Statement To

Subcommittee on Housing and Community Opportunity
Financial Services Committee
United States House of Representatives

Testimony on Affordable Housing Preservation and Protection of Tenants

By Ricky Leung, Treasurer
National Alliance of HUD Tenants
July 15, 2009

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Subcommittee on Housing and Community Opportunity
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On behalf of the National Alliance of HUD Tenants (NAHT), I want to thank Chairwoman Waters, Ranking Member Bachus, and members of the Subcommittee for inviting our testimony today. My name is Ricky Leung. I am an architect by profession and a tenant in project-based Section 8 housing; the President of the Cherry Street Tenant Association in the Lower East Side of Manhattan; and the elected Treasurer of the NAHT Board. I also work closely with NAHT's New York affiliates, New York Tenants and Neighbors, the Urban Homesteading Assistance Board (UHAB), and Good Ole Lower East Side (GOLES).

NAHT is the national tenant union representing the 1.7 million families who live in privately-owned, HUD assisted multifamily housing, including the 1.3 million families, elderly and disabled people in apartments receiving project-based Section 8 assistance. The elected NAHT Board represents a membership including voting member tenant groups and areawide coalitions in 23 states**.**

Since Congress ended the Title VI Preservation Program in 1996, the nation has lost at least 360,000 units of affordable low income housing, through owner conversion to high market rents and/or voucherization by HUD. The Draft Preservation Bill prepared by Committee staff represents a tremendous step toward halting this loss. We commend Chairman Frank and Chairwoman Waters for including virtually all of NAHT's priority concerns in the Draft Bill, especially the no-cost First Right of Purchase in Section 103.

We also thank Representative Velasquez, who represents my District in Manhattan, for filing HR 44, the Troubled Housing reforms now incorporated in Title IV of the Draft Bill. In 1994, Congress gave HUD "flexible authority" to voucher out troubled housing, with little oversight. The nation has since lost 120,000 formerly subsidized apartments through HUD policy decisions. Today, 16,000 families in 122 substandard apartment complexes face foreclosure in New York City alone. We applaud Representative Velasquez, Chairman Frank and Chairwoman Waters for including these NAHT priorities in the Draft Bill.

NAHT testified and commented on the 2008 Discussion Draft of this bill. In the revised Draft, we appreciate that Committee staff have made major improvements to the Right to Purchase section, as well as to Section 503 regarding HUD approved prepayments, and added important provisions for HUD held and HUD owned buildings in a new Section 108. About 90% of the Bill has consensus support among the major stakeholders, including several NAHT priorities (all of HR 44 and other Troubled Housing reforms; reform and extension of Enhanced Vouchers for all expiring units; Project Based Enhanced Vouchers; and conversion of Rent Supplement and RAP contracts to Section 8). There is also consensus support for Section 513, the Tenant Technical Assistance provision, which is identical to the language adopted unanimously in HR 3965 in October 2007. We thank Representative Green, Chairman Frank and Ranking Members Bachus and Capito for their leadership on this provision.

Accordingly, my remarks today focus on NAHT's highest priorities for this legislation, namely the Federal First Right of Purchase (Section 103) and Tenant Empowerment provisions (Sections 303, 304 and 305). These priorities have been endorsed by the National Preservation Working Group, but have not been supported by all stakeholders.

Federal First Right of Purchase Will Save Our Homes

I am honored to represent NAHT before you today. For 30 years, I have grown up in the 488 unit Cherry Street Apartment complex in a Section 8 apartment with my two aging parents, whose stable jobs in the garment industry were largely wiped out after 9/11. Cherry Street has provided a secure home for our family, which I largely support while working as an apprentice architect in Manhattan. Neither my parents nor I would be able to survive long paying full rent in the overheated Manhattan market.

The other 487 families in the Cherry Street community are working families, professionals and retirees; old, young, and in between; African American, Caucasian, Asian-American and Latino. We are the diverse New York working and middle class, a microcosm of the City and of the nation. As President of the Cherry Street Tenants Association for the past eight years, I have worked to help our community sustain and thrive in the face of increasing threats from a super hot real estate market.

In 2003, our project-based Section 8 contract was set to expire again after several one year extensions. We were fearful and uncertain what would be the fate of our community, given rapid gentrification and mega development projects in the Lower East Side. Our Tenant Association persuaded our owner to renew under the Mark Up to Market Program, but only for five years. After I testified before the Committee in 2008, our building was sold to a "predatory equity" investor for $177 million –more than $360,000 per apartment—who renewed the Section 8 contract for another five years. The new owner will face the same decision of whether or not to renew in three years. Next time around, we are not so certain he will renew: he can likely make far more money converting to speculative rents on unsubsidized units or converting to condominiums.

Passage of a First Right of Purchase would at least give our Tenant Association and the City a fighting chance to save our homes.

By itself, the First Right of Purchase provision would not add to federal costs. It would simply allow a City agency, acting alone or on behalf of a nonprofit or tenant organization, to purchase a property at risk of conversion to market housing during a six month window of time, during the owner's One Year Notice period already required by federal law. A preservation purchaser would use current federal subsidy programs such as Mark Up to Market, Low Income Housing Tax Credits, city and state capital grants or loans, the National Housing Trust Fund, Stimulus Bill funds and new federal preservation grants to buy the property at full market value, while preserving affordable housing for future and current tenants. Agencies awarding funds would ensure that repair needs are met to protect tenants and the buildings.

If a viable purchase plan cannot be assembled in the required time frame, the owner would be free to opt out. In that case, the Draft Bill's provisions for Enhanced Vouchers for all current tenants (including Expiring Mortgage units) would apply.

The Right of First Purchase framework is similar to the Title II/VI Preservation program, which preserved 90,000 at-risk apartments between 1988 and 1996. Of these,

30,000 apartments were purchased by nonprofit or tenant organizations. Tenants in my building deserve the same opportunity.

New York City is Losing Affordable Housing at an Alarming Rate

Tenants' fears that owners might opt out are unfortunately well founded. As of the end of 2006, fully 27% of New York City's original 119,785 units of privately-owned, subsidized housing have been lost since 1990, and another 18% (21,561 total) were threatened with subsidy loss, according to the Community Services Society (CSS).[1] ***Of the 32,422 units lost so far, 17,911 were in federally subsidized apartments that could have been saved if a First Right of Purchase were in place***. Needless to say, the City of New York is not building new housing affordable to low income families at anywhere near this rate.

Since 9/11, the rate of housing loss has spiked dramatically: more than 2/3 of the units lost overall since 1990 have converted since 2001. Mitchell-Lama buildings with older, non-Section rent subsidy programs (Rent Supplement and RAP, which are not eligible for Mark Up to Market) have opted out at an alarming rate. By 2004, these trends had spread from high market areas such as the Upper West Side to "medium" market areas in the City, including lower rent areas of Manhattan and the Bronx. In my neighborhood, Land's End I converted to the market rents in 2004. In 2007, the proposed conversion of the 6,000 unit Starrett City complex—the nation's largest HUD subsidized development—was only the most visible example of a much deeper crisis in our city. The new crisis in expiring 40 year HUD mortgages will only accelerate this loss.

In the wake of the traumas inflicted on New York City in 2001, the loss of more than 54,000 affordable housing units is a crisis which we can neither bear nor ignore. The people of our city are still reeling from the after shocks of 9/11. Cherry Street and other subsidized housing developments are home to many of the police, firefighters and health service workers who performed heroically after the 9/11 attacks, as well as many low income and elderly people who simply have no options in the high rental market of New York City.

Homeland security begins with a home. Adoption of a First Right of Purchase is urgently needed to preserve the estimated 20,000 federally subsidized apartments at immediate risk in New York City alone.

Predatory Investors Are Driving Up Rents and Destroying Affordable Housing

Since 9/11, the destruction of affordable housing has been fueled by an unprecedented surge of speculative investment by large, international private equity firms taking advantage of the declining dollar and market conditions in New York. A stone's throw from the World Trade Center, Independence Plaza was lost to a predatory investor who converted to high rent housing in 2004. Since then, 13,000 subsidized apartments have been acquired and deregulated by three predatory equity firms in New York City alone, with no end in sight.

For example, Cammeby's International, a private equity firm based in the Middle East, purchased 10 and 210 Stanton Street in the Lower East Side, not far from where I live, along with 10 other developments totaling 7,458 apartments in New York City. In Harlem, another investor sold 4,000 units of state and HUD subsidized housing for $300 million ($79,000 per unit) in May 2005, who then flipped them to a second investment fund managed by Morgan

[1] The full CSS report is available on line at http://www.cssny.org/pdfs/Closing_the_Door_2007_Report.pdf

Stanley, for almost $1 billion ($250,000 per unit) in 2007. The new owner tripled the debt service in a two year period, creating tremendous pressure to replace low income people with higher rent paying tenants. My own building, Cherry Street, has now joined the list of predatory equity targets with its sale at $360,000 per unit last year.

City and state agencies in New York have stepped in where they can to review and reject sales of subsidized housing where speculative purchase prices appear unsupportable, but their authority is limited. With pressure from Rep. Velasquez, HUD Secretary Jackson did block the sale at Starrett City for $220,000 per unit. But not all at-risk properties have HUD mortgages that allow HUD to do this, and HUD has rarely rejected a sale.[2] ***A First Right of Purchase would provide an additional tool to local governments to remove at-risk buildings from the speculative market spiral entirely, with a one time purchase and transfer to socially responsible ownership.***

Deregulation Has Resulted in Uncontrolled Speculation and the Loss of Housing

The explosion of predatory equity speculation in New York's subsidized housing stock is echoed in other high market areas from Boston to San Francisco, Atlanta to Los Angeles, and will soon spread to gentrifying neighborhoods across the country. It is one byproduct of the deregulation of federally subsidized housing since 1996. As in the single family mortgage industry, deregulation and speculation in subsidized multifamily housing have already had hugely negative consequences for affordable housing, low income families and communities.

Deregulation is a strategy that has failed in the mortgage lending, energy, telecommunications, banking, and airline industries in the US and in countries around the globe. It is a failure in the subsidized housing industry as well. It is time to push back with judicious, moderate regulation to save affordable rental housing, as the Committee has recommended for the single family mortgage and banking industries.

The predatory equity crisis poses new challenges for all of us. NAHT appreciates the Committee's leadership in addressing the need for new regulatory controls, such as the language protecting tenants and affordable rental housing in the TARP legislation, and Rep. Velasquez' proposals for a Multifamily Housing Preservation Program, which are currently under review by the Treasury Department and HUD. The First Right of Purchase is one more critical regulatory tool which residents and cities need in our arsenal to save our homes.

There is ample precedent for the limited, no-cost regulatory tool of the First Right of Purchase***. Besides Title VI, for 20 years Congress has provided a Right of Purchase in the federally subsidized Rural Housing sector, which has worked to preserve this stock from conversion to high market rents.[3] In addition, since 1996 several states, including Illinois, Rhode Island, and Maine have adopted First Right of Purchase statutes.***

[2] One measure sought by NAHT and included in the Preservation Working Group proposals is a provision mandating that HUD preserve at risk housing when it has discretion to do so. This brief proposal would nonetheless be important to redress the many ways that HUD officials have acted in a manner which undermines, rather than preserves, affordable housing. We were unable to find this proposal in the Draft Bill; since it should be noncontroversial among the HUD stakeholders, we recommend its inclusion in the final bill.

[3] 42 U.S.C. Sec. 1472 (c)

New York Courts Nullified Local Law 79 Due to Preemption, Not Constitutional Concerns, and Called for Action by Other Levels of Government

In New York City, tenants won Local Law 79, which enacted a First Right of Purchase in the City, based on these statewide models. We are aware that HUD Secretary Donovan expressed reservations about the Right of First Purchase at the Committee hearing on June 25, 2009. The Secretary alluded to "constitutional" and other objections which were raised by landlord groups and the City of New York in state court litigation which ultimately struck down Local Law 79. He suggested that the Committee explore these constitutional issues and proceed cautiously before adopting this regulatory tool.

In response, it is important to note that the New York state trial court (upheld upon appeal) struck down Local law 79 due to concerns about preemption conflicts with state and federal laws, not because of any constitutional "taking" concerns, which the court did not address. Obviously, establishing a national Right of First Purchase, or altering the federal Notice laws, will not present any federal "preemption" problems. In fact, the New York Court wrote that "the recent sales and proposed sales of major assisted rental housing complexes in this City and the likely devastating impact of those sales on low and moderate-income residents of New York may and should function as a wake-up call for the need for immediate action" by other levels of government. We are attaching to our testimony a recent memorandum prepared by the National Housing Law Project, highlighting these points and addressing the constitutionality of Section 103.

We agree with Secretary Donovan that the Right of First Purchase provision in the bill should be carefully crafted to avoid successful constitutional challenges, by for example ensuring that there is no unwarranted delay in the exercise of a city's right to purchase and that landlords receive full market compensation for any sale. The language in Section 103 of the Draft Bill meets those tests, and improves on the Title II and VI programs in that respect.

On the question of federal preemption, the New York Court referred to Section 232 of the now-defunct Title VI program, which expressly preempts state or local laws that regulate rents in buildings that were once eligible for Title VI. Since the original purpose of Section 232—to ensure that appraisals under Title VI reflected unrestricted market value, regardless of local rent control laws—is no longer applicable, this archaic provision should be clarified, limited only to properties that executed a Title VI Plan.

More broadly, there is no sound reason for Congress to block state and local governments from protecting their own communities, or to do more to preserve affordable housing or to protect tenants than the federal government if they wish. Section 107 of the Draft Bill addresses this concern.

The First Right of Purchase Will Save Money with Greater Benefits for At Risk Families

Congress dismantled Title VI in 1996 due to concerns about excessive costs. But ***the federal costs of the current "unregulated" owner choice system usually match or exceed the cost of Title VI, but with none of the benefits.***

Today, an owner who "opts out" receives Enhanced Section 8 Vouchers which pay the full market rent for assisted units, but with no HUD oversight. An owner who chooses to renew under Mark Up to Market likewise is paid full market rents by HUD, for 5 to 20 years, with no requirement to make needed repairs. Either way, HUD pays out a full market rent in subsidies

equivalent to what was formerly paid out under Title VI, but with none of the offsetting benefits. ***Under Title VI, residents and HUD negotiated major repair programs, permanent affordability, and transfers to nonprofit purchasers and tenant organizations; none of these are required by HUD under either Enhanced Vouchers or Mark Up to Market.***

In fact, short term extensions under Mark Up to Market of five years leave residents and HUD at continued risk that owners will opt out down the road, as is happening in my building in the Lower East Side. ***As long as owners have an unrestricted choice to opt out of HUD programs, they will be able to leverage ever-increasing subsidy commitments from HUD--which residents and communities will doubtless support--since the alternative of losing affordable housing is unacceptable.*** Owners who opt out likewise trigger Enhanced Voucher costs at least the same or higher the subsidy costs in previously regulated developments. In speculative markets like New York, HUD often pays out artificially inflated subsidies—in effect, taxpayer financed windfall profits--that in turn contribute to the speculative spiral in our neighborhoods, with no public benefits other than preservation of Section 8 housing.

A First Right of Purchase will save money in the long run by removing subsidized developments from this speculative spiral, lessening owner windfalls, and ensuring that Congress receives guaranteed benefits on its investment of any federal funds such as Section 8 or the National Housing Trust Fund. Implementing the First Right of Purchase in New York would help stabilize and pull back residential real estate markets from speculative pressures that ramp up prices above true values.

Section 103 Will Save Housing Threatened by Expiring Mortgages and Other Risks

While Mark Up to Market may have slowed the loss of housing since 2000 in some regions, it has by no means stopped it. In addition to the challenges of speculation in high market areas, tenants are now threatened by the rapid growth of "expiring 40 year mortgages" across the nation, a problem that emerged in 2007 and will accelerate through at least 2015. The Federal First Right to Purchase, coupled with the Project Based Enhanced Voucher provision and other incentives in the Draft Bill, will give tenants and communities the tools they need to save these and other at-risk buildings.

In June 2008, the Committee heard about the struggle of Lincoln Place tenants in ***Venice, California*** against AIMCO, the world's largest residential Real Estate Investment Trust (REIT) and a major speculator in HUD housing. Lincoln Place could have been saved had a First Right of Purchase been in place at the time.

The same can be said about many other AIMCO buildings. For example, take Northwest Terrace and Northlake Terrace in ***Dallas***, two AIMCO buildings that once provided a racially integrated community for 472 families. In 1996, the tenants picked a nonprofit to buy both developments under Title VI, but the program ended before the sale could go through. AIMCO later indicated they would consider selling to a nonprofit, but they reneged and sold to another predatory investor in 2000. Conditions deteriorated, and rents skyrocketed 60-75% as the new owner planned to flip the land for luxury townhouse development. The property has since been demolished. This tragedy could have been avoided had a First Right of Purchase been in place.

In ***Boston,*** First Realty Management, which owns several thousand apartments refinanced in the early 1990's with equity take-out loans netting $46 million for the owners, converted the 540 unit High Point Village complex in August 2006, when the original HUD 40 year mortgage expired. The owner and his family invested only $120,000 in 1966, netting more than $90

million in windfall profits by 2006 paid largely by steadily escalating Section 8 subsidies. The owner spurned appeals to at least preserve 320 apartments as Section 8 housing, opting out instead. FRM is now systematically converting its entire portfolio, more than 2,000 apartments statewide, when they reach the end of their 40 year mortgage term. The City of Boston could have exercised a First Right of Purchase to remove High Point from the speculative market to preserve affordable housing and racial diversity.

In ***Hawaii***, the Right of Purchase, along with the revised Section 503 of the Draft Bill, would have helped preserve affordability at Kukui Gardens, an 850 unit complex being converted to mostly market housing by the nonprofit owner. Hawaii has the second highest rate of Section 8 opt outs in the country, according to the Government Accounting Office (GAO)[4]. Section 503 would tighten HUD approval requirements for prepayment by nonprofit owners, to help avoid housing losses like Kukui in the future.

Tenant Empowerment Provisions Essential

NAHT's second priority is the Tenant Empowerment measures included in Title III of the Draft Bill. Along with the urgently needed reactivation of Section 514 funds required by Section 601, these no-cost measures will empower tenants to participate as full partners with HUD to improve and save their homes. These tools will enable tenants to utilize the First Right of Purchase to save at-risk buildings, as NAHT affiliates helped preserve 90,000 apartments under Title II and VI Preservation. They also complement the Troubled Housing reform measures in Title IV of the Draft Bill. [5]

Particularly important are provisions to give tenants Access to Information regarding project budgets and ownership and substandard housing (Section 305 and 306), Third Party Beneficiary Status in HUD contracts with owners (Section 304), and Rent Withholding procedures for substandard housing (Section 303).

