



TOOLS FOR TACKLING CORPORATE LANDLORDS

A series on state and local policy options for mitigating the
impact of private equity and other institutional investors



PART 2: CHALLENGING STATE PREEMPTION OF LOCAL AFFORDABLE HOUSING INITIATIVES

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PRIVATE EQUITY
STAKEHOLDER
PROJECT

BACKGROUND



Concerns are growing among tenant advocates and government officials regarding the expansion of corporate investment in local housing systems. The trend of housing financialization gained momentum after the 2007-2008 mortgage crisis, when Wall Street firms acquired a significant number of foreclosed homes. The onset of the COVID-19 pandemic further exacerbated speculative housing investment, as the residential sector became a reliable option for investors despite the overall economic uncertainty. As a result, housing affordability and renters' rights have become pressing issues, with individuals from various political backgrounds raising alarms.

Presently, private equity firms own at least 1.6 million housing units in the United States, although this figure is likely underestimated due to a lack of transparency regarding ownership.¹ While this statistic alone is concerning, the distribution of investor-owned properties is not uniform across the country, with certain neighborhoods and cities experiencing the brunt of its effects. For instance, in Atlanta, more than 65,000 homes are owned by large investors.² In Richmond, Virginia, Jacksonville, Florida, and Philadelphia, over 20% of homes sold are acquired by investors.³ Similar patterns persist throughout the country, particularly in Sunbelt states.



Analyses often emphasize the unfair competition created by increasing corporate housing investment, which effectively excludes middle and working-class families from homeownership. However, it is important to acknowledge that the impact of heightened investor ownership is most significant for tenants, especially those with very low incomes. Reports indicate that tenants of corporate-owned properties face significant challenges, including drastic rent hikes, unjust or illegal evictions, additional fees, neglected home maintenance, and various other issues.⁴

Among corporate landlords, private equity poses a particularly insidious threat due to the pressure to generate high returns within a short timeframe. Private equity firms aim to deliver returns of at least 15% to their investors, which is approximately double the rate of return for other asset classes. Typically, these firms seek to achieve this goal within a brief period of 3-5 years before exiting the business or selling the property. Consequently, private equity firms often prioritize maximizing revenue while minimizing costs, such as deferring maintenance, evading regulations, and burdening tenants with unnecessary fees. This financialized housing model places millions of tenants in the United States at risk of heightened instability. Clearly, government intervention is necessary to ensure that housing remains safe, affordable, and accessible for people.

Regulating corporate landlords is a challenging task, but not an impossible one. Private Equity Stakeholder Project's policy toolkit report series aims to shed light on potential strategies for addressing corporate landlords by examining policy frameworks and showcasing successful past measures. In researching potential solutions, we have encountered numerous instances in which state law restricts the ability of municipalities to legislate housing issues. In these instances, lawmakers sympathetic to the housing justice cause find themselves unable to make important local interventions on the topics of rent control, landlord licensing, habitability standards, and much more. As such, this report attempts to explain how state preemption functions to thwart local efforts to protect individuals, tenants and prospective homebuyers alike, from corporate housing consolidation.

KEY POINTS

- ◆ State governments have moved to preempt local initiatives to combat the nation's housing crises.
- ◆ Researchers found that efforts to protect citizens from pandemic related housing issues by local governments in states like California, Florida, and Illinois were stymied to a varying degree depending on the level of state preemption employed.
- ◆ Passing state legislation to abrogate state preemption of local issues like income non-discrimination, inclusionary zoning, and rent control is key to winning housing policy victories at the local level.
- ◆ To move policy at the state level, it is necessary to organize powerful, reliable constituencies that will compel politicians to make concessions on preemption and ultimately hold them accountable.




STATE PREEMPTION OF LOCAL HOUSING POLICIES



Issues pertaining to conflict of laws and legal preemption are inherent in the practice of federalism in the United States. Although federal preemption of state laws are what often come to mind in conflict of laws analyses, the less-covered issue of state preemption of municipal laws offers important context in understanding the current environment of local housing legislation, particularly as it relates to the proliferation of corporate landlords.

Laws governing the rights of tenants and landlords, as well as conveyances of real estate, have historically been the purview of state courts and legislatures.⁵ Aside from the monetary toolset available through the Federal Housing Finance Administration and anti discrimination authority through Department of Housing and Urban Development, the federal government has not done much to interfere with state property laws. As a consequence, states and municipalities have begun introducing legislation that would address corporate landlord consolidation on the local level. This is where the problem of state preemption manifests itself: local efforts to enact various housing policies have routinely been preempted (meaning they were superseded by state law and therefore deemed invalid) by state governments resistant to tenant protections.⁶



Further, although state preemption is often framed as conflict between local and state politicians, it is important to remember that many preemptive policies are heavily influenced by corporate lobbying. These policies prevent local governments from making necessary decisions that benefit their communities, allowing private equity and other Wall Street actors to exploit residential environments with low tenant protection and individual homeowner (or “homebuyer”) laws or regulations. While state policymakers are ultimately responsible for the legislative push for preemption, corporate interests often provide ample support by way of lobbying operations and campaign contributions.⁷

States generally fall along two different tracks when considering state preemption of municipal laws: states that follow “home-rule” and those that follow “Dillon’s rule.” According to the Illinois Municipal League, home-rule states grant municipalities the ability to exercise any power and perform any function unless it is specifically prohibited from doing so by state law.⁸ States following Dillon’s rule limit municipalities’ power to those (1) explicitly granted to them by the state, (2) the powers necessarily or fairly implied in or incident to the powers expressly granted, and (3) the powers essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. This rule also requires that, when the authorization of a municipality to exercise power is ambiguous, such ambiguity be resolved against authorizing such power.⁹

To summarize, home rule grants relatively broad authority to local governments, while Dillon’s rule grants narrow authority. To complicate things further, many states utilize aspects of both rules in determining municipal authority, and in home rule states such power can be self-executing or require a new statute depending on the laws. Since real estate conveyance and landlord-tenant laws are generally contained in state statutes, policy changes at the local level designed to address housing are often vulnerable to state preemption.

URBAN INSTITUTE REPORT



According to a September 2020 report from the Urban Institute, thirty-three states have passed preemption laws that prevent local governments from adopting various affordable housing policies or tenant protections, the most common being laws that restrict their ability to adopt rent regulations or inclusionary zoning ordinances.¹⁰ In surveying the policy responses to the rent crisis brought on by the COVID-19 pandemic in the states of California, Florida, and Illinois (all three being primarily home-rule states), the authors observed that state preemption constrained local housing policy responses to COVID-19 across all three states:¹¹

“Local governments did not consider adopting local protections that would flout state preemption laws even if such protections could help stabilize housing for at-risk renters. Even local actions that were not directly covered by state preemption laws were ‘chilled’ by concerns that acting would spark legal challenges or new preemption efforts at the state level.”¹² (Urban Institute)



CALIFORNIA

Already reeling from a statewide housing crisis before the COVID-19 pandemic, California has adopted some of the strongest laws promoting new housing development in the country since 2017.¹³ Laws such as the California Housing Crisis Act of 2019, which limits the ability of municipalities to delay approvals for new housing, reduce density, or impose fees that raise the costs of development for five years, preempt all local ordinances to the contrary.¹⁴ As a home-rule state, California law only preempts those municipal laws when state laws address the same subject-matter that the local law explicitly or implicitly seeks to govern.¹⁵


Other preemptive California housing laws include, but are not limited to, the Costa-Hawkins Rental Housing Act (which limits the ability of cities and counties to adopt rent regulation for certain properties and prevents local governments from limiting rent increases after a tenant moves out) and the Ellis Act (which allows landlords to evict renters without cause when they remove units from the rental market, such as by converting rental units into condominiums).¹⁶

However, as COVID-19 hit California shores in March 2020, the state began changing its tune on the issue of preempting local housing laws. On March 16, 2020, California Governor Gavin Newsom signed an executive order that suspended state preemption of certain local eviction protections, thus making California the first state in the nation to suspend housing-related preemption laws during the pandemic.¹⁷ Since the executive order provided local governments with the latitude to enact laws that provided greater protections than the statewide moratoria, many municipalities decided to take the initiative and adopt bans on utility shutoffs, temporary rent freezes, and grace periods for tenants to pay back rent in addition to their own local moratoria (which included more than 30 cities and counties across the state).¹⁸ Local intervention provided California's citizens with housing stability during a time of great economic and medical precarity.

For example, Los Angeles issued orders and adopted ordinances (through the mayor and city council, respectively) that paused rent increases and extended rent freezes for rent-stabilized housing in the city beyond the existence of the emergency order.¹⁹ Stakeholders have cited the state’s COVID-19 executive order as giving policymakers the confidence to implement such measures, even though earlier state court decisions may have also been a source of legitimacy.²⁰ Eventually, local housing initiatives that went beyond the scope of eviction moratoria were subject to legal challenges and were ultimately rolled back. As state laws like Costa-Hawkins restricted local action on rent freezes, most municipalities limited rent freezes to units that were already rent-regulated.²¹

Although California provides greater authority for local governments to govern their own affairs, the state’s experience managing its housing crisis during the pandemic provides a cautionary lesson about the limits of home-rule policies, especially with the recent expiration of national public health emergency declarations. Even if home-rule localities may provide innovative solutions to support their communities, state lawmakers can always step in to preempt those laws barring prohibitions in the state constitution. Therefore, passing tenant protection legislation at the state level remains the most effective way to address the tenancy crises in states like California.





An example of successful, if incomplete, action at the state level is the passage of California’s Tenant Protection Act of 2019, which limits rent increases for current (at least 12 months of occupancy) tenants. Although the law is quite narrow in terms of its application (it does not apply to new tenants at all), its protections are not as easily assailable as those provided by California’s municipalities.²² However, due to the limitations of this legislation and the preemption of local efforts due to Costa-Hawkins, private equity firms like Blackstone have been able to list apartment units for significantly more than previous tenants had been paying.²³

FLORIDA

Although it is a home-rule state, Florida’s home-rule law is implemented through statute.²⁴ Florida adopted the Home Rule Powers Act in 1973.²⁵ Even though the state constitution previously provided for home-rule for municipalities, legal challenges led the legislature to promulgate such powers through statute.²⁶ However, as was seen in California, the home-rule law in Florida does little to prevent state preemption if the state desires to act.

In Florida, municipalities may only regulate rents when they identify a “housing emergency so grave as to constitute a serious menace to the general public.”²⁷ Even then, the process for approving such measures is so burdensome that it is often regarded as a dead issue on the local level.²⁸ In addition to rent control, Florida law preempts local governments from enacting other housing related policies, such as those tied to affordable housing and new property taxes.²⁹


The preemption situation in Florida led cities like Miami to enact their own measures to mitigate the housing crisis wrought by the COVID-19 pandemic. Well before Governor Desantis’ executive order mandated an eviction moratorium on April 2, 2020, Miami became the first city in the country to do so on March 12 by halting all eviction activities by the city’s police and suspending evictions for public housing residents.³⁰ Still, Florida and its local governments have found ways to work together with programs such as the State Housing Initiatives Partnership, which gave local governments greater flexibility to create rental assistance programs suited to local needs.³¹



Although Miami was able to maintain its eviction prevention measures, its power to implement meaningful tenant protections has been historically limited to emergency situations (such as Florida’s frequent hurricanes).³² Even such emergency powers are not guaranteed, however, as emergency housing protection legislation has been defeated at the state level.³³ Interestingly, Florida has recently welcomed legislation aimed at addressing affordable housing when it benefits developers by giving them regulatory (e.g., expedited permits) and monetary (e.g., tax breaks) incentives.³⁴

Florida’s reluctance to pass meaningful legislation for tenants, or at least allow cities to do so, has allowed the nation’s largest corporate landlord to exploit its citizens. The private equity firm Blackstone owns more than 300,000 housing units across the United States, including in Florida. Unfortunately, Blackstone’s housing footprint in the Sunshine State has been linked to disturbing eviction practices.

Until August 2022, Blackstone had a voluntary eviction moratorium for tenants who were behind on rent. Since then, Blackstone has initiated a wave of evictions³⁵ in a number of states and counties throughout the U.S. In at least 33 cases over the last year at properties owned by



Blackstone’s single family rental subsidiary, Home Partners of America, Blackstone filed to evict the tenant and, in short order, subsequently listed the property at a substantially higher rent (ranging from 9% to 38% higher).³⁶ Blackstone executive Nadeem Meghji’s statement at an internal company meeting seems to indicate that increasing market-rate occupancy after tenant evictions is a sound business strategy:

“[W]e’re also seeing a meaningful increase in economic occupancy as we move past what were voluntary eviction restrictions that had been in place for the last couple of years [.]”³⁷

If state preemption was abrogated, and local governments were allowed to enact policies related to eviction protection and rent control without state preemption, Miami would be able to better protect its residents from predatory eviction and pricing practices like those employed by Blackstone.

ILLINOIS

Like California, Illinois establishes home-rule for municipalities with populations over 25,000 in its constitution.³⁸ However, like the previous examples, Illinois’ home-rule posture does not prevent it from preempting city laws surrounding housing policy.

Illinois passed the Rent Control Preemption Act in 1997 to prevent cities from enacting their own rent stabilization laws.³⁹ This law prevents cities like Chicago (which enjoys greater latitude in terms of setting local housing policies due to its home-rule designation) from passing laws that implement, or could be construed to implement, rent control.⁴⁰ As a result, there has been a chilling effect on city officials where they are reluctant to pass anything that would contradict the state statute, even in the face of the pandemic.⁴¹

Governor J.B. Pritzker issued an executive order that instituted an eviction moratorium throughout Illinois on April 23, 2020.⁴² Chicago’s additional “COVID-19 Eviction Protection” and “Fair Notice” ordinances

followed shortly after.⁴³ Even as these unprecedented measures took hold, however, city officials across the state did not call for rent control due to the inevitable preemption.⁴⁴ This is interesting in comparison to California, where the state explicitly eased state preemption laws and city officials at least extended rent freezes to properties that were already rent-stabilized.⁴⁵

The rent-control preemption situation in Illinois makes it clear that these policy interventions are best fought for at the state level, with housing advocates such as the Lift the Ban Coalition trying to do so for years.⁴⁶ Still, political realities may limit this strategy as well, as legislative efforts to overturn the state's Rent Control Preemption Act have been consistently defeated.⁴⁷

OTHER STATES

The Urban Institute study does not address the myriad other states that have preempted local housing laws, but the three states surveyed above are not alone. In fact, 34 states have passed laws preempting equitable housing solutions of various kinds at the local level,⁴⁸ including those related to source of income non-discrimination,⁴⁹ inclusionary zoning,⁵⁰ short term rentals⁵¹ and rent control.⁵² Landlord registry and rental licensing legislation have been targets of preemption as well.⁵³



CONCLUSION



Given the level of state resistance to equitable housing policies at the local level, housing advocates focused on changing local housing policies should dedicate substantial efforts to rolling back or mitigating preemption on certain housing issues at the state level. Due to the varying character of state preemption laws, these efforts will no doubt look different depending on the state. However, lobbying for legislation at the state level will not be enough where state legislatures are dominated by policymakers that are hostile to housing protections.

Building and growing political coalitions, such as Lift the Ban in Illinois, is the first step to acquiring the political power necessary to pressure state legislators to abrogate various preemption measures related to housing. Without action at the state level, there is very little local governments can do to address the nation's housing crisis outside of emergency situations (and even then, their abilities are often restrained). Therefore, while local initiatives and actions by government officials do what they can to alleviate the country's housing woes, housing advocates should see changes to preemption at the state level as a north star and major aim of their campaigns. In a time where state governments are increasing their power over local decisions in different ways,⁵⁴ it is essential that communities be able to govern themselves and enact policies that serve their constituents and fit their specific contexts.

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