

# Fordham Law Review

---

Volume 45 | Issue 3

Article 7

---

1976

## Pre-Emption of Local Rent Control Laws by HUD Regulation

Mary Anne Wirth

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>

 Part of the [Law Commons](#)

---

### Recommended Citation

Mary Anne Wirth, *Pre-Emption of Local Rent Control Laws by HUD Regulation*, 45 Fordham L. Rev. 651 (1976).

Available at: <https://ir.lawnet.fordham.edu/flr/vol45/iss3/7>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

# PRE-EMPTION OF LOCAL RENT CONTROL LAWS BY HUD REGULATION

## I. INTRODUCTION

Within the past two years, the plight of many urban tenants has been complicated by a new and controversial regulation promulgated by the Department of Housing and Urban Development (HUD).<sup>1</sup> The regulation supersedes state and local rent control laws with respect to projects financially supported by mortgages insured or held by HUD.<sup>2</sup> Two distinct groups of tenants have been affected by the regulation. HUD has pre-empted the entire field of rent control with respect to low and moderate income tenants living in projects that are both subsidized and insured by the federal government.<sup>3</sup> The Department has also indicated that it will pre-empt local rent control laws relating to upper-middle and upper income families in projects that are federally insured, even though they are not otherwise federally subsidized.<sup>4</sup> Here, the Department will proceed on a case by case basis, only acting when the delay or decision of a local rent control board places the project in economic jeopardy.<sup>5</sup> The new HUD regulation has been criticized as an unnecessary intrusion into an area traditionally regulated by the states and as an example of federal insensitivity to the needs of urban tenants in an inflationary economy.<sup>6</sup> This Note will examine these criticisms and also the relation of the pre-emption doctrine<sup>7</sup> to the federal regulatory agency.<sup>8</sup> Relevant mortgage insurance programs under the National Housing Act<sup>9</sup> and the HUD regulation itself<sup>10</sup> will be discussed in detail in order to elucidate the extent of federal economic and regulatory involvement in projects insured by HUD. Finally, this Note will review several recent cases spawned by the HUD regulation.<sup>11</sup>

### A. *The Federal Pre-emption Doctrine*

The doctrine of federal pre-emption is founded upon the supremacy clause of the Constitution.<sup>12</sup> However, at the outset, it should be noted that there is

---

1. 24 C.F.R. § 403 (1976); see N.Y. Times, June 6, 1976, § 8, at 1, col. 1

2. 24 C.F.R. §§ 403.5, 403.9 (1976).

3. See notes 91-93 *infra* and accompanying text.

4. See notes 97-99 *infra* and accompanying text.

5. See note 99 *infra* and accompanying text.

6. See note 107 *infra* and accompanying text.

7. See notes 12-34 *infra* and accompanying text.

8. See notes 35-53 *infra* and accompanying text.

9. See notes 54-77 *infra* and accompanying text.

10. See notes 78-107 *infra* and accompanying text.

11. See notes 108-71 *infra* and accompanying text.

12. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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." U.S. Const. art. VI, cl. 2. See Note, Parker v. Brown: A Preemption Analysis, 84 Yale L.J. 1164, 1167 (1975).

a critical analytical distinction between true "pre-emption" and the literal meaning of the supremacy clause. The supremacy clause invalidates state laws actually in conflict with federal law. The pre-emption doctrine strikes down all state laws in the area validly pre-empted.<sup>13</sup> Despite this distinction, the two have been used interchangeably.<sup>14</sup>

The Constitution delegates a broad spectrum of powers to Congress in Article I.<sup>15</sup> With the exception of specific functions reserved to the national government,<sup>16</sup> the states may concurrently regulate areas affected by federal legislation as a legitimate exercise of their police power.<sup>17</sup> The supremacy clause, however, mandates that federal law displace concurrent state law when the two are incompatible.<sup>18</sup> Hence, state regulation of the public health, safety, welfare or morals is often tempered by federal control of the same subject matter.<sup>19</sup> Therefore, any consideration of coexisting federal and state legislation affecting the same subject matter must be made within the historical and constitutional context of a system designed to preserve unity among the states in areas where Congress has chosen to act.<sup>20</sup>

---

13. See Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DePaul L. Rev. 630, 636 n.34 (1972); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 Colum. L. Rev. 623, 636 (1975) [hereinafter cited as *Shifting Perspectives*]. See generally Hirsch, *Toward a New View of Federal Preemption*, 1972 U. Ill. L.F. 515; Note, *Federal Pre-emption of State Laws: The Effect of Regulatory Agency Attitudes on Judicial Decisionmaking*, 50 Ind. L.J. 848 (1975) [hereinafter cited as *Federal Pre-emption*].

14. See, e.g., *Perez v. Campbell*, 402 U.S. 637 (1971); *California v. Zook*, 336 U.S. 725 (1949); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DePaul L. Rev. 630 (1972); Comment, *A Conceptual Refinement of the Doctrine of Federal Preemption*, 22 J. Pub. L. 391 (1973).

15. For the purposes of this discussion, particular import rests on the general welfare clause (U.S. Const. art. I, § 8, cl. 1), the commerce clause (U.S. Const. art. I, § 8, cl. 3) and the necessary and proper clause (U.S. Const. art. I, § 8, cl. 18) since these are frequent sources of federal powers analogous to the state police powers (see note 17 *infra*). See Note, *Environmental Control: Higher State Standards and the Question of Preemption*, 55 Cornell L. Rev. 846, 849-50 (1970) [hereinafter cited as *Cornell L. Rev.*].

16. U.S. Const. art. I, § 10, cl. 1.

17. Cornell L. Rev., *supra* note 15, at 851. The tenth amendment to the Constitution, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" is the source of the police powers of the states and their political subdivisions. Comment, *Environmental Law—Aircraft Noise Regulation—Federal Pre-emption*, 20 N.Y.L.F. 165, 167 n.16, citing *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1145-46 (8th Cir. 1971), *aff'd* without opinion, 405 U.S. 1035 (1972). Traditional state police powers include regulation of the health, safety, welfare and morals of its citizens. Cornell L. Rev., *supra* note 15, at 849. Such regulations must be reasonable and bear a rational relation to the evil sought to be remedied. See *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

18. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Shifting Perspectives*, *supra* note 13, at 623.

19. Cornell L. Rev., *supra* note 15, at 850.

20. Note, *Parker v. Brown: A Preemption Analysis*, 84 Yale L.J. 1164, 1167 (1975). For a general discussion of the constitutional background, see Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954).

Before analyzing the pre-emptive capabilities of any federal statute, it must be established that the law has been properly enacted pursuant to a power delegated to Congress by the Constitution.<sup>21</sup> Once this has been determined, the inquiry shifts to the manner in which Congress has exercised its power and the crucial issue becomes whether the state has been precluded from regulating the same subject matter.<sup>22</sup> It is often difficult to ascertain the intent of Congress in this regard.<sup>23</sup> The Supreme Court in *Florida Lime & Avocado Growers, Inc. v. Paul*<sup>24</sup> utilized a two-pronged test which states the essence of federal pre-emption analysis.<sup>25</sup> In order for a federal statute to supersede concurrent state legislation, either an "irreconcilable conflict"<sup>26</sup> must exist between the state and federal regulations, or Congress must have clearly "ordained that the state regulation shall yield."<sup>27</sup>

The first part of the *Florida Lime* test focuses on the nullification under the supremacy clause of an otherwise valid state law when conflict with federal law is inescapable and compliance with both statutes is impossible.<sup>28</sup> The court must first construe the coexisting pieces of legislation in order to determine whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>29</sup> State law has also been pre-empted when it was only potentially incompatible with federal regulation.<sup>30</sup> If such a conflict exists, the state law may be pre-empted even if it was enacted pursuant to traditional state powers and regardless of the law's importance to the state.<sup>31</sup>

The second facet of the *Florida Lime* test focuses on the intent of Congress to exclude concurrent state legislation. If this intent is clearly manifested on the face of the federal statute, state regulation of the same subject matter

---

21. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1146 (8th Cir 1971), aff'd without opinion, 405 U.S. 1035 (1972).

22. *Id.*

23. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31 (1947).

24. 373 U.S. 132 (1963).

25. Wallach, *Whose Intent? A Study of Administrative Preemption: State Regulation of Cable Television*, 25 Case W. Res. L. Rev. 258, 264 (1975) [hereinafter cited as Wallach].

26. 373 U.S. at 146.

27. *Id.*

28. *Id.* at 142-43. See *Perez v. Campbell*, 402 U.S. 637, 649-50 (1971), *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424, 430 (1963).

29. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). See *DeCanas v. Bica*, 424 U.S. 351 (1976), *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

30. *Pennsylvania v. Nelson*, 350 U.S. 497, 509 (1956). It has been suggested that such a potential conflict ground for pre-emption was a manifestation of a presumption in favor of federal law during the New Deal Era and has since been abrogated in *New York State Dep't of Social Serv. v. Dublino*, 413 U.S. 405 (1973), where the Supreme Court held that conflicts must be substantial in order to invoke the supremacy clause. *Shifting Perspectives*, supra note 13, at 647-48.

31. *Free v. Bland*, 369 U.S. 663, 666 (1962). See *Wissner v. Wissner*, 338 U.S. 655, 660 (1950); *In re Marriage of Fithian*, 10 Cal. 3d 592, 597, 517 P.2d 449, 452, 111 Cal. Rptr 369, 372 (en banc), cert. denied, 419 U.S. 825 (1974).

must yield,<sup>32</sup> even if it merely supplements the congressional scheme and does not conflict with federal law.<sup>33</sup> However, if Congress does not expressly forbid the exertion of concurrent state jurisdiction, an exclusionary intent may be deduced from several factors inherent in the federal statutory design:

the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so *pervasive* as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so *dominant* that the federal system will be assumed to preclude enforcement of state laws on the same subject.<sup>34</sup>

### B. *The Pre-emption Doctrine and the Federal Regulatory Agency*

The ability of Congress to delegate its power to a federal regulatory agency in order to preserve the vitality of the legislative function is now well recognized.<sup>35</sup> "Congress may declare its will, and after fixing a primary standard, devolve upon administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations."<sup>36</sup> Thus, the

32. See note 26 *supra* and accompanying text.

33. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1146 (1971), *aff'd* without opinion, 405 U.S. 1035 (1972); see *Campbell v. Hussey*, 368 U.S. 297, 302 (1961); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 235-36 (1947). For examples of federal statutes which expressly pre-empt state regulation, see 15 U.S.C. § 1461 (1970) (Fair Packaging and Labeling Program); 21 U.S.C. § 678 (1970) (Meat Inspection Act).

34. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added). Thus, state laws have been pre-empted where national uniformity was required to implement congressional purposes. E.g., *Campbell v. Hussey*, 368 U.S. 297, 300-01 (1961) (standards for classification and inspection of tobacco held to be a subject requiring national uniformity under the Federal Tobacco Inspection Act); *Hines v. Davidowitz*, 312 U.S. 52, 73-74 (1941) (registration of aliens found to require national uniformity under Federal Alien Registration Act). See also *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963); *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424, 430 (1963); *Shifting Perspectives*, *supra* note 13, at 625. It should be noted that rent control is not a subject requiring national uniformity since HUD establishes the appropriate charges on a case by case basis. *Columbia Plaza Ltd. Partnership v. Cowles*, 403 F. Supp. 1337, 1342 (D.D.C. 1975).

Several writers have criticized judicial implication of intent to pre-empt state and local jurisdictions where there has been no clear expression by Congress and no evidence in the legislative history that the pre-emption issue was ever considered. Wham & Merrill, *Federal Pre-emption: How to Protect the States' Jurisdiction*, 43 A.B.A.J. 131 (1957); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 *Stan. L. Rev.* 208, 209, 224 (1958). However, it has been suggested that with a recent return to a state oriented pre-emption doctrine, state law will not be usurped unless Congress clearly manifests an actual intent to do so. *Shifting Perspectives*, *supra* note 13, at 623, 645. But see *DeCanas v. Bica*, 424 U.S. 351 (1976), in which the Supreme Court examined the comprehensiveness of the Immigration and Nationality Act in its consideration of implied congressional intent to pre-empt, thus demonstrating that the *Rice* factors are still intact. See 424 U.S. at 359.

35. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940).

36. *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932). See K. Davis, *Administrative Law* § 2.01 (3d ed. 1972) [hereinafter cited as Davis].

courts have repeatedly sustained broad and vague standards of agency behavior set forth in statutes delegating legislative power.<sup>37</sup>

The complexities of the subject matter regulated by modern government demand the delegation of power with essentially "meaningless" standards to guide administrative activity.<sup>38</sup> Otherwise, a regulatory agency would be unable to deal effectively with problems unforeseeable at the time of the legislative enactment.<sup>39</sup> Likewise, legislators would be unable to formulate standards in sufficient detail to insure agency flexibility.<sup>40</sup> One author has suggested that attention should shift from legislative reluctance to provide agencies with precise standards. Instead, the focus should be upon safeguards and the promulgation of rules and self-imposed standards by regulatory agencies.<sup>41</sup> A delegation of regulatory power should not be held unconstitutional because Congress failed to provide specific standards and safeguards.<sup>42</sup> Rather, courts should require the agency to define its own discretionary power within a reasonable time.<sup>43</sup>

In any event, rules promulgated by federal agencies raise questions concerning the pre-emption of coexisting state law. The issue is most pronounced when Congress has expressed no intention to pre-empt state and local law, but has merely delegated broad regulatory power to the agency.<sup>44</sup> A regulation promulgated pursuant to these powers bears the force of federal law and, under the supremacy clause, "must prevail if it conflicts with state law."<sup>45</sup> Further, when the federal regulations are comprehensive, state law must yield even if "that particular phase of the subject has not been taken up by the federal agency."<sup>46</sup>

---

37. E.g., *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932) ("public interest"); *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 431 (1930) ("just and reasonable"); see Davis, *supra* note 36, at § 2.01 for further examples.

38. Davis, *supra* note 36, at § 2.01; see *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932).

39. Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 713, 720 (1969); Davis, *supra* note 36, at § 2.05.

40. See Davis, *supra* note 36, at § 2.05.

41. Davis, *supra* note 36, at § 2.08. See *United States v. Bryant*, 439 F.2d 642, 652 (D.C. Cir. 1971); *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 596-98 (D.C. Cir. 1971).

42. Davis, *supra* note 36, at § 2.08.

43. *Id.*

44. E.g., 12 U.S.C. § 1715b (1970) ("The Secretary [of HUD] is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter [on mortgage insurance]").

45. *Free v. Bland*, 369 U.S. 663, 668 (1962) (Treasury regulations governing United States savings bonds pre-empted conflicting Texas community property law); *Public Util. Comm'n v. United States*, 355 U.S. 534, 542-44 (1958) (federal law and regulations concerning special rates for shipment of government property displaced California statute intended to require state approval). Wallach, *supra* note 25, at 265 (1975). A critical qualification of this proposition is that regulations must be within the proper exercise of power delegated to the agency. *Id.*; see also *Abbott Laboratories v. Gardner*, 387 U.S. 136, 151-52 (1967).

46. *Bethlehem Steel Co. v. Labor Relations Bd.*, 330 U.S. 767, 774 (1947).

The pre-emption doctrine should grant primacy to agency regulations since these are merely extensions of congressional intent that the agency have jurisdiction in a particular field.<sup>47</sup> In determining the pre-emptive nature of a federal regulation, attention should focus on agency intent to displace state law pursuant to a broad grant of regulatory power.<sup>48</sup> One writer has suggested that congressional intent to pre-empt should not be as crucial a consideration here as it is in a traditional analysis of federal and state statutes.<sup>49</sup> This shift in perspective would enable agencies to effect policies within their particular expertise and insure that these will not be encumbered by conflicting state schemes.<sup>50</sup>

While they continue to discuss congressional intent, the courts have impliedly sanctioned agency pre-emptive intent as the controlling factor in several cases where congressional intent was unclear and the state law at issue did not conflict with a federal statute.<sup>51</sup> Thus, when a federal regulatory agency has demonstrated hostility to a state law, pre-emption has occurred.<sup>52</sup> "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . ."<sup>53</sup>

## II. SECTIONS 220 AND 221 OF THE NATIONAL HOUSING ACT

Since the establishment of the Federal Housing Administration (FHA) in 1934,<sup>54</sup> Congress has recognized multifamily housing programs as an increasingly important means of improving urban areas and coping with total

47. Wallach, *supra* note 25, at 265.

48. *Id.* at 276.

49. *Id.*

50. *Id.* The author proposes a two-tier model for analyzing pre-emption problems: 1) congressional grant of broad regulatory power, and 2) agency intent to pre-empt the field.

51. Federal Pre-emption, *supra* note 13, at 855-56.

52. *Id.* at 855; *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd* without opinion, 405 U.S. 1035 (1972). Likewise, when an agency has cooperated with or expressed its assent to a state scheme, pre-emption will not occur. Federal Pre-emption, *supra* note 13, at 855; see *New York Dep't of Social Serv. v. Dublino*, 413 U.S. 405 (1973); *Chrysler Corp. v. Tofany*, 419 F.2d 499 (2d Cir. 1969).

53. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969). "This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers" unless "[w]hat has been ordered [is] 'so entirely at odds with fundamental principles . . . ' as to be the expression of a whim rather than an exercise of judgment." *A.T. & T. Co. v. United States*, 299 U.S. 232, 236-37 (1936) (citations omitted).

54. Fitzpatrick, *FHA and FNMA Assistance for Multifamily Housing*, 32 *Law and Contemp. Prob.* 439 (1967) [hereinafter cited as Fitzpatrick]. The Department of Housing and Urban Development was established in 1965. 42 U.S.C. § 3532 (1970). All the functions, powers and duties of the FHA have been transferred to the Secretary of HUD. FHA is now a division of HUD and administers programs of the Department relating to the private mortgage market. H.R. Rep. No. 214, 90th Cong., 1st Sess. 2 (1967).

housing demand.<sup>55</sup> Two such programs enacted in 1955 are central to the pre-emption issue discussed in this Note. Sections 220<sup>56</sup> and 221<sup>57</sup> of the National Housing Act (NHA) provide FHA mortgage insurance to complementary sets of housing projects in order to effect an integrated urban renewal scheme.<sup>58</sup>

Congress enacted section 220 of the NHA "to aid in the elimination of slums and blighted conditions and the prevention of the deterioration of residential property . . ." <sup>59</sup> The statute is designed to encourage private participation by providing federally guaranteed mortgages to those who invest in the construction of new dwellings or the rehabilitation of old dwellings in areas of slum clearance and urban redevelopment.<sup>60</sup> Further, the Secretary of HUD may "in his discretion require such mortgagor to be regulated or restricted as to *rents* or sales, charges, capital structure, rate of return and methods of operation . . ." <sup>61</sup>

The companion section 221 of the NHA was enacted to finance private investors who provide housing for low and moderate income families and those displaced by urban renewal.<sup>62</sup> Section 221 offers two distinct features to eligible mortgagors—federal insurance on long-term mortgages<sup>63</sup> and below-market interest rates on loans insured by the FHA.<sup>64</sup>

The below-market interest rate (BMIR) program was added to the NHA in 1961 specifically to induce the private sector to maximize its role in satisfying the total housing demand.<sup>65</sup> Public housing costs have since been estimated to

55. Fitzpatrick, *supra* note 54, at 439. In the Housing Act of 1949, Congress enunciated what has since been the goal of national housing policy—"a decent home and a suitable living environment for every American family . . ." 42 U.S.C. § 1441 (1970). See 42 U.S.C. § 1441a (1970), as amended, (Supp. IV 1974), in which Congress renewed this goal.

56. 12 U.S.C. § 1715k (1970), as amended (1974).

57. 12 U.S.C. § 1715l (1970), as amended (1974).

58. See Prothro & Schomer, *The Section 221(d)(3) Below Market Interest Rate Program for Low and Moderate Income Families*, 11 N.Y.L.F. 16, 18 (1965) [hereinafter cited as Prothro & Schomer]. See *Tenants' Council v. Lynn*, 497 F.2d 648, 651-52 (D.C. Cir. 1973), cert. denied, 419 U.S. 970 (1974).

59. 12 U.S.C. § 1715k(a) (1970).

60. 12 U.S.C. § 1715k(a), (d) (1970); *Tenants' Council v. Lynn*, 497 F.2d 648, 650 (D.C. Cir. 1973), cert. denied 419 U.S. 970 (1974); *Columbia Plaza Ltd. Partnership v. Cowles*, 403 F. Supp. 1337, 1340 (D.D.C. 1975).

61. 12 U.S.C. § 1715k(d)(2)(A) (1970) (emphasis added).

62. 12 U.S.C. § 1715(a) (1970). See 24 C.F.R. § 221.3 (1976) which defines the term "displaced family" as one "displaced from an urban renewal area, or as a result of governmental action, or as a result of a disaster determined by the President to be a major disaster." See also 24 C.F.R. § 221.537 (1976).

63. The term approved is usually 40 years. Fitzpatrick, *supra* note 54, at 440. See 12 U.S.C. § 1715(d)(3)(iii) (1970) for financing details depending on the class of mortgagor and whether a new construction or rehabilitation case is involved.

64. 12 U.S.C. § 1715(d)(5) (1970).

65. 1961 U.S. Code Cong. and Ad. News 1923, 1925, 2016-17 (1961).



exceed private financing by 15%.<sup>66</sup> Further, the private sector has been reluctant to invest in lower income housing.<sup>67</sup>

The BMIR program was also designed to increase the housing supply for families with incomes sufficiently high to deny them public housing eligibility, yet too low to permit home ownership at current market rates.<sup>68</sup> One report has estimated that rents under a BMIR program are 15 to 20% below those resulting from ordinary private financing.<sup>69</sup> The success of this approach is attributed to the special assistance powers of the Government National Mortgage Association (GNMA)<sup>70</sup> which has been authorized to purchase mortgages insured under section 221(d)(3).<sup>71</sup> Private lenders, by their very nature, would not accept below-market interest rate mortgages.<sup>72</sup> Hence, the BMIR program is a valuable supplement to the FHA mortgage insurance scheme and has already provided the impetus for expanded participation by private enterprise in the area of low and moderate income housing.<sup>73</sup>

Section 221 maintains strict eligibility requirements for prospective mortgagors<sup>74</sup> and HUD continues to exercise broad control over project owners while the mortgage relationship persists.<sup>75</sup> The statute is replete with

66. Low Income Housing: Section 236 of the National Housing Act and the Tax Reform Act of 1969, 31 U. Pitt. L. Rev. 443, 444 (1970), citing Statement of Robert C. Weaver, Secretary of the U.S. Dept. of Housing and Urban Development (August 5, 1967).

67. *Id.* See Note, Government Programs to Encourage Private Investment in Low-Income Housing, 81 Harv. L. Rev. 1295, 1295-96 (1968).

68. 1961 U.S. Code Cong. and Ad. News 1923, 1929-30 (1961).

69. Prothro & Schomer, *supra* note 58, at 20 n.25.

70. 12 U.S.C. § 1720 (1970). In 1968, Congress divided what had formerly been the Federal National Mortgage Association (FNMA) into two parts. The first is a government sponsored private corporation, still known as FNMA, which operates in the secondary mortgage market. The second is the GNMA, a government corporation, which operates the special assistance functions of the old FNMA under the National Housing Act. See Note, The Housing and Urban Development Act of 1968: Private Enterprise and Low-Income Housing, 10 Wm. & Mary L. Rev. 936, 950-53 (1969).

71. 12 U.S.C. § 1720(h) (1970). Section 221(d)(5) of the National Housing Act provides that mortgages shall bear interest at below market rates with an established minimum of 3% or "the annual rate of interest determined . . . by estimating the average market yield to maturity on all outstanding marketable obligations of the United States . . ." whichever is lower. 12 U.S.C. § 1715(d)(5) (1970).

72. Prothro & Schomer, *supra* note 58, at 21.

73. Fitzpatrick, *supra* note 54, at 450; Prothro & Schomer, *supra* note 58, at 26.

74. Four classes of mortgagors are eligible for assistance under this section—public agencies, cooperatives, limited dividend corporations, and private non-profit corporations or associations. 12 U.S.C. § 1715(d)(3) (1974). The statute excepts from eligibility projects assisted or to be assisted under section 8 of the United States Housing Act of 1937. *Id.* HUD regulations specify further qualifications for each class. 24 C.F.R. §§ 221.510(a), 221.532(a) (1976). All projects assisted by mortgage insurance under section 221(d)(3) must contain five or more family units, are restricted to rental and cooperative use, and must accommodate low and moderate income families. 12 U.S.C. §§ 1715(f) (1974), 1715(d)(3)(iii) (1970). HUD has promulgated a regulation concerning income limits and other qualifications for occupancy in 221(d)(3) projects with preference granted to displaced families. 24 C.F.R. § 221.537 (1976).

75. 24 C.F.R. § 221.529 (1976).

broad grants of discretion to the Secretary of HUD in a wide variety of areas relevant to the housing industry.<sup>76</sup> Of particular import here is the Secretary's power to determine whether rents, charges and methods of operation in a 221(d)(3) project will be supervised by "Federal or State laws or by political subdivisions of States, or agencies thereof, or by the Secretary under a regulatory agreement or otherwise . . . ."<sup>77</sup>

### III. THE HUD LOCAL RENT CONTROL REGULATION

The ability of states or political subdivisions thereof to enact rent control statutes affecting housing within their jurisdictions is clearly a proper exercise of the police power.<sup>78</sup> In the specific area of projects insured by the FHA under sections 220 and 221 of the NHA, the Secretary of HUD is empowered to regulate rents at his discretion.<sup>79</sup> FHA project owners within the concurrent jurisdiction of state and federal regulations have expressed great concern over the power of local boards to control rents charged in their buildings.<sup>80</sup> The problem becomes most critical when local rent control boards approve rents below those specifically established by HUD in order to "maintain the economic soundness of the project" and "provide a reasonable return on the investment consistent with providing reasonable rentals to tenants."<sup>81</sup> HUD has concluded that inadequate rental limits imposed by local boards are a significant cause of FHA project default.<sup>82</sup>

The defaults are leading to a substantial number of mortgage insurance claims by mortgagees upon HUD and to the withdrawal from the nation's housing stock of an increasing number of units for low income families.<sup>83</sup>

When a federally insured project owner fails to meet his mortgage payments, the FHA must reimburse the mortgagee, a process which may cost several millions of dollars.<sup>84</sup> The FHA must also assume control over the project, either by assignment or foreclosure, and search for a new purchaser.<sup>85</sup> Thus, HUD has an overriding economic interest in preventing mortgage default. Further, if the goals of the Housing Act of 1949 are ever to be attained, the Department has a social interest in maintaining the nation's housing supply for low income families at an adequate and stable level.

Congress did not expressly pre-empt state rent control laws in the NHA;<sup>86</sup> nor have the courts been consistent in finding that state rent control laws conflict with the federal scheme.<sup>87</sup> In fact, early decisions indicated that the

---

76. *Hahn v. Gottlieb*, 430 F.2d 1243, 1246 (1st Cir. 1970).

77. 12 U.S.C. § 1715l(d)(3) (1974).

78. See *Lindsey v. Normet*, 405 U.S. 56, 68-69 (1972).

79. See notes 61, 77 *supra* and accompanying text.

80. 40 Fed. Reg. 8189 (1975).

81. 24 C.F.R. §§ 207.19(e), 221.531(c) (1976).

82. 40 Fed. Reg. 8189 (1975).

83. *Id.*

84. *Id.*

85. *Hahn v. Gottlieb*, 430 F.2d 1243, 1247 n.5 (1st Cir. 1970).

86. See note 109 *infra*.

87. See notes 134-40, 146 *infra* and accompanying text.

NHA is not a rent control statute, precluding pre-emption on direct conflict grounds.<sup>88</sup> HUD established its position on the relationship of local rent control to FHA insured projects in a rule promulgated on October 22, 1975 with the express purpose of maintaining rents in these projects at a level which is reasonable for tenants, yet sufficient to absorb mortgage payments and other reasonable expenses of project operation.<sup>89</sup> This regulation distinguishes between unsubsidized and subsidized insured projects<sup>90</sup> and varies the pre-emption policy accordingly.

Subsidized insured projects include those receiving below-market interest rates under section 221(d)(3) and (5) of the NHA.<sup>91</sup> In view of the particularly critical economic status of subsidized projects, HUD expressly pre-empted the entire field of rent regulation by state and local rent control boards.<sup>92</sup>

The Department finds that it is necessary and desirable to minimize defaults by the mortgagor in its financial obligations with regard to projects covered by this subpart, and to assist mortgagors to preserve the continued viability of those projects as a housing resource for low income families. The Department also finds that it is necessary and desirable to protect the substantial economic interest of the Federal Government in those projects.<sup>93</sup>

The HUD regulation also formally establishes the Department's pre-emption policy with respect to unsubsidized projects.<sup>94</sup> Section 220 of the NHA is covered by this regulation subpart which refers to those projects which are not subsidized, as defined by the regulation, but have mortgages insured or held by HUD.<sup>95</sup> Presumably because of the greater rental yield and other factors which make higher income projects a more favorable investment,<sup>96</sup> HUD has determined that the threat of mortgage default is not as

88. See note 134 *infra* and accompanying text.

89. 40 Fed. Reg. 49318-21 (1975). HUD had published an interim rule to the same effect on February 26, 1975. 40 Fed. Reg. 8189-90 (1975).

90. 24 C.F.R. § 403.4 (unsubsidized), 403.8 (subsidized) (1976).

91. 24 C.F.R. § 403.8 (1976). Other subsidized projects affected by this section are those receiving "interest reduction payments pursuant to Section 236 of the [NHA] . . . direct loans at below-market interest rates pursuant to Section 202 of the Housing Act of 1959; or . . . rent supplement payments pursuant to Section 101 of the Housing and Urban Development Act of 1965 and/or housing assistance payments . . ." *Id.*

92. 24 C.F.R. § 403.9 (1976).

93. *Id.* The regulation further provides the procedure by which the mortgagor may apply for an increase in rental charges. While processing the application, HUD must notify the board having jurisdiction over the project that the Department has pre-empted the entire field of rent control with respect to subsidized insured projects. Within ten days of the rent increase approval by HUD, the mortgagor must provide the appropriate board with a schedule of the new rents. However, this notice is strictly informative, since the rent control board has no power to approve or disapprove the rental increase. 24 C.F.R. § 403.10 (1976).

94. 24 C.F.R. § 403.4 (1976).

95. *Id.*

96. See Comment, *Low Income Housing: Section 236 of the National Housing Act and the Tax Reform Act of 1969*, 31 U. Pitt. L. Rev. 443, 444 (1970) (lower income housing involves the additional risks of tenant neglect, vandalism, difficulty in collection rent, and high turnover rates).

critical in the field of unsubsidized projects as it is when subsidized housing is involved.<sup>97</sup> Consequently, the Department has decided not to pre-empt state and local rent control boards in this area, but rather to analyze the supremacy issue on a case-by-case basis.<sup>98</sup>

The Department will generally not interfere in the regulation by a local rent control board . . . of rents for unsubsidized projects with mortgages insured or held by HUD. However, HUD will preempt the regulation of rents for such a project when the Department determines that the delay or decision of a board . . . jeopardizes the Department's economic interest in the project.<sup>99</sup>

Upon issuing its interim rule, HUD invited concerned persons to submit comments and suggestions with respect to its content.<sup>100</sup> A cross section of the responses<sup>101</sup> reveals the basic objections that have been made to the regulation in subsequent cases.

Several comments maintained that Congress did not intend that the NHA pre-empt state rent control boards,<sup>102</sup> nor did it delegate such authority to the Secretary of HUD.<sup>103</sup> It was also suggested that there is no conflict between the NHA and local rent control laws because the two schemes strive to achieve the same goal—adequate housing for low and moderate income families at reasonable rents.<sup>104</sup> In addition, many local ordinances provide for annual rent increases and allow a landlord to request hardship increases should he be unable to meet his mortgage payments.<sup>105</sup> Under this reasoning, state and local laws should be able to insure against project default without federal interference.

A number of comments indicated that mortgage defaults were not caused by the deficiencies of local rent control, but rather by the mismanagement and

---

97. 40 Fed. Reg. 49319 (1976).

98. *Id.*; 24 C.F.R. § 403.5 (1976).

99. 24 C.F.R. § 403.5 (1976). The procedure under this subpart for a mortgagor to apply for rental increases also reflects the HUD policy to analyze unsubsidized projects on an individualized basis when reaching a pre-emption determination. The mortgagor must submit applications to both HUD and the appropriate state or local rent control board, providing the latter with notice that HUD is also considering the rental increase issue and has the authority under the regulation to supersede the board's decision. The mortgagor must inform the Department if the board has delayed or approved rents lower than those authorized by HUD and must support his contention that the board's delay or decision has placed the economic interest in his project in jeopardy. HUD may then decide upon a review of the relevant information whether pre-emption is indicated. 24 C.F.R. § 403.6 (1976).

100. 40 Fed. Reg. 8190 (1975).

101. *Id.* at 49318. Five hundred and forty-four were form letters from tenants protesting the rule. The remainder contained substantive comments and suggestions for technical changes. Some of these were implemented in the final rule. *Id.* at 49318-19.

102. *Id.* at 49319; e.g., Letter No. 7, on file in HUD Office of General Council, Washington, D.C. [hereinafter these letters will be cited as Letter No. \_\_\_].

103. 40 Fed. Reg. 49319 (1975).

104. Letter No. 7, *supra* note 102.

105. Letters No. 7, 14, 19, *supra* note 102.

greed of profit-oriented landlords who failed to provide adequate services.<sup>106</sup> Finally, a common theme throughout the responses maintained that rent control should be a matter of local concern and that pre-emption would inevitably result in higher rents imposed by a federal agency insensitive to the hardship suffered by low income tenants already beleaguered by inflation and unemployment.<sup>107</sup>

#### IV. PRE-EMPTION DOCTRINE AND THE FEDERAL HOUSING SCHEME

Prior to any pre-emption analysis, it should be noted that the National Housing Act constitutes a valid exercise of the federal commerce power.<sup>108</sup> Congress did not expressly pre-empt state and local regulation of rents in projects financed by federal mortgage insurance under the NHA.<sup>109</sup> Therefore, the NHA must be considered in conjunction with the HUD regulations in order to determine if state and local rent control laws will be nullified with respect to FHA projects.<sup>110</sup> To date, few courts have considered this specific issue.

In *Levin-Sagner-Orange v. Rent Leveling Board*,<sup>111</sup> the Superior Court of New Jersey considered the validity of the HUD regulation and its pre-emptive capability with respect to a local rent control ordinance. Plaintiffs, the owners of a federally insured project subsidized under section 221(d)(3) of the NHA,<sup>112</sup> applied to HUD for a monthly rental increase. When HUD approved the application, defendant rent leveling board notified the plaintiffs and their tenants that the increase was void under the local ordinance.

The court held that the HUD regulation, pre-empting the entire field of rent regulation,<sup>113</sup> was a valid exercise of the Secretary's rule-making author-

106. 40 Fed. Reg. 49319 (1975); Letters No. 10, 14, *supra* note 102.

107. Letters No. 10, 14, *supra* note 102. "HUD's consideration of 'economic interest' without a simultaneous measurement of human cost is to be expected more from the real estate and banking interests which these regulations will serve than from a governmental agency presumably operating in the public interest." Letter No. 14, *supra* note 102.

108. See *Druker v. Sullivan*, 334 F. Supp. 861, 862-63 (D. Mass. 1971), *aff'd*, 458 F.2d 1272 (1st Cir. 1972); *Levin-Sagner-Orange v. Rent Leveling Bd.*, 142 N.J. Super. 429, 435 (L. Div. 1976); see note 21 *supra* and accompanying text.

Congress may regulate private individuals and businesses within the concurrent jurisdiction of the states subject to the limitation that "the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution." *National League of Cities v. Usery*, 96 S. Ct. 2465, 2469 (1976), quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964). The Supreme Court in *Usery* held that Congress may not exercise its commerce power to abrogate the state's exercise of its essential governmental function. However, this does not prevent Congress from "regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside." *Id.* at 2471.

109. *Druker v. City of Boston*, 410 F. Supp. 1314, 1319-20 (D. Mass. 1976); *Columbia Plaza Ltd. Partnership v. Cowles*, 403 F. Supp. 1337, 1342 (D.D.C. 1975).

110. See notes 24, 44-45 *supra* and accompanying text.

111. 142 N.J. Super. 429 (L. Div. 1976).

112. The project was a limited dividend enterprise, hence an eligible mortgagor under section 221(d)(3) of the NHA. See note 74 *supra* and accompanying text.

113. See notes 92-93 *supra* and accompanying text.

ity.<sup>114</sup> It further noted that section 221(d)(3) gives the Secretary the power to choose whether rents in a given project should be regulated by local, state or federal law, or by the Secretary under a regulatory agreement.<sup>115</sup> Under this reasoning, the HUD regulation pre-empting the entire field of rent regulation with respect to 221(d)(3) projects is a mere formalization of a clear choice already granted by Congress to the Secretary. Further, the purpose of section 221 was to provide housing for low and moderate income families and those displaced by urban renewal.<sup>116</sup> Based upon its experience, HUD determined that rent levels imposed by local rent control boards contribute to mortgage default and loss of available housing and investor interest.<sup>117</sup> Hence, the HUD regulation is necessary to carry out the provisions of section 221 and is a proper exercise of the Secretary's authority.<sup>118</sup>

The *Levin* court refused to interfere with the judgment of administrative officials made pursuant to granted powers,<sup>119</sup> and attached the full force of a federal statute to the regulation, once its validity was established.<sup>120</sup> Pre-emption followed since the local ordinance could not exert control when it had been expressly nullified.<sup>121</sup>

A frequent criticism of the HUD regulation has been that rent control should be a matter of local concern, traditionally regulated under the state's police power.<sup>122</sup> The *Levin* court addressed itself to the contention that the HUD regulation violates the tenth amendment<sup>123</sup> and held that "[t]o the extent the local ordinance and the federal law conflict, the National Housing Act and valid regulations made pursuant thereto must prevail."<sup>124</sup>

In another New Jersey case, *Edgemere at Somerset v. Johnson*,<sup>125</sup> the court also considered the validity of the HUD regulation and its ability to pre-empt

114. 142 N.J. Super. at 433-35.

115. *Id.* at 433. One court in dictum has interpreted section 221(d)(3) to indicate that the Secretary may regulate rents in such projects under a regulatory agreement only in default of regulation by some federal, state or local body. *Langevin v. Chenango Ct., Inc.* 447 F.2d 296, 300 n.7 (2d Cir. 1971). However, there is no indication in the statute that one form of regulation should take precedence over another. Rather, the clause granting the Secretary the discretion to determine which form of regulation is most conducive to the purposes of section 221 seems to apply with equal weight to each class of regulation listed.

116. See note 62 *supra* and accompanying text.

117. 142 N.J. Super. at 434; see notes 82-83 *supra* and accompanying text.

118. 12 U.S.C. § 1715b (1970). *City of Boston v. Hills*, No. 75-902-C (D. Mass. April 18, 1975) held without discussion that the HUD regulation was within the scope of authority granted to the agency by Congress.

119. 142 N.J. Super. at 434-35.

120. *Id.* at 436; see note 45 *supra* and accompanying text.

121. *Id.* at 437; see note 28 *supra* and accompanying text.

122. See *Lindsey v. Normet*, 405 U.S. 56, 68-69 (1972) (landlord-tenant relationship has traditionally been a matter of local concern).

123. See note 17 *supra*.

124. 142 N.J. Super. at 435 (emphasis added).

125. No. T15-285 (N.J. Somerset County Ct., March 23, 1976) [hereinafter cited as *Edgemere*].

a local rent control ordinance. The apartment complex at issue was characterized as an unsubsidized project financed with FHA mortgage insurance under the NHA. Plaintiff-landlord applied to HUD for a rent increase. The agency pre-empted the local rent control ordinance, having determined that rent levels authorized by the local board placed the project in economic jeopardy since they were insufficient to meet operating costs and mortgage payments.<sup>126</sup> The court found that the HUD regulation was a valid exercise of the broad authority granted to the Secretary of HUD by Congress in order to carry out the purposes of the NHA.<sup>127</sup> Once valid, the regulation assumed the qualities of a federal statute and superseded the conflicting local rent control board decision.<sup>128</sup>

Critics of the HUD regulation have claimed that many local rent control laws provide hardship clauses enabling a project owner to apply to the local board for rent increases to absorb operating expenses or mortgage payments.<sup>129</sup> The theory is that such local laws could not conflict with federal regulations since both strive to maintain mortgagor solvency.<sup>130</sup> The court in *Edgemere*, however, noted that increases allowed by local boards were frequently unrelated to the costs of operating and maintaining a project.<sup>131</sup> Further, burdensome and dilatory local procedures often engendered the very project defaults they were designed to prevent.<sup>132</sup> The court noted that pre-emption of such laws seemed to be the only alternative available to HUD in order to protect its economic interest in FHA projects.<sup>133</sup>

In contrast, a series of recent cases have specifically held that the NHA is not a rent control statute and as such cannot conflict with local and state laws regulating rents in FHA projects.<sup>134</sup> These decisions turned on the fact that,

---

126. *Id.* at 3. Since the project is unsubsidized, 24 C.F.R. § 403.5 (1976) applies. See notes 95-99 *supra* and accompanying text.

127. *Edgemere*, *supra* note 125, at 5.

128. *Id.* at 8.

129. See note 105 *supra* and accompanying text.

130. HUD regulations affecting sections 220 and 221 of the NHA provide that in approving rents and charges in a federally insured project, HUD will consider the "[r]ental income necessary to maintain the economic soundness of the project." 24 C.F.R. §§ 207.19(e)(1), 221.531(c)(1) (1976).

131. *Edgemere*, *supra* note 125, at 5. Presumably, such allowances are frequently inadequate to meet project costs and maintain mortgagor solvency. See 40 Fed. Reg. 49318-19 (1975).

132. "[T]he procedures necessary for a mortgagor to obtain a hardship increase from a local rent control board were so cumbersome and took so long that, when the increase was approved, it was often too late to prevent the project from going into default." 40 Fed. Reg. at 49319. See, e.g., the local procedure in *Druker v. City of Boston*, 410 F. Supp. 1314 (D. Mass. 1976), discussed at note 149 *infra* and accompanying text.

133. *Edgemere*, *supra* note 125, at 5.

134. *Columbia Plaza Ltd. Partnership v. Cowles*, 403 F. Supp. 1337, 1342 (D.D.C. 1975) ("§ 220 is not a rent control measure at all; thus, there is no federal system of rent control in effect"); *Helmsley v. Borough of Fort Lee*, 362 F. Supp. 581, 590 (D.N.J. 1973); *Stoneridge Apts., Co. v. Lindsay*, 303 F. Supp. 677, 680 (S.D.N.Y. 1969) ("The [local] ordinance deals with rent control pure and simple. It cannot conflict with federal legislation on this subject, since there is none.

prior to the promulgation of the HUD regulation on local rent control, the Department had chosen only to regulate the *maximum* rents FHA project owners could charge their tenants.<sup>135</sup> This was equally true with respect to both mortgage insurance programs under sections 220 and 221 of the NHA.<sup>136</sup> For example, under section 220 of the NHA, the Secretary is fully authorized to regulate rents charged by mortgagors.<sup>137</sup> However, the Department had decided to issue a regulation providing only the maximum rents which a project owner can charge.<sup>138</sup> It has been held that by establishing maximum rents, HUD sought to promote the solvency and continuity of insured projects while preventing huge returns.<sup>139</sup> Such an "interest is not necessarily impaired by a rent control measure that sets a ceiling beneath the maximum fixed by the Secretary."<sup>140</sup>

The court in *Edgemere* found that the NHA is not itself a rent control mechanism.<sup>141</sup> However, the new HUD regulation has specifically substituted the phrase "increases in rental charges" for "maximum permissible rents" in order to emphasize that when HUD processes a request for rent increases, it is determining the *minimum* rents necessary to meet operating expenses and mortgage payments.<sup>142</sup>

The *Edgemere* court noted that, as a result of the substituted phrase, both federal and local schemes could not be satisfied since the HUD minimum exceeded the local board maximum.<sup>143</sup> The inescapable conflict mandated nullification of the local law.<sup>144</sup>

---

The only federal legislation relevant to the discussion is the National Housing Act, the subject matter of which . . . is unrelated to that of rent control.").

135. *Columbia Plaza Ltd. Partnership v. Cowles*, 403 F. Supp. 1337, 1341 (D.D.C. 1975). For example, the HUD regulation concerning the establishment of rents in section 220 projects forbids the mortgagor from charging amounts "in excess of those approved by the Commissioner . . ." C.F.R. § 207.19(e) (1976). The standard regulatory agreement which the Secretary of HUD enters into with section 220 mortgagors contains similar language and likewise provides only for maximum rents. 403 F. Supp. at 1340.

136. Although the HUD regulation applicable to rents in federally subsidized projects under 221(d)(3) does not refer to the establishment of rent maximums, the standard regulatory agreement provides that owners may not charge rents exceeding those established by the Commissioner of the FHA. See *Druker v. City of Boston*, 410 F. Supp. 1314, 1316 (D. Mass. 1976).

137. See note 61 *supra* and accompanying text; *Columbia Plaza Ltd. Partnership v. Cowles*, 403 F. Supp. 1337, 1340 (D.D.C. 1975).

138. *Id.* at 1341; see note 135 *supra*.

139. *Id.* at 1342.

140. *Id.*

141. *Edgemere*, *supra* note 125, at 7.

142. *Id.* at 7-8; 24 C.F.R. § 403.6(a) (1976); 40 Fed. Reg. 49319 (1975)

143. *Edgemere*, *supra* note 125, at 8.

144. *Id.* The court in *Levin* held that section 221(d)(3) of the NHA is not itself a rent control statute since it merely gives the Secretary the option to regulate rents. However, the Secretary decided to control rents directly in the HUD regulation on local rent control. Hence, the regulation could pre-empt conflicting local law under the supremacy clause because both



The controversy in *Druker v. City of Boston*<sup>145</sup> developed before the HUD regulation pre-empting local rent control laws was promulgated. Although the regulation has since been declared a proper exercise of authority by HUD, *Druker* provides further justification by finding that the local ordinance conflicted with the NHA itself.<sup>146</sup>

Plaintiffs owned four housing developments financed with mortgage insurance under section 221(d)(3) of the NHA. Each project owner had applied to HUD for rent increases which were granted and subsequently denied or reduced by the Boston Rent Board. At the time of litigation, three projects were in mortgage default and investor dividends had not been paid. The Boston rent control ordinance specifically applied to 221(d)(3) projects and structured a hearing procedure for rent increases. Although the local law was designed to yield the landlord " 'a fair net operating income,' "<sup>147</sup> the *Druker* court found that it consistently derived a lower maximum rent than that permitted by HUD.<sup>148</sup> Further, the delay and expense inherent in the local adversary system conflicted with the HUD mechanism which only affords tenants in 221(d)(3) projects notice of impending rent increases and opportunity to submit comments to HUD.<sup>149</sup> The court found that, since HUD controlled only maximum rents in its projects, there was no bar to finding a conflict with lower local rent schedules because the rents established by HUD were in effect the minimum amount necessary to provide mortgage payments, expenses and investor dividends.<sup>150</sup>

The court in *Druker* also discussed the proposed HUD regulation which pre-empted local rent control with respect to 221(d)(3) projects.<sup>151</sup>

A careful reading of the history of HUD's treatment of the local rent control issue would seem to indicate that its decision resulted from a *realization of the conflict with national policy created by certain local rent stabilization programs*. This did not signal a change of policy . . . . Rather, it seems to have been a codification of policy which had been evolving as HUD gained experience with the operation of local rent control.<sup>152</sup>

controlled the same subject matter. *Levin-Sagner-Orange v. Rent Leveling Bd.*, 142 N.J. Super. 429, 437 (L. Div. 1976); see note 22 *supra* and accompanying text

145. 410 F. Supp. 1314 (D. Mass. 1976). See 6 Law Project Bull., Housing Section, issue 5 at 3-5 (June 1976).

146. 410 F. Supp. at 1320-21.

147. *Id.* at 1317.

148. *Id.* at 1319. "In arriving at maximum rents, HUD allows a fixed vacancy rate of 7%; Boston permits 5% or the actual rate, whichever is lower. HUD permits certain expenditures to be treated as expenses while the Rent Board requires them to be classified as capital. A third difference is the fact that the Rent Board will often disallow expenses which HUD has accepted." *Id.*

149. *Id.* at 1318 n.4, 1319. Tenants in 221(d)(3) projects must be notified by the mortgagor thirty days before an application to HUD is made for a rent increase. Their comments on the proposed increase may be sent to HUD.

150. *Id.* at 1320.

151. *Id.* at 1321.

152. *Id.* (emphasis added).

Therefore, the HUD regulation pre-empting state rent control laws is valid because it was promulgated pursuant to a broad grant of authority delegated to the Secretary in order to effect the purposes of the NHA.<sup>153</sup> Moreover, the regulation is sound because it formally pre-empts many local rent control laws already superseded by the NHA on conflict grounds.<sup>154</sup> Finally, the pervasive nature of the NHA in conjunction with regulations pursuant thereto should support a finding of pre-emption.<sup>155</sup>

Critics of the HUD regulation have understandably maintained that a federal agency should operate for the public benefit and place economic and real estate interests below concern for human needs.<sup>156</sup> The HUD regulations of rents and charges under sections 220 and 221 of the NHA reflect the agency goal to balance economic soundness of a project with reasonable rents for tenants.<sup>157</sup> When mortgage default is imminent and this balance is almost impossible to maintain, HUD is forced to determine which interest shall take precedence. Several courts have wrestled with this same issue when deciding whether tenants in projects subsidized pursuant to section 221(d)(3) have a statutory or due process right to participate in rental increase applications.<sup>158</sup>

Under the NHA, the government acts as an "insurer for private investors."<sup>159</sup> HUD enters into regulatory agreements with mortgagors for the benefit of the public sector, "but its freedom to pursue social goals is limited by the need to avoid excessive losses."<sup>160</sup> Congress has not granted financial assistance under 221(d)(3) directly to low and moderate income families, but rather to private landlords who then lease the premises to eligible tenants.<sup>161</sup> Therefore, tenants have no legal right to low-cost housing, but rather only "an abstract need or desire for it."<sup>162</sup> It has also been held that tenants residing in

---

153. See note 114 *supra* and accompanying text.

154. See note 152 *supra* and accompanying text.

155. *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1146 (8th Cir. 1971), *aff'd* without opinion, 405 U.S. 1035 (1972); *American Airlines, Inc. v. Town of Hempstead*, 398 F.2d 369, 376 n.4 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); see notes 34, 45-46 *supra* and accompanying text.

156. See note 107 *supra* and accompanying text.

157. 24 C.F.R. §§ 207.19(e), 221.531(c) (1976).

158. *Grace Towers Tenants Ass'n v. Grace Housing Dev. Fund Co.*, 538 F.2d 491 (2d Cir. 1976); *Langevin v. Chenango Ct., Inc.*, 447 F.2d 296 (2d Cir. 1971); *Hahn v. Gottlieb*, 430 F.2d 1243 (1st Cir. 1970). Each of these cases denied the existence of a due process or statutory right on the part of tenants in projects financed pursuant to section 221(d)(3) to participate in HUD's decision-making process. *Contra*, *Marshall v. Lynn*, 497 F.2d 643 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 970 (1974); *Geneva Towers Tenants Org. v. Federated Mortgage Investors*, 504 F.2d 483 (9th Cir. 1974).

159. *Hahn v. Gottlieb*, 430 F.2d 1243, 1247 (1st Cir. 1970).

160. *Id.* The court in *Levin* used this language to support the validity of the HUD regulation pre-empting state rent control (24 C.F.R. § 403 (1976)). 142 N.J. Super. 429, 434 (1976).

161. *Hahn v. Gottlieb*, 430 F.2d at 1247.

162. *Grace Towers Tenants Ass'n v. Grace Housing Dev. Fund Co.*, 538 F.2d 491, 494 (2d Cir. 1976), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The court in *Marshall v. Lynn*, 497 F.2d 643 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 970 (1974), found that tenants in housing financed under 221(d)(3) had a due process right to receive notice of proposed rent

projects financed under section 220 of the NHA have no legal interest in the establishment of rent levels since that program was not enacted to benefit any specific class of needy tenants, but rather to eliminate urban blight.<sup>163</sup>

HUD has determined that the substantial number of mortgage defaults caused by local rent control laws has seriously depleted the nation's housing stock for low income families.<sup>164</sup> As a practical matter, tenants would perhaps be even more adversely affected by a total lack of available housing units than by an increase in rental charges.<sup>165</sup> It should be remembered that HUD remains committed to providing housing at reasonable rents.<sup>166</sup>

HUD's expertise has also weighed heavily in the pre-emption of local rent control laws. In *Levin*, the court said that "[d]eference must be paid to a regulation issued by an agency exercising power expressly delegated to it by Congress in developing and changing circumstances."<sup>167</sup> The *Druker* court found that HUD's intervention in the case on behalf of the plaintiff-landlords was "entitled to some weight."<sup>168</sup> Years of experience in the field of federally assisted housing and broad delegation of power by Congress attach a certain

increases and an opportunity to be heard. *Id.* at 644, 648. The court found that section 221 of the NHA with its BMIR incentives was designed to benefit low and moderate income tenants, not private investors. *Id.* at 645-46. The *Langevin* court found no such right but recommended that tenants be granted notice and opportunity to comment on the application for rent increases. 447 F.2d at 301-02. HUD has since promulgated a regulation which grants tenants in 221(d)(3) projects the procedural rights mandated in *Marshall* and recommended in *Langevin*. 24 C.F.R. § 401 (1976).

163. *Tenants' Council v. Lynn*, 497 F.2d 648, 651 (D.C. Cir. 1973), cert. denied, 419 U.S. 970 (1974). Tenants in 220 projects tend to be upper-middle and upper-income groups. *Id.* at 649. See also *N.Y. Times*, June 6, 1976, § 8, at 1, col. 1.

164. See note 82-83 *supra* and accompanying text.

165. The availability of rent supplement programs should tend to alleviate the burden of increased rents. *Hahn v. Gottlieb*, 430 F.2d 1243, 1247 (1st Cir. 1970).

166. 40 Fed. Reg. 49319 (1975).

167. *Levin-Sagner-Orange v. Rent Leveling Bd.*, 142 N.J. Super. 429, 437 (L. Div. 1976).

168. *Druker v. City of Boston*, 410 F. Supp. 1314, 1321 (D. Mass. 1976). Other courts have found agency hostility to the enforcement of state law a crucial factor in determining the outcome of a pre-emption issue. In *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), the Supreme Court found that a Burbank city ordinance placing a curfew on evening jet flights was pre-empted under the supremacy clause in the light of the pervasive nature of federal regulation under the Noise Control Act of 1972 and by the Federal Aviation Administration. The Court found two factors to be crucial in its determination to supersede the Burbank ordinance. First, Congress had delegated broad authority to the Administrator of the FAA to issue regulations concerning the use of navigable airspace. *Id.* at 627. Secondly, the FAA had demonstrated opposition to local curfews as inconsistent with federal uniform control of navigable airspace. *Id.* at 639-40. See *Federal Pre-emption*, *supra* note 13, at 857-59.

In *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd* without opinion, 405 U.S. 1035 (1972), the Eighth Circuit held that Minnesota regulations of radioactive liquid and gaseous discharges in excess of those imposed by the Atomic Energy Commission were pre-empted by the Atomic Energy Act of 1954 as amended in 1959. The court accorded "respectful consideration" to the position taken by the AEC in a regulation interpreting the Act. *Id.* at 1152. See *Federal Pre-emption*, *supra* note 13, at 861-62.

degree of expertise to the agency's determination that local rent control laws are a major cause of mortgagor insolvency.<sup>169</sup> Further, there is a presumption in favor of the agency's interpretation of the NHA which can only be overcome by "compelling indications that it is wrong."<sup>170</sup> Finally, it is not necessary that Congress should have foreseen the precise development in housing affairs which induced HUD to pre-empt local laws.<sup>171</sup>

## V. CONCLUSION

HUD's determination to assert jurisdiction over rent levels in projects with FHA insured mortgages has changed the complexion of federal regulation in this area. Since HUD has clarified the nature of approved rental increases as the minimum necessary to maintain mortgagor solvency, the NHA and attendant regulations have been, in effect, a federal system of rent control with respect to those projects.<sup>172</sup> Cases prior to the regulation which held that the NHA is not a rent control statute had relied upon the Department's former decision to regulate only maximum rents.<sup>173</sup> Therefore, these decisions are no longer valid and should not be cited to defeat the full regulation of rents in FHA projects by HUD.

As in other situations where federal law displaces concurrent state regulation of the same subject matter, two important and legitimate interests conflict.<sup>174</sup> HUD has a clear economic stake in the solvency of its insured projects and a governmental interest in providing adequate housing for urban communities. The agency's expertise and need to deal with changing economic circumstances cannot be overlooked. Understandably, tenants and local rent boards are concerned with maintaining rents at an affordable level due to spiraling inflation and other economic pressures. While both viewpoints are meritorious, the federal interest has prevailed.

Several courts thus far have determined that the HUD regulation at issue is a proper exercise of the Secretary's delegated authority and thus displaces state and local rent control laws with respect to FHA insured projects.<sup>175</sup> This

---

169. 142 N.J. Super. at 437; see notes 47-50 *supra* and accompanying text.

170. Cf. note 53 *supra* and accompanying text; see also *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

171. Cf. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968).

172. The ability of the federal government to regulate the landlord-tenant relationship was upheld by the Supreme Court in *Block v. Hirsh*, 256 U.S. 135 (1921). The Court found that wartime circumstances in the District of Columbia justified a federal statute restricting the right of a landlord to displace his tenants at the expiration of their lease "Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present." *Id.* at 156. See also *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974) where dictum provided that Congress could entrust the area of landlord-tenant disputes to the supervision of an administrative agency.

173. See note 134 *supra* and accompanying text.

174. E.g., *Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1145 (8th Cir. 1971), *aff'd* without opinion, 405 U.S. 1035 (1972), where the court noted the conflict between the need for nuclear power and the maintenance of an ecological balance.

175. See notes 119-21, 127-28 *supra* and accompanying text.

conclusion is supported by the *Druker* court which found that a local rent control law conflicted with the NHA, all consideration of the HUD regulation aside.<sup>176</sup> The comprehensive nature of the NHA and the HUD regulations justifies the displacement of local rent control laws in this area.<sup>177</sup>

*Mary Anne Wirth*

---

176. See note 146 *supra* and accompanying text.

177. See notes 34, 54-77 *supra* and accompanying text.