Access to Information (Section 305 and 601). The value of transparency regarding use of taxpayer subsidies should be self evident. Project ownership and budget information can help tenants spot waste, fraud and abuse in the use of HUD money in the buildings where we live. Tenants have the greatest stake, and the first hand knowledge, to make sure that public subsidies are used well—these are our homes. ***Only owners and managers who fail to provide quality service and/or have something to hide should raise any objection to empowering tenants with this information.***

Recently in New York City tenants had a major victory in preserving at risk housing thanks to our ability to get access to detailed financial information with the help of city and state agencies—including blind rent rolls, operating budgets and proposed sale prices. This information has aided tenants and advocates in getting regulatory agencies to reject speculative sales of subsidized projects at Starrett City and 1520 Sedgwick, known as the "Birth of Hip Hop" building in the Bronx. Tenants are now pursuing resident ownership at 1520 Sedgwick.

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[4] "Project Based Rental Assistance," GAO-07-290, April 2007

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7 NAHT has also made recommendations to increase tenant involvement and minimize abuse in the Section 202 provisions authorizing transfer of project-based Section 8 contracts from one building to another.

Tenants in other parts of the country deserve the same access to information which has empowered residents in New York without any discernable harm to owners.

HUD does not now make available project budget information under the Freedom of Information Act (FOIA), outside of a short period when owners apply for rent increases. Amazingly, HUD also refuses to provide REAC inspection scores to "failed" buildings that have been referred to HUD's Enforcement Center—precisely the buildings where tenant cooperation with HUD should be encouraged the most. Worse, in 2003 former HUD Deputy Secretary Bernardi adopted a controversial policy effectively withholding information from FOIA requests that involve "current or former senior HUD management officials" or ask "questions about HUD's policies or the performance of departmental responsibilities," leaving it up to local staff to flag "controversial" FOIA requests. The outgoing Administration further weakened the FOIA with 11th hour regulations in October 2008 that impose steep fees and other obstacles to tenants seeking basic information. One result: in October 2008, HUD declined a request for an approved Mark to Market plan to a nonprofit Rhode Island tenant assistance group unless the tenants paid HUD $5,800 to assemble a copy of the Plan, even though HUD's own regulations require release of the Plan to the tenants and their representatives! Clear direction by Congress is required to help the new Administration reverse these now institutionalized policies.

Particularly where public subsidies are concerned, tenants and the public generally should know where our tax dollars are going. Subsidy contracts with owners should not be treated as a secret compact of private information beyond public scrutiny. Claims that making project budgets available to tenants will discourage investment and inhibit the effectiveness of preservation owners are contrary to the experience in areas where this information is available from local governments. In fact, as Sedgwick and Starrett City have shown, making information available to the public will enable tenants to encourage, not discourage, investment by preservation purchasers.

Rent Withholding (Section 303). This proposal would allow tenants to withhold rent when there are serious violations of housing quality standards and trigger HUD to withhold as well. It also provides that HUD will conduct an inspection or management review when requested by the local government or a petition signed by not less than 10% of the tenants. This proposal is based on language which passed the House in 1993 or was included in a Senate Floor Managers Amendment, but which was not adopted in final legislation. NAHT has submitted technical amendments to refine Section 303.

Many states allow rent withholding for serious substandard conditions; states like Massachusetts or Ohio report no problems of frivolous litigation, serious controversy or abuse. But Alabama, North Carolina, South Carolina, Louisiana, Georgia, Missouri, Colorado, Oklahoma and Texas are among the states that do not have this right. HUD receivership authority is rarely used and inaccessible to most tenants. ***Rent withholding creates a strong incentive for the owner to repair, and can help save buildings before they deteriorate. Section 303 is a natural complement to Title IV and will enlist tenants as partners with HUD in improving Troubled Housing.***

Third Party Beneficiary Status (Section 304). This proposal would establish tenants and tenant associations as third party beneficiaries in HUD contracts affecting their property. Tenants are listed as third party beneficiaries in Mark-to-Market Use agreements, but not in the Section 8 contract or any other Mark-to-Market documents, such as the Rehab Escrow Deposit Agreement or Mark-to-Market Restructuring Commitments***. HUD is often slow or too late in***

enforcing these contracts, leaving tenants to suffer. Adding tenants as third party beneficiaries would give us standing to enforce the contracts.

