City of Chicago
COMMISSION ON HUMAN RELATIONS
740 North Sedgwick - Third Floor
Chicago, Illinois 60610

IN THE MATTER OF:	)	
	)	
WESLEY SMITH, DAVID TORRES, and KIA WALKER,	)	
	)	Case Nos. 95-H-159 &
Complainants,	)	98-H-44/63
	)	
and	)	
	)	
WILMETTE REAL ESTATE & MANAGEMENT CO.,	)	Date of Order: April 13, 1999
	)	
Respondent.	)	

To: Mr. Wesley Smith
c/o Harriet Smith
5518 North Winthrop
Suite 502
Chicago, IL 60640

Joseph Butler, Esq.
J. Damian Ortiz, Esq.
Jennifer LaMell (Law Student)
Jennifer O'Reilly (Law Student)
The John Marshall Law School
Fair Housing Clinic
28 East Jackson Boulevard, #500
Chicago, IL 60604

Alan Didesch, Esq.
Wilmette Real Estate
& Management Co.
107 Green Bay Road
Wilmette, IL 60091

ORDER REGARDING RESPONDENT'S 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

them an opportunity to rent two of its apartments. Specifically, 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. 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.

On November 6, 1998, Respondent filed a motion to dismiss the Complaints of the three Complainants. In its motion, Respondent asserts that Complainants lack standing to sue under the Chicago Fair Housing Ordinance ("Ordinance"), that the Ordinance is preempted by federal law, and that the enforcement of the Ordinance would violate Respondent's rights under the United States Constitution. On December 7, 1998, Complainants Torres and Walker filed a response to Respondent's motion to dismiss.[1] On January 15, 1999, Respondent filed a reply in support of its motion to dismiss. This matter is now ripe for decision. For the reasons stated in this Order, the Commission denies Respondent's motion to dismiss.

I. 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., Leadership Council for Metropolitan Open Communities v. Carstea & Berzava, Case No. 98-H-76, at 2

---

[1] Complainant Smith, who is proceeding *pro se*, did not file a response to Respondent's motion to dismiss. Respondent's arguments for dismissal, for the most part, apply with equal force to all three Complainants. Consequently, the Commission will treat the counter-arguments raised by Complainants Torres and Walker as applying to Complainant Smith as well.

(Aug. 19, 1998)(and cases cited therein). 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 claim that would entitle him to relief. Id. 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 that he had a Section 8 voucher. Id., ¶4. Respondent's representative then told Mr. Smith that Respondent did not want any more Section 8 tenants and that she was going to try to get rid of the Section 8 tenants that Respondent had. Id., ¶5.

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. Respondent's representative showed Mr. Torres two apartments; he decided to rent one of them. Id., ¶4. Respondent's representative then gave Mr. Torres an application. Id., ¶5. As he was completing the application, Mr. Torres mentioned to Respondent's representative that his rent would be paid by Section 8. Id. Respondent's representative then 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 out 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 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 Ms. Walker mentioned that she was a Section 8 recipient. Id., ¶5. The manager then stated that Respondent did not accept Section 8, and he refused to show Ms. Walker any apartments. Id., ¶6.

II. RESPONDENT'S ARGUMENTS FOR DISMISSAL

Respondent moves to dismiss Complainants' Complaints for three reasons. First, Respondent contends that Complainants lack standing to sue under the Fair Housing Ordinance because the basis upon which they alleged discrimination (i.e., their reliance on Section 8 vouchers) does not constitute a "source of income" within the meaning of the Ordinance.[2] Second, Respondent contends that the Ordinance is preempted by the United States Housing Act of 1937, 42 U.S.C. §1437f, to the extent that it mandates that landlords participate in the Section 8 program. Finally, Respondent contends that the enforcement of the Ordinance would violate its rights under the due process and takings clauses of the Fifth and Fourteenth Amendments to the United States Constitution. As shown below, Respondent's arguments are without merit.

---

[2] The Commission will address this argument first because "[i]t is preferable to determine whether the state law applies before reaching a determination that state law has been preempted." Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1132 (9th Cir. 1998).

III. ANALYSIS

A. Section 8 Funding Is A "Source of Income" Within the Meaning of the Fair Housing Ordinance

Pursuant to Section 8 of the United States Housing Act of 1937, 42 U.S.C. §1437f, the federal government provides assistance payments "[f]or the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing." 42 U.S.C. §1437f(a). Complainants are participants in the Section 8 rental voucher program. Under the Section 8 voucher program, tenants pay in rent an amount not exceeding 30% of their adjusted income and the local public housing authority pays to the landlords the remainder of the market rent. 42 U.S.C. §1437f(o). Persons must apply and be deemed eligible by the state or local housing agency to participate in the Section 8 program. See 24 C.F.R. §§982.201-207; see also 24 C.F.R. §982.4(b)(defining "Applicant").

Respondent moves for dismissal on the ground that Complainants' reliance on Section 8 funding does not constitute a "source of income" within the meaning of the Ordinance. In consideration of the language and purpose of the Ordinance and prior rulings of the Commission, the Commission finds that Respondent's argument is without merit.

1. The Language and Purpose of the Ordinance Support the Conclusion That Section 8 Funding Is a Protected Source of Income

In construing the Chicago Fair Housing Ordinance, the Commission must look first to its language, giving words their popular, ordinary and plain meaning unless otherwise defined. Tizes v. North State Astor Lake Shore Drive Association et al., CCHR No. 95-H-17, at 3 (Aug. 30, 1995). Furthermore, as a remedial statute, the Ordinance is to be liberally construed in light of

the City of Chicago's stated policy of "assur[ing] 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." Chicago Municipal Code §5-08-010; McClinton v. Antioch Haven Homes/Haynes, CCHR No. 91-FHO-42-5627, at 18 (Feb. 26, 1992); see People v. Chicago Title and Trust Co., 75 Ill.2d 479, 389 N.E.2d 540, 546 (1979) ("The words of a statute must be read in light of the purposes it seeks to serve"). Finally, the Commission has "a duty to avoid a construction of the [Ordinance] that would defeat the [Ordinance's] purpose or yield an absurd or unjust result." In re: A.P., 179 Ill.2d 184, 688 N.E.2d 642, 648 (1997).

Section 5-08-030 of the Ordinance provides in pertinent part that:

> It shall be an unfair housing practice and unlawful . . . :
>
> A. To make any distinction, discrimination or restriction against any person in the price, terms, conditions or privileges of any kind relating to the sale, rental, lease or occupancy of any real estate used for residential purposes in the City of Chicago . . . predicated upon the race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military discharge status, or **source of income of the prospective or actual buyer or tenant thereof.**

(Emphasis added). The Chicago Human Rights Ordinance and the Commission's Regulations define the term "source of income" as "mean[ing] the lawful manner by which an individual supports himself or herself and his or her dependents." Chicago Municipal Code §2-160-020(m) & §5-08-040; Regulation 100(32).

Respondent contends that the plain language of the Ordinance precludes a finding that Complainants' reliance on Section 8 rent subsidies is a "source of income" because:

> the use of Section 8 certificates and vouchers is not a manner by which the recipient supports himself or herself. Rather the Section 8 certificate or voucher is the manner by which the recipient is supported by the federal government.

Respondent's Reply ("Reply"), at 6. Thus, under Respondent's theory, the Ordinance would exclude from its definition of "source of income" all governmental payments to an individual and governmental payments made to third parties on an individual's behalf. Indeed, extending Respondent's theory to its logical conclusion, the Ordinance would exclude from a person's source of income **any** payments to the person from a third party that were not earned by the person. This is so because such payments would be the means by which the third party supported the person, and not the means by which the person supported him or herself. Thus, neither alimony payments nor payments from a trust fund, for example, would be sources of income for the recipient.

The Commission finds that Respondent's narrow interpretation of the Ordinance is at odds with its plain language and purpose. The Ordinance's broad definition of "source of income" refers to "the lawful manner" -- without any qualification -- by which an individual supports him- or herself. One "lawful manner" by which an individual can support him or herself is through reliance on governmental assistance of one form or another. There is no indication within the text of the Ordinance that the City of Chicago's City Council intended to exclude individuals who rely on government assistance from protection against "source of income" discrimination. The Commission is not at liberty to read into the Ordinance a restriction that was not intended by its drafters. See, e.g., Nottage v. Jeka, 172 Ill.2d 386, 667 N.E.2d 91, 93 (1996) ("courts should not, under the guise of statutory construction, add requirements or impose limitations that are inconsistent with the plain meaning of the enactment").[3]

---

[3] The Commission, therefore, declines to rest its decision on Black's Law Dictionