
[236] *See supra* Part III.D.
[237] *See supra* note 16 and accompanying text.
[238] *See* Mayo v. Boston Rent Control Adm'r, 314 N.E.2d 118, 123 (1974) (public emergency must exist to allow interference between the landlord-tenant relationship).
[239] *See* Barney & Casey Co. v. Town of Milton, 87 N.E.2d 9, 13 (1949) (regulations considered "arbitrary, unreasonable, and oppressive" and that deprive an owner of his private property interest may be struck down).
[240] *See supra* note 16 and accompanying text.

provide to the housing stock mix, such housing creates racial and economic diversity. Preserving expiring project-based units is clearly a worthy cause. It is unlikely, however, that a court would apply the Massachusetts voucher discrimination law to preserve project-based subsidies. The legislature intended for subsection 4(10) to apply to portable, individual vouchers. The structure of the statute itself supports application to individual tenant-based vouchers. Further, interpreting subsection 4(10) to apply to project-based contracts and mortgage subsidies would lead to illogical results. Chapter 40T appears to be the legislature's primary tool to deal with expiring affordable units, though 40T's effectiveness may be limited by the Commonwealth's budget.

Whether state discrimination law should be precluded by federal law from renewing Section 8 contracts remains an open question. Naturally, state courts support a strong state discrimination law and oppose preemption. Some federal courts have indicated that allowing a state to force a developer to renew a federal contract would be an absurd and improper result. LIHPRHA and MAHRA both have express preemption provisions. In spite of this apparent conflict, the Supreme Court has declined to address the question of whether federal law preempts state voucher discrimination law.

There are alternative theories by which to preserve expiring units, and the *High Point United* plaintiffs correctly recognized that voucher recipients have the ability to bring FHA claims.[241] If a voucher holder is a member of a FHA-protected class, then the disparate impact theory of liability offers a voucher holder a bite at the FHA apple. The Sixth Circuit decision in *Graoch* established that landlords withdrawing from housing subsidy programs can be liable for FHA disparate impact violations, and First Circuit caselaw gives no indication that the First Circuit would have reason to decide a similar case—a case like *High Point United*—any differently. Finally, states have the power to enact emergency housing laws to protect the welfare of the community. Given the status of the current housing crisis, now seems as good a time as ever for the Commonwealth to declare a public emergency to preserve—albeit temporarily—expiring project-based housing, though lawmakers may be reluctant to take such a drastic step.

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[241] *See* Highpoint Amended Complaint, *supra* note 3, at 24.