One example will illustrate why this proposal is needed. The Texas Tenants Union reports that there is a 100 unit property in Longview, TX called the Jerusalem Apartments that completed HUD's Mark-to-Market (M2M) program in November 2001. The M2M plan called for $83,750 to be spent from the Rehab Escrow Account in the first year for new hot water heaters, exterior painting and carpentry, repairs to the water and sewer lines, and other repairs. Another $48,000 was supposed to be spent from the Reserve Account in the first year to begin replacing windows, furnaces, and appliances. More than two years after M2M approval, none of the improvements had begun. By the fall of 2006, HUD terminated the Section 8 contract and displaced all the families, senior citizens, and disabled tenants. HUD proceeded to foreclose on the property in the fall of 2007, and has scheduled at least three auctions to sell the property, which of course, is now without subsidies. If the tenants had been able to withhold rent early on, or been a party to the contracts, there likely would have been a better outcome.

Action Need to Make Resources Available to Empower Tenants

NAHT strongly supports Section 513, which would direct HUD to provide $10 million annually under Section 514 of MAHRAA which Congress has authorized since 1997 but HUD has not spent since 2002. Sponsored by Rep. Al Green, this language was adopted with a strong bipartisan consensus by the full Committee in October 2007 as part of the Mark to Market Reform bill, now incorporated in the Draft bill.

Tenants urgently need the resources Section 513 would provide in order to cope with a variety of preservation challenges, including the growth of expiring 40 year mortgages, troubled housing, and predatory equity. Despite the Committee's vote in October 2007, HUD has yet to provide these resources, although HUD's FY 10 Appropriations request includes $10 million for Section 514 in the project-based Section 8 account. HUD should be able to make funds available by October 2009.

It is critical for the Committee to retain Section 513 in the Preservation Bill, and to encourage HUD to implement the Committee's policy directives in the interim. An Interagency Agreement between HUD and the Corporation for National Service or similar federal agency, as provided in Section 513, is the only and most cost effective way to get resources out to the field during 2009. Similarly, it is important for HUD to implement a new grant program based on performance based contracts for eligible incurred costs, not the unworkable "fee for activity" model proposed for the new "TRIO" grant program planned by HUD staff in 2007, and to ensure that qualified locally based intermediaries get priority for grant funds. So far, HUD has not indicated support for these key provisions in Section 513.

Similarly, it is important for the Committee to urge HUD to heed the recommendations of the Alternative Management Control Review (AMCR), HUD's internal report generated by audits of earlier Section 514 programs. The AMCR recommended that new programs be administered by the Office of Grant Administration in the Office of Housing, rather than by OAHP, which had failed in its oversight of earlier programs. The AMCR further recommended that the OGA/OH be assigned three program staff to provide better oversight through Cooperative Grant Agreements. We strongly support these recommendations and ask the Committee to urge HUD to implement them, along with the policies outlined in Section 513.

NAHT and its local affiliates have the strongest stake in making sure the new program works to empower tenants. We ask the Committee's continued support to make sure that HUD adopts our recommendations to get resources out in the most timely, cost effective and effective manner.

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In summary, we urge the Committee to retain the critical provisions for a First Right of Purchase and Tenant Empowerment. The Committee has crafted an exciting and comprehensive program that will sustain our homes for decades to come.

We would be happy to provide more information to the Committee upon request. Thank you for developing this legislation and allowing NAHT to submit its views.

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MEMORANDUM

TO: Subcommittee on Housing & Community Opportunity, House Financial Services Committee
FROM: James Grow and Adam Cowing, National Housing Law Project
RE: Proposed Federal First Right of Purchase
DATE: July 13, 2009

The Federal First Right of Purchase Does Not Amount to an Unconstitutional Taking

The Fifth Amendment requires that "private property [shall not] be taken for public use, without just compensation." Though there is no clear precedent that the proposed right of purchase would even constitute a "taking," the proposed federal first right of purchase satisfies the Fifth Amendment because it provides just compensation and furthers a valid public purpose.

- **The bill's purpose – to preserve affordable housing – is a public use.** The public use requirement has been interpreted broadly by the Supreme Court. The judiciary's role in judging public use is narrow and should be restrained "unless the use be palpably without reasonable foundation." *Hawaii Hous. Auth. v. Midkiff*, 104 S. Ct. 2321, 2329 (1984). Further, property taken need not be put into use for the general public, nor must it be held by public entities. The "mere fact that property… is transferred… to private beneficiaries does not condemn that taking as having only a private purpose." *Kelo v. City of New London*, 545 U.S. 469, 482 (2005) (citing *Midkiff*, 104 S. Ct. at 2331).

- **The proposed right of purchase specifically *requires* just compensation**. Takings analysis requires two steps: determining whether a taking has occurred and, if so, whether just compensation has been provided. Just compensation obviates the need to address the first requirement, since the Fifth Amendment does not prohibit the taking of property, only the taking of property without just compensation. The proposed bill requires that owners receive fair market value if a property is sold (sec. 103(d)(3)(B)), which the Supreme Court has held satisfies the just compensation requirement of the Fifth Amendment. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Nor is there any temporary takings issue since the proposed bill permits an owner to convert at the end of the original notice period if the qualified preservation purchaser does not purchase the property (sec. 103(b)) – the same date upon which the owner could otherwise convert.

- **Precedent**: The proposed federal right of purchase is analogous to 42 U.S.C. § 1472(c), which in 1988 established a purchase right for Rural Development rental housing facing prepayment. This law has been upheld in court, against claims that it violated due process and was an unconstitutional taking. *Parkridge*

Investors v. Farmers Home Admin., 13 F.3d 1192 (8th Cir. 1994); *Lifgren v. Yeutter*, 767 Fed. Supp. 1473 (D.Minn. 1991) (deciding only the takings issue).

HUD's Position On a Federal First Right of Purchase

When asked about HUD's position on the federal right of purchase (question from Rep. Maxine Waters, June 25, 2009, Committee Hearing), Secretary Donovan stated his opinion that a legislative right to purchase must be "crafted very carefully," and is not the most important tool for preserving affordable housing.

Based upon his experience in New York City, the Secretary cited two levels of complex legal issues, which should "be looked into very carefully" because they might engender burdensome litigation: constitutional issues and state level issues. Since only constitutional issues are relevant to Congress' evaluation of possible legal impediments to a *federal* law, the inquiry here should focus upon any issues posed by the takings doctrine and the Supremacy Clause. While takings claims might be filed, they would be difficult to sustain under the authorities previously cited, and none was decided in New York. Concerning the Supremacy Clause, the Secretary's experience involved a local right of purchase law that was challenged and eventually invalidated as impliedly preempted by federal law. *Mother Zion Tenant Ass'n v. Donovan*, 865 N.Y.S.2d 64 (2008). Whatever the merits of the state court's federal preemption ruling, no such problem is presented here, for two reasons. First, a *federal* right of purchase affirmatively establishes federal policy, which must be given effect under the Supremacy Clause. Second, the proposed bill expressly clarifies that state and local preservation laws are not preempted (sec. 107(d)). The Secretary also stated that litigation challenging the New York City law disrupted preservation efforts, but this assertion or its relevance to the proposed federal policy cannot be evaluated without more facts

Secretary Donovan also expressed his belief that the federal right of purchase is not the most effective tool for preservation, stating that "carrots" are more important than "sticks" in preserving affordable housing. To be sure, incentives are of critical importance, and the proposed bill includes many such carrots, none of which are excluded in favor of creating a right to purchase. Although the federal government has provided many preservation incentives, an additional tool is necessary to preserve the value of those investments where owners reject incentives. We submit that the right to purchase at market value properly balances the owner's financial interest with the need to preserve affordable homes.