City of Chicago
COMMISSION ON HUMAN RELATIONS
740 North Sedgwick, 3rd Floor
Chicago, Illinois 60610
(312) 744-4111/(312) 744-1088 (TTY)

IN THE MATTERS OF:	)	
	)	
WESLEY SMITH, DAVID TORRES, and KIA WALKER,	)	
Complainants,	)	Case Nos. 95-H-159 & 98-H-44/63
	)	
and	)	
	)	Date of Order: October 6, 2000
WILMETTE REAL ESTATE & MANAGEMENT CO.,	)	
Respondent.	)	

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ORDER REGARDING RESPONDENT'S THIRD MOTION TO DISMISS

On December 14, 1995, Complainant Wesley Smith filed a Complaint with the Commission alleging that Respondent Wilmette Real Estate & Management Company ("Wilmette Real Estate") violated Section 5-08-030 of the City of Chicago's Fair Housing Ordinance by discriminating against him on the basis of his source of income when it denied him the opportunity to rent one of its apartments. Complainant David Torres (on March 27, 1998) and Complainant Kia Walker (on April 30, 1998) filed Complaints with the Commission similarly alleging that Wilmette Real Estate

discriminated against them based on their source of income when it denied each of them an opportunity to rent one of its apartments. Specifically, all Complainants allege that Respondent discriminated against them because they intended to make use of Section 8 housing vouchers to pay a portion of their rent.[1]

Presently before the Commission is Respondent's motion to dismiss. This is Respondent's third bite at the apple as it has previously filed two other motions to dismiss. In its first motion, Respondent contended for multiple reasons that the Commission lacks subject matter jurisdiction over Complainants' claims. In its second motion, Respondent targeted Complainant Smith and argued that the Commission lacked subject matter jurisdiction over his claims for additional reasons. The Commission, after exhaustively considering the arguments raised, denied Respondent's motions to dismiss. Smith et al. v. Wilmette Real Estate & Management Co., CCHR Nos. 95-H-159 & 98-H-44/63 (April 13, 1999)("Smith I"); Smith et al. v. Wilmette Real Estate & Management Co., CCHR Nos. 95-H-159 & 98-H-44/63 (September 9, 1999)("Smith II").

This matter is fully briefed[2] and the parties have submitted several exhibits in support of their respective positions. Respondent once again contends that the Commission lacks subject matter jurisdiction to hear Complainants' claims. In addition, Respondent contends, in reliance on the

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[1] On June 11, 1998, the Commission entered an Order that "consolidated for all purposes" the cases of Complainants Smith, Torres, and Walker. On that same date, the Commission determined that there is substantial evidence to support Complainants' claims that Respondent discriminated against them based on their source of income. After the conciliation process did not garner a settlement, the cases were assigned to Hearing Officer Jeffrey I. Cummings with whom it has been pending through now the third motion to dismiss.

[2] The term "fully briefed" is an understatement. Respondent's opening brief and reply brief alone contain 68 pages of argument plus exhibits.

exhibits attached to its briefs, that it simply did not discriminate against Complainants based on their source of income. As explained below, Respondent's third attempt to obtain dismissal fares no better than its first two attempts and its motion is denied.

I. THE COMPLAINANTS' FACTUAL ALLEGATIONS

When ruling on a motion to dismiss, the Commission must take all of the complaints' allegations, together with reasonable inferences drawn from them, as true. E.g., Smith I, at 2; Leadership Council for Metropolitan Open Communities v. Carstea & Berzava, CCHR No. 98-H-76, at 2 (August 19, 1998) (and cases cited within). Furthermore, a complaint should not be dismissed unless it appears beyond doubt that the complainant can prove no set of facts in support of his or her claim that would entitle him to relief. Smith I, at 3; Leadership Council, at 2. Complainants' factual allegations are as follows:

Complainant Wesley Smith is a disabled veteran who receives Social Security benefits, Veterans' Assistance benefits, and a Section 8 voucher. Smith Complaint, ¶1. In late November 1995, Mr. Smith went to Respondent's rental office and completed an Introduction Form that required him to disclose personal information including his source of income. Id., ¶2. Respondent's representative told Mr. Smith that Respondent was not accepting Section 8 applicants at that time and that he should come back in a few weeks. Id. In December 1995, Mr. Smith returned to Respondent's rental office and again tried to rent an apartment. Id., ¶3. Respondent's representative asked Mr. Smith how he was going to pay his rent and he responded by indicating that he had a Section 8 voucher. Id., ¶4. "Connie" (one of Respondent's agents):

then responded by stating they did not want anymore Section 8 tenants. She claimed they were not good tenants and she was going to try and get rid of the ones she had.

Id., ¶5. Mr. Smith left the building after hearing that his application had been rejected. Id.

Complainant David Torres has a Section 8 voucher. Torres Complaint, ¶1. In March 1998, Mr. Torres saw an apartment advertised in the newspaper and he called to make an appointment to view the apartment. Id., ¶3. One of Respondent's agents showed Mr. Torres two apartments and he decided to rent one of them. Id., ¶4. Respondent's agent then gave Mr. Torres an application. Id., ¶5. As he was completing the application, Mr. Torres mentioned to Respondent's agent that his rent would be paid by Section 8. Id. Respondent's agent then brought "Connie" (one of Respondent's agents) over to where Mr. Torres was sitting. Id. Connie informed Mr. Torres that Respondent did not accept Section 8 vouchers. Id.

Complainant Kia Walker relies on Section 8 as a source of her income. Walker Complaint, ¶1. In January 1998, Ms. Walker was looking for an apartment when she noticed a sign on a building indicating that a two-bedroom apartment was for rent. Id., ¶3. Ms. Walker went inside the building and saw a Wilmette Real Estate sign. Id., ¶4. She then spoke with the on-site property manager who indicated that there were apartments for rent. Id., ¶¶4-5. The manager was going to show Ms. Walker a vacant unit when she mentioned that she was a Section 8 recipient. Id., ¶5. The manager stated, "We don't take Section 8 here," and he refused to show Ms. Walker the apartment. Id., ¶6. At Ms. Walker's request, Respondent's property manager prepared a written statement reiterating Respondent's position. Walker Complaint (attached exhibit).

II. RESPONDENT'S ARGUMENTS FOR DISMISSAL

Respondent moves to dismiss Complainants' Complaints for two reasons. First, Respondent asserts that the Chicago Fair Housing Ordinance, for various reasons, cannot be construed to require landlords to participate in the Section 8 program. Second, Respondent contends that it did not lease to Complainants because of its difficulty with the Section 8 program and not because of Complainants' "source of income." As shown below, Respondent's arguments are without merit.

III. ANALYSIS

A. The Fair Housing Ordinance Requires Landlords To Accept Otherwise Qualified Section 8 Recipients As Tenants

Respondent contends, based on its interpretation of the Fair Housing Ordinance, that the Commission lacks subject matter jurisdiction over the claims alleged in the Complainants' Complaints. In making this argument, Respondent recognizes and explicitly disagrees with the Commission's prior decisions that "read the prohibition against 'source of income' discrimination to cover the Section 8 program" and that require landlords renting qualifying[3] property "to arrange with the federal government to accept Section 8 when requested (unless the applicant is not acceptable for a non-discriminatory reason)." See Smith I, at 5-12; Smith v. Goodchild, CCHR No.

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[3] Section 8 housing assistance typically may be used only for units that rent for no more than 110 percent above the "fair market rental." Commission on Human Rights and Opportunities v. Sullivan Associates, 250 Conn. 763, 739 A.2d 238, 244 n.17 (1999) (citing to 42 U.S.C. §1437f(c)(1); 24 C.F.R. §882.106). Fair market rentals are calculated using several criteria, but generally are based on the forty-fifth percentile rent of standard quality rental housing in a particular metropolitan area. Sullivan Associates, 739 A.2d at 244 n. 17 (citing to 24 C.F.R. §888.113).

98-H-177, at 2 (April 13, 1999);[4] Brief, at 5. Non-discriminatory reasons for not accepting a prospective tenant who relies on Section 8 funding include "a poor rental history, poor references, or poor credit," as well as a history of "[d]rug-related criminal activity or other criminal activity that is a threat to the health, safety or property of others." Sullivan Associates, 739 A.2d at 247; 24 C.F.R. §982.307(a)(3).

In its brief, Respondent contends "that the Commission's construction of the Ordinance is an unconstitutional usurpation of the legislative function and is an attempt to improperly legislate what the Commission deems to be a socially desirable end." Respondent's Brief In Support of Its Motion To Dismiss ("Brief"), at 7. In particular, Respondent contends that the Fair Housing Ordinance cannot (or at least should not) be construed to require landlords to participate in the Section 8 program because (1) the City of Chicago, when it passed the Fair Housing Ordinance, "never intended to mandate landlord participation in Section 8" (Brief, at 7); (2) "the radical differences between Section 8's terms and well established landlord-tenant law require a construction of the Fair Housing Ordinance that allows landlord abstention from the program" (Id.); and (3) the Commission "lacks the authority to effect radical changes to well established landlord-tenant law" by construing the Ordinance to require landlords to participate in the Section 8 program (Id.). For the reasons explained below, the Commission rejects Respondent's contentions.

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[4] The Commission's decision in Goodchild explicitly adopts the reasoning of Smith I (which was issued on the same day) with respect to "whether 'source of income' does and may include Section 8." Goodchild, at 3 & 6. As a consequence, the Goodchild decision contains no independent substantive discussion of this particular issue.

1. Construing The Fair Housing Ordinance To Prohibit Discrimination Against Otherwise Qualified Section 8 Recipients Is Fully Consistent With The Intent Of The Ordinance

The parties dispute whether the City intended for the Fair Housing Ordinance's prohibition against "source of income" discrimination to effectively require landlords to participate in the Section 8 program.[5] In particular, Respondent contends that the Ordinance should be construed to provide a defense to a landlord charged with "source of income" discrimination against a Section 8 recipient if the landlord can show that it declined to rent to the prospective tenant based on its distaste for the required terms of the Section 8 program. Complainants, on the other hand, argue that such a defense would eviscerate the protection that the Ordinance offers to Section 8 recipients.

The Ordinance does not explicitly address this issue. It is therefore appropriate to turn to principles of statutory construction. See Crawford v. City of Chicago, 304 Ill.App.3d 818, 710 N.E.2d 91, 96 (1st Dist. 1999) ("The rules which govern the construction of statutes are also applied in the construction of municipal ordinances"). The parties agree that "[t]he cardinal rule of statutory construction is to ascertain and give effect to the true intent of the legislature." People v. Latona, 184 Ill.2d 260, 703 N.E.2d 901, 906 (1998); see Ragan v. Columbia Mutual Insurance Co., 183 Ill.2d 342, 701 N.E.2d 493, 497 (1998) (courts must "give effect to the intention of the legislature" when construing statutes); Bonaguro v. County Officers Electoral Board, 158 Ill.2d 391, 634 N.E.2d 712, 714 (1994) ("a court should ascertain and give effect to the intent of the legislature"); Complainants' Consolidated Response to Respondent's Motion To Dismiss ("Response"), at 7; Respondent's Reply Brief in support of its Motion to Dismiss ("Reply"), at 28-29.

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[5] In its first motion to dismiss, Respondent argued that Section 8 funding was not a "source of income" within the meaning of the Ordinance. The Commission rejected this argument. Smith I, at 5-12.

Furthermore,

> [t]he most reliable indicator of legislative intent is the language of the statute itself. In determining legislative intent, a court may consider the reason and necessity for the statute, the evils to remedied, and the objectives to be attained. In ascertaining the legislature's intent, th[e] court has a duty to avoid a construction of the statute that would defeat the statute's purpose or yield an absurd or unjust result.

Latona, 703 N.E.2d at 906 (citations omitted); see Ragan, 701 N.E.2d at 497. The starting point for construing the Ordinance is to consider the language of the Ordinance. See, e.g., Ragan, 701 N.E.2d at 497; Smith I, at 5; Tizes v. North State Astor Lake Shore Drive Association et al., CCHR No. 95-H-17, at 3 (August 30, 1995).

The City of Chicago made clear the policy underlying the Fair Housing Ordinance in the Ordinance's first section:

> It is hereby declared the policy of the City of Chicago to assure full and equal opportunity to all residents of the city to obtain fair and adequate housing for themselves and their families in the city of Chicago without discrimination against them because of their race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military discharge status or source of income.

Chicago Municipal Code §5-08-010; see Smith I, at 5-6. The Ordinance, as a remedial statute, is to be liberally construed to effectuate the City's declared policy. See, e.g., S.N. Nielsen Co. v. Public Building Commission of Chicago, 81 Ill.2d 290, 410 N.E.2d 40, 44 (1980) ("remedial legislation should be construed liberally to effectuate its purposes"); Smith I, at 4-5 (and cases cited within). Consequently, whether the Ordinance should be construed to allow the type of defense urged by Respondent depends on whether doing so would effectuate the policy underlying the Ordinance.

As stated above, Respondent's proposed defense would allow a landlord to opt out of participating in the Section 8 program as a matter of law if the landlord did not like the program's

regulations. A Section 8 recipient cannot use Section 8 funding as a "source of income" unless he/she does so in compliance with the regulations governing the Section 8 program. The Section 8 program's regulations require, among other things, that landlords which participate in the program use a lease that conforms with the program's requirements. See 42 C.F.R. §982.308. Because Section 8 funding is inextricably linked with the regulations of the Section 8 program, a landlord's simple rejection of the Section 8 program will inevitably result in its rejection as tenants of any persons who rely on Section 8 funding as a "source of income." In Respondent's view, however, this fact is of no consequence because:

> refusing to contract on Section 8's terms constitutes nothing more than discrimination against a noninvidious characteristic which, admittedly, is unquestionably correlated with Complainants' source of income. Such discrimination against a noninvidious characteristic simply does not give rise to the requisite discriminatory intent.

Reply, at 32 (citing to Village of Bellwood v. Dwivedi, 895 F.2d 1521 (7th Cir. 1990)).

The Commission rejects this reasoning and agrees with Complainants that the creation of such an open-ended defense would be inconsistent with, and would in fact frustrate, the purpose of the Ordinance. Any landlord with biased views toward Section 8 recipients could avoid renting to them merely by professing an objection to a term of the Section 8 program. Two courts have expressly declined to recognize the type of defense that Respondent attempts to rely on here. Sullivan Associates, 739 A.2d at 248; Glover v. Crestwood Lake Section 1 Holding Corps., 746 F. Supp. 301, 308-09 (S.D.N.Y. 1990).

In Sullivan Associates, the Connecticut Supreme Court rejected the argument that landlords could justify not accepting Section 8 recipients as tenants on account of their objection to the terms of a Section 8 lease:

> The legislative history of [the statute] demonstrates that the legislature intended to prohibit landlords from denying rental opportunities to people whose source of income included federal or state housing assistance. Interpreting [the statute] as the trial court has, to allow an exception to its anti-discrimination provisions for those landlords who refuse to use the required section 8 lease, would eviscerate the basic protection envisioned by the statute. It would lead to the unreasonable result that while the legislature mandated that landlords may not reject tenants because their income included section 8 assistance, the legislature at the same time also intended that landlords might avoid the statutory mandate by refusing to accede to a condition essential to its fulfillment. Such a result is untenable.

Sullivan Associates, 739 A.2d at 248.

In Glover, as here, "defendants stated that their refusal to accept Section 8 voucher applicants stemmed from their reluctance to depart from their standard lease agreement." Glover, 746 F. Supp. at 308. The Glover court found defendants' contention to be unavailing and held that their

> refusal to accept certain provisions of the HUD-mandated Section 8 voucher lease cannot be interpreted as anything but a refusal to rent an apartment to a Section 8 voucher holder as a result of that applicant's status as a Section 8 voucher holder.

Glover, 746 F. Supp. at 309.

The holdings in Sullivan Associates and Glover are consistent with the general admonition that entities "cannot be permitted to use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination." McWright v. Alexander, 982 F.2d 222, 228 (7th Cir. 1992) (noting that "discrimination 'because of' handicap is frequently directed at an effect or manifestation of a handicap rather than being literally aimed at the handicap itself"); Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161, 1163 (7th Cir. 1992) ("an employer cannot be permitted to use a proxy for age, such as having gray hair, to evade the prohibition of intentional discrimination"); Sullivan v. Vallejo City Unified School District, 731 F. Supp. 947, 960 (E.D.Cal. 1990) (school's exclusion of a disabled student's service dog is discrimination "because of" a

handicap in violation of the Rehabilitation Act, 29 U.S.C. §794).[6]

The Commission finds the above line of authority, in particular the Connecticut Supreme Court's analysis in Sullivan Associates,[7] to be sufficiently persuasive to warrant denial of Respondent's motion to dismiss. The City of Chicago passed the Ordinance to ensure that "all" of its residents would have an equal opportunity to obtain housing without being victimized by discrimination. Adopting Respondent's position that its professed difficulties with the Section 8 program is sufficient as a matter of law would defeat this purpose. See, e.g., Sullivan Associates, 739 A.2d at 783-84. As a practical matter, the Ordinance's prohibition of "source of income" discrimination against Section 8 recipients would be severely undermined if not negated altogether if the Ordinance were construed to permit Respondent's proposed defense.

Respondent does not claim that the creation of its proposed defense would effectuate the purpose of the Ordinance. Rather, it contends that the Ordinance cannot be construed to achieve an

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[6] Respondent's reliance on Village of Bellwood v. Dwivedi is misplaced. In that case, the court pointed out that the alleged discriminatory action (i.e., steering prospective African-American home purchasers toward integrated communities) could have resulted from a "noninvidious reason," namely, the preference of the African-American consumers themselves. Dwivedi, 895 F.2d at 1530-31. By contrast, the alleged discrimination here had nothing to do with the preferences of Complainants.

[7] Respondent, which at one point described Sullivan Associates as "an action strikingly similar" to this case (Brief, at 26), attempts at another point to distinguish the decision by pointing out that there was (unlike here) legislative history to support the conclusion that the legislature intended to prohibit discrimination against persons whose source of income included Section 8 funding. Reply, at 30 n.68. This distinction is of no moment. The Commission relied on the plain meaning of the text of the Ordinance to conclude that Section 8 funding was an intended "source of income" within the meaning of the Ordinance. Smith I, at 5-7. It is a statute's text which provides the "most reliable indicator of legislative intent." Latona, 703 N.E.2d at 906. Consequently, where (as here) the legislative intent can be derived from the statute's text, resort to legislative history is unnecessary. See Continental Can Co., Inc. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union, 916 F.2d 1154, 1157 (7th Cir. 1990) ("The text of the *statute*, and not the private intent of the legislature, is the law").

"absurd" result and that treating a landlord's refusal to rent to a Section 8 recipient because of the strictures of the Section 8 program as "necessarily an objection to the status of Complainants as Section 8 recipients" would be absurd for two reasons. Brief, at 30-31.

First, Respondent asserts that construing the Ordinance in such a fashion would improperly grant one party to the contract (i.e., the tenant) "'totally unrestricted carte blanche.'" Brief, at 30, quoting Peyton v. Reynolds Associates, 955 F.2d 247, 253 (4th Cir. 1992). Respondent's reliance on Peyton, however, is misplaced. In that case, plaintiffs were tenants who had been renting from the defendant landlord under a different rent-relief program. The landlord decided to convert its participation from the original rent program to the Section 8 voucher program. The local agency administering Section 8 then required the landlord to enter into new one-year leases; the landlord, however, agreed to continue renting to the tenants only through their then-current lease period (less than a year). The tenants claimed that that refusal was discrimination based on their status as voucher holders. Peyton, 955 F.2d at 248-50. The Peyton court held that the objection to the duration of the leases was a legitimate, non-discriminatory reason not to lease to plaintiffs "[s]ince neither the statutes, the regulations, nor HUD's (the Department of Housing and Urban Development) form contract mandates that the owner enter a housing voucher contract and leases for one-year terms." Id. at 251. Because the objectionable term was not mandated by the Section 8 program, the landlord's adverse action in reliance on it was not held to be discriminatory. Id. at 251-52.[8]

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[8] In light of its conclusion regarding this issue, the court did not assess the validity of the landlord's objection to another proposed contract term that was required by the Section 8 program. Peyton, 955 F.2d at 253.

The Peyton court found that "[t]he objection to a unilateral extension of the lease terms beyond the terms in the existing leases had no connection to the Tenants' status as voucher holders; it could have been expected in the case of any tenants, voucher holders or not." Id. at 254; see also Lopez v. Arias, CCHR No. 99-H-12, at 19-20 (September 20, 2000) (finding no "source of income" discrimination where there was "no evidence that Respondent refused to consider [tenant] for or imposed upon her any 'price, terms, conditions or privileges of any kind' that he would have considered her for or would not have imposed on her had she not had a Section 8 voucher.") Consequently, because the refusal to extend the plaintiffs' leases beyond their termination dates did not run afoul of any legitimate terms of the Section 8 program, the landlord's actions were non-discriminatory and not a proxy for anti-voucher-holder sentiments. In sum: Peyton involves a much different situation from the facts alleged by Complainants in these cases.

Respondent's second argument is similarly without merit. It asserts that "[i]f Section 8's regulations are to be forced on landlords, then the Chicago City Council must do so explicitly," Brief, at 31 & 26 (citing to Commission on Human Rights v. Sullivan Associates, 1998 WL 395196 (Conn.Super.Ct. 1998)). The Connecticut Supreme Court, however, reversed that Sullivan Associates trial court decision on the precise ground for which Respondent cites it. The Supreme Court held that the legislature could "require landlords to use section 8 leases" notwithstanding the fact that the statute in question did not contain an explicit mandate to this effect. Sullivan Associates, 739 A.2d at 247, 251. The Commission agrees with the rationale of the Sullivan court and holds that the City Council can require landlords with qualifying properties to use Section 8 leases when renting to Section 8 recipients notwithstanding the fact that the Ordinance does not explicitly mandate the landlords to do so.

2. The City of Chicago Has Home Rule Authority To Prohibit Landlords From Rejecting Otherwise Qualified Section 8 Recipients As Tenants

Respondent next argues that "the Fair Housing Ordinance must be construed in harmony with existing common and statutory law" and that "[s]uch construction requires that landlords not be compelled to participate in the Section 8 program." Brief, at 27 (emphasis added). This is so, according to Respondent, because many of the terms of the Section 8 program "differ radically from state and municipal laws regulating the landlord-tenant relationship." Brief, at 6-7. Respondent goes on at considerable length to outline the ways in which the terms of the Section 8 program (in its view) "radically differ" from the dictates of the Illinois Forcible Entry and Detainer Act, 735 ILCS 5/9-101 et seq., the City of Chicago's Residential Landlord and Tenant Ordinance, Chicago Municipal Code §5-12-010 et seq., and the common law. Brief, at 8-26; Reply, at 1-21. Complainants respond (again at length) by asserting that the terms of the Section 8 program "impose[] no undue hardship upon landlords and do[] not (in any meaningful way) change existing law." Response, at 9, 10-18.

Respondent's argument raises a preliminary question. Namely, whether the City of Chicago would have the legal authority to mandate by ordinance that landlords lease to tenants under the terms required by the Section 8 program even if those terms were more disadvantageous than those otherwise required by statutory and common law. If the City could lawfully pass such an ordinance, then the parties' dispute regarding the degree to which the terms of Section 8 diverge from statutory and common law need not be resolved to decide this motion. For the reasons stated below, the Commission finds that the City would have the authority to pass such an ordinance.

The City of Chicago is a home rule unit of local government under the 1970 Illinois Constitution. See, e.g., City of Chicago v. Roman, 184 Ill.2d 504, 705 N.E.2d 81, 86 (1998); Reed v. Burns, 238 Ill.App.3d 148, 606 N.E.2d 152, 155 (1st Dist. 1992) (citing to Ill.Const.1970, art. VII, §6(a)). Under §6(i) of the Constitution:

> Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State exercise to be exclusive.

Ill.Const.1970, art. VII, §6(i). Moreover, "[p]owers and functions of home rule units shall be construed liberally." Ill.Const.1970, art. VII, §6(m).

Pursuant to this constitutional authority, home rule units are given "broad powers to legislate" regarding matters "pertaining to their government and affairs, including regulation for the protection of the public health, safety, morals and welfare." Page v. City of Chicago, 299 Ill.App.3d 450, 701 N.E.2d 218, 225 (1st Dist. 1998) (concerning the Chicago Human Rights Ordinance). To this end, "[t]he Illinois Supreme Court has repeatedly held that an ordinance which is within a municipality's home-rule powers supersedes . . . a conflicting statute passed before the 1970 Constitution took effect." Reed, 606 N.E.2d at 154 (and cases cited within). This is true even where the state statute is "less stringent" than the municipality's ordinance. Kalodimos v. Village of Morton Grove, 103 Ill.2d 483, 470 N.E.2d 266, 275 (1984); Roman, 705 N.E.2d at 86-90; People v. Jaudon, 307 Ill.App.3d 427, 718 N.E.2d 647, 661 (1st Dist. 1999) (citing cases); Page, 701 N.E.2d at 225 *passim* (upholding the City of Chicago's power to regulate employees with fewer than 15 employees despite the equivalent state law's restriction to employers with 15 or more employees).

The City's home rule authority encompasses the power to mandate that landlords accept the terms of Section 8 so long as (1) the exercise of that power pertains to the City's government and affairs and (2) the state legislature has not preempted the exercise of the power. See, e.g., Village of Bolingbrook v. Citizens Utilities Co. of Illinois, 158 Ill.2d 133, 632 N.E.2d 1000, 1001-02 (1994); Page, 701 N.E.2d at 225. Illinois courts have held that the regulation of housing discrimination is a proper exercise of police power (Chicago Real Estate Board v. City of Chicago, 36 Ill.2d 530, 224 N.E.2d 793, 801 (1967)), and that "allowing a home rule unit to control its unique problems regarding the relationship between landlord and tenant is consistent with the role of home rule." City of Evanston v. Create, Inc., 85 Ill.2d 101, 421 N.E.2d 196, 201 (1981); see Reed, 606 N.E.2d at 155. Furthermore, the state legislature has not preempted the City from exercising its home rule power with respect to landlord-tenant relations in the manner specified by the Illinois Constitution. See Page, 701 N.E.2d at 225 (explaining methods of preemption under the Ill.Const.1970, art. VII, §§6(g), 6(h)); Goodchild, at 4.

Thus, the City has the home rule authority to pass an ordinance that prohibits source of income discrimination by requiring landlords to lease to otherwise qualified Section 8 recipients even if the terms of the Section 8 program differ from those that the landlords might otherwise prefer or from those set forth in other laws. Given this, Respondent's objection that the Fair Housing Ordinance – by requiring participation in the Section 8 program – imposes more specific limitations on landlords than are otherwise required by statutory and common law is unavailing.

In any case, neither the statutes (i.e., the Forcible Entry and Detainer Act and the Residential Landlord Tenant Ordinance) nor the common law cited by Respondent requires that the Ordinance be construed in the restrictive manner urged by Respondent. The Forcible Entry and Detainer Act

does not address housing discrimination; rather, it has the "distinctive and limited purpose . . . [of] supply[ing] a speedy remedy to permit persons entitled to possession of lands to be restored thereto." Rosewood v. Corp. v. Fisher, 46 Ill.2d 249, 263 N.E.2d 833, 835 (1970), cert. denied, 401 U.S. 928 (1971). Moreover, it is well-settled that home rule units have the authority to pass ordinances that regulate the limited subject matter of the Act. See, e.g., Reed, 606 N.E.2d at 155 (finding that §5-12-150 of Chicago's Residential Landlord and Tenant Ordinance "supercedes" a conflicting provision of the Forcible Entry and Detainer Act); Landry v. Smith, 66 Ill.App.3d 616, 384 N.E.2d 430, 431 (1st Dist. 1978) (holding that the Act "does not limit or deny the right of a home rule unit to enact legislation concerning the eviction process"); see also City of Evanston v. O'Leary, 244 Ill.App.3d 190, 614 N.E.2d 114, 117, 118 (1st Dist. 1993) (noting that Evanston's ordinance "provides more specific limitations on landlords than those provided" by the Act).

Similarly, the City of Chicago's Residential Landlord and Tenant Ordinance does not purport to restrict the interpretation of the Fair Housing Ordinance. To the contrary, the Residential Landlord and Tenant Ordinance indicates that its terms will not apply to the extent that they conflict with the terms of the regulations applicable to federal housing programs:

> This chapter applies specifically to rental agreements for dwelling units operated under subsidy programs of agencies of the United States and/or the state of Illinois, including specifically programs operated or subsidized by the Chicago Housing Authority and/or the Illinois Housing Development Authority to the extent that this chapter is not in direct conflict with statutory or regulatory provisions governing such programs.

Chicago Municipal Code §5-12-010 (emphasis added). Thus, the inter-ordinance "conflict" that Respondent envisions if the Fair Housing Ordinance is construed to require Section 8 participation will never arise because the terms of the Residential Landlord Tenant Ordinance yield to those of the Section 8 program.

Nor does the common law mandate a restrictive interpretation of the Ordinance. As a general matter, the state legislature "has the inherent power to repeal or change the common law, or do away with all or part of it." People v. Gersch, 135 Ill.2d 384, 553 N.E.2d 281, 286 (1990). The City of Chicago, as a home rule unit, has the same power to legislate for the protection of the health, safety, and welfare of its residents "as the sovereign except where such powers are limited by the General Assembly." Triple A Services, Inc. v. Rice, 131 Ill.2d 217, 545 N.E.2d 706, 711 (1989); City of Urbana v. Houser, 67 Ill.2d 268, 367 N.E.2d 692, 694 (1977). Thus, because the state legislature has not limited the City's power in any pertinent respect (*supra*, at 15-17), the City was at liberty to pass the Ordinance even though it conflicts with the common law. Moreover, for the reasons stated above (*supra*, at Part III(A)(1)), a change in the common law is "warrant[ed], or . . . necessarily implied from what is expressed" by the terms and stated purpose of the Ordinance. West v. West, 294 Ill.App.3d 356, 689 N.E.2d 1215, 1220 (5th Dist. 1998).

In addition to referencing the above statutes and common law, Respondent makes the assertion that "a statute should not be construed to effect a change in the settled law of the state unless its terms clearly require such construction." Brief, at 24 (citing cases); Reply, at 22-23 (citing cases). The cases that Respondent cites in support of this proposition, however, apply it under different circumstances. In the cited cases, the courts had either consistently interpreted a statute or applied the common law regarding a particular subject and the issue was how a newly passed (or amended) statute regarding that same subject should be interpreted. The courts presumed that the legislature was aware of the interpretative case law and therefore required a clear indication in the

new statute before they would interpret the statute as deviating from precedent.[9] In this case, by contrast, there is no long-standing precedent interpreting "source of income" discrimination that predates the passage of the 1988 amendment to the Fair Housing Ordinance. Consequently, the Commission's construction of the Fair Housing Ordinance does not change any settled law of the state regarding "source of income discrimination."[10]

3. The Commission Has The Authority To Construe The Ordinance As Prohibiting Landlords From Rejecting Otherwise Qualified Section 8 Recipients As Tenants

Respondent contends that the Commission lacks the authority to construe the Fair Housing Ordinance in a manner that is inconsistent with well-settled landlord-tenant law, and that in doing so it is impermissibly legislating. Brief, at 27-28; Reply, at 34. Respondent's argument is without merit. The Commission is charged with the duty of enforcing the Fair Housing Ordinance. See Chicago Municipal Code §2-120-510. The power to enforce the Ordinance necessarily includes the power to construe it. See, e.g., Solar v. City Colleges of Chicago & Truman College, CCHR No. 95-PA-16 (September 25, 1998) (construing the Chicago Human Rights Ordinance); see also Gersch v. Illinois Department of Professional Regulation, 308 Ill.App.3d 649, 720 N.E.2d 672, 680 (1st

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[9] See In re: May 1991 Will County Grand Jury, 152 Ill.2d 381, 604 N.E.2d 929, 932-33 (1992); In re: Contest of the Election for the Offices of Governor and Lieutenant Governor, 93 Ill.2d 463, 444 N.E.2d 170, 179 (1983); People v. Bernette, 30 Ill.2d 359, 197 N.E.2d 436, 445 (1964); Sternberg Dredging Co. v. Estate of Sternberg, 10 Ill.2d 328, 333-34, 140 N.E.2d 125 (1957).

[10] Even if it did, the Commission finds that the purpose of the Ordinance (namely, assuring that all Chicago residents have a full and equal opportunity to obtain housing without experiencing discrimination) clearly requires the interpretation of the Ordinance that the Commission has adopted. *Supra*, Part III(A)(1).

Dist. 1999) ("Express legislative grants of powers or duties to administrative agencies include the power to do all that is reasonably necessary to execute these powers or duties"); Page, 701 N.E.2d at 227-28 (deferring to the Commission's interpretation of the Ordinance with respect to the question of whether punitive damages may be awarded); Tizes v. North State Astor Lake Shore Drive Assoc., et al., CCHR No. 95-H-17, at 3 (August 30, 1995).

The Commission is not required to read the Fair Housing Ordinance "as coterminous with any other law." Solar, at 7 (same, with respect to the Human Rights Ordinance). Rather, the Commission is required to read the Ordinance in a "liberal fashion" consistent with principles of statutory construction. Id; Tizes, at 3. By construing the Ordinance in this fashion (*supra*, Part III(A)(1)), the Commission has fulfilled its mandate and it has not acted outside of its jurisdiction as Respondent wrongly contends.

B. Respondent Cannot Obtain Dismissal By Relying On Exhibits Attached To Its Briefs To Contradict The Substantive Allegations Of The Complaints

In support of its second argument for dismissal, Respondent cites to the exhibits it attaches to its briefs. In these exhibits, Respondent sets forth its "long history of problems with Section 8's regulations and administration." Brief, at 4 (citing Exhibit A). Among other things, Respondent claims that the Section 8 administrators have been slow to pay (if they have paid at all) and that their slow pace in doing inspections of rental units has kept the units off the market for an inordinate length of time. Id. These problems led Respondent to become so "[d]isgusted with Sections 8's administration" that it ceased altering its standard rental policies to accommodate Section 8. Id.

Complainants, who sought rental housing after the time of those problems, were denied the opportunity to rent because of Respondent's

> unwillingness [to] deal with Section 8's administrative morass and on its unwillingness to accept Section 8's onerous and economically disadvantageous regulations.

Brief, at 4. Complainants, according to Respondent, have failed to state a claim because the above reason does not concern their "source of income." Brief, at 4.

Respondent claims that the facts asserted in its exhibits may be considered because they are "uncontested," see Brief, at 1 (citing to Harris v. Chicago Board of Education, CCHR No. 98-E-95 (December 22, 1998)); Reply, at 31, and that these facts entitle it to dismissal. Respondent's argument, which raises the legal question of whether taking adverse action toward a person based upon a reluctance to deal with the entity that provides that person's income could constitute a valid defense to a "source of income" discrimination claim, is for the most part directed toward providing an alternative explanation for Respondent's failure to rent to Complainants (namely, that the Section 8 program is too burdensome).[11] This argument does not warrant dismissal of the Complaints for three reasons.

First, even if the above argument were procedurally appropriate (and it is not, *infra*, at 24-25), it is directed to the merits and not to the validity of the Complaints. The evidence offered by Respondent, at best, raises an issue of fact as to whether it had a legitimate, non-discriminatory reason for taking adverse action toward Complainants. While Respondent would have the burden

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[11] Respondent's argument on this score also challenges whether the City of Chicago has the authority to prohibit landlords from rejecting otherwise qualified Section 8 recipients as tenants (discussed in Part III(A)(2) above).

of producing credible evidence as to this issue once Complainants have raised an inference of discrimination by establishing their prima facie cases, see, e.g., Sanders v. Onnezi, CCHR No. 93-H-32, at 9 (March 16, 1994); Castro v. Georgeopoulos, CCHR No. 91-FHO-6-5591, at 9 (December 18, 1991),[12] such evidence does not establish that the Complaints fail to state a claim upon which relief can be granted. Therefore, dismissal based upon such evidence is inappropriate.

Second, even if Respondent's evidence went to the sufficiency of the Complaints (and not to the merits), the legitimacy of Respondent's reasons for not renting to Complainants raises issues of fact that cannot be resolved on a motion to dismiss. The Commission recognizes that the specific requirements of the Section 8 program could create such a burden on a landlord that the onerous nature of the program requirements would constitute a legitimate, non-discriminatory reason for not renting to a Section 8 recipient. For example, the nature of the Section 8 program requirements might provide a landlord of modest means with a legitimate, nondiscriminatory reason for not renting to Section 8 recipients if the landlord presented credible evidence that the requirements caused a delay in receipt of rental payments which prevented the landlord from paying its mortgage in a timely fashion and resulted in the imposition of penalties that the landlord could not afford to pay. Cf. Attorney General v. Brown, 400 Mass. 826, 511 N.E.2d 1103, 1109 (Mass. 1987). In Brown, the Massachusetts Supreme Judicial Court held that evidence that a landlord might lose a

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[12] Respondent's burden as to this issue is one of "production" and not one of "proof." See, e.g., Sanders, at 9 ("After Complainant presented her *prima facie* case, the Respondents had the burden of producing evidence that unlawful discrimination was not the cause of Complainant failing to view the Apartment. Respondents were not required to persuade the factfinder that it was motivated by the reasons given at the trial as long as the evidence raised a genuine issue of fact"). If Respondent meets its burden of production, Complainants can carry their ultimate burden of proof by showing that the reasons offered are pretextual. Id., at 10; Castro, at 9-10; see also Collier v. Budd, 66 F.3d 886, 892 (7th Cir. 1995)(describing methods of showing pretext).

"substantial economic benefit" (i.e., "the cash flow engendered from his collecting, in advance, the last month's rent and a security deposit equal to one month's rent") if forced to comply with the requirements of the Section 8 program was sufficient to raise a genuine issue of material fact to preclude a grant of summary judgment in plaintiff's favor on its claim that the landlord discriminated against prospective tenants "solely" because of their status as Section 8 certificate holders. Id.; see also Lopez, at 17 (discussing Brown).

The circumstances under which the burden created by the Section 8 program requirements will rise to the level sufficient to excuse a landlord's participation are limited. "[C]redible evidence" – and not mere generalizations or suppositions – is required to meet the landlord's burden of production. See, e.g., Castro, at 9. Morever, simply presenting evidence that the program requirements create some added burden will not suffice. Implicit in the Commission's decision in Smith I "is a consideration that entering into a contract with CHAC, [Inc. (the private subcontractor that administers the Section 8 program)] and receiving all or part of the rent from CHAC instead of the tenant is a *de minimis* formality necessary to facilitate use of the voucher," and not the type of burden sufficient to excuse a landlord's participation in the program. Lopez, at 16. Similarly, some of the alleged "burdens" cited by Respondent in its motion (e.g., such as the "burden" created by the program requirement that a landlord provide to the housing agency a copy of any eviction notice served on a Section 8 tenant) are facially insufficient to sustain a landlord's burden of production. Brief, at 18.

Ultimately, the determination as to whether the purported burdens created by the requirements of the Section 8 program rise to the requisite level is a fact-specific one that must be resolved on a case-by-case basis with consideration of the objected-to requirement(s) as well as the

specific circumstances of the objecting landlord. Consequently, this matter cannot be resolved on a motion to dismiss.

Third, and finally, Respondent cannot rely on the facts stated within the exhibits attached to its briefs to refute the substantive allegations of the Complaints.

> [T]he Commission has never decided a "motion to dismiss" which merely presented new facts to demonstrate that the complainant should lose the underlying claim. In fact, the Commission has explicitly denied such motions. E.g., Chow v. Lemen Sun Grocery, et al., CCHR No. 97-E-251 (Nov. 4, 1997). Such motions are more properly considered summary judgment motions which the Commission has not and shall not consider.

Morris v. Chicago Department of Law, et al., CCHR No. 98-E-212, at 3 (March 19, 1999).[13] "The Commission shall not accept motions for summary judgment at any stage of the proceedings." Regulation 210.340, cited in Morris, at 2. Instead, the facts for purposes of this motion (along with all reasonable inferences to be drawn for them) must be drawn from the Complaints. *Supra*, at 3.

When the appropriate standard is applied (and Respondent's exhibits are not considered), it is clear that each of the three Complaints states a claim upon which relief can be granted. The pertinent factual allegations are as follows. Complainant Smith explicitly alleges that Respondent's agent denied him the opportunity to rent an apartment after telling him that persons who relied on Section 8 "were not good tenants" and that Respondent "did not want any more Section 8 tenants." Smith Complaint, ¶5. The Commission can infer from this allegation that Respondent did not lease

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[13] Uncontested facts alleged in exhibits to motions to dismiss may be considered only where motions to dismiss "argue that the Commission does not have authority to proceed with the case or which argue that the complaint is not legally sufficient." Morris, at 2-3 (citing cases); cf. Smith II, at 3-10 (discussing factual allegations and facts contained in documentation submitted in support of Respondent's motion to dismiss to determine whether the parties reached a settlement that barred Complainant Smith's lawsuit).

to Complainant Smith based on its sweeping derogatory generalization regarding Section 8 recipients. This is precisely the type of discrimination that the Fair Housing Ordinance was designed to combat. See Sullivan Associates, 739 A.2d at 247 (finding that the "target" of the anti-discrimination statutes is "the unspoken presumption that section 8 assistance recipients, by virtue only of their source of income, are undesirable tenants for a landlord's rental properties"). Complainant Smith clearly states a claim upon which relief can be granted.

Complainants Walker and Torres allege that they were either in the process of being shown a vacant apartment (Walker) or of completing an application to lease after seeing an apartment (Torres) when Respondent learned that they intended to rely on Section 8 funding and abruptly terminated the process. *Supra*, at 4. While these allegations are less direct than those made by Complainant Smith, the Commission can reasonably infer that Respondent ceased its dealings with Complainants Walker and Torres because it did not want to rent to Section 8 tenants. At a minimum, it cannot be said beyond doubt that Complainants Walker and Torres can prove no facts in support of their claim that would entitle them to relief. Courts have frequently inferred discriminatory intent from an abrupt, adverse change in the parties' course of dealings after the landlord discovers that the tenant (or the tenant's significant other) is a member of a protected class. See, e.g., Littlefield v. McGuffey, 954 F.2d 1337, 1340-42 (7th Cir. 1992); Hamilton v. Svatik, 779 F.2d 383, 386-88 (7th Cir. 1985); Pollitt v. Bramel, 669 F. Supp. 172, 173-76 (S.D.Ohio 1987). For these reasons, dismissal of the Complaints of Torres and Walker is likewise inappropriate.

IV. CONCLUSION

For the reasons set forth above, the Commission DENIES Respondent's motion to dismiss.

PURSUANT TO REGULATION 250.120, A PARTY MAY OBTAIN REVIEW OF THIS ORDER ONLY AFTER THE COMMISSION HAS ISSUED AN ORDER DISMISSING THE COMPLAINT OTHER THAN AFTER AN ADMINISTRATIVE HEARING OR AS PART OF OBJECTIONS TO A HEARING OFFICER'S FIRST RECOMMENDED DECISION AFTER AN ADMINISTRATIVE HEARING.

By: Clarence N. Wood
Chair/Commissioner

for: CHICAGO COMMISSION ON HUMAN RELATIONS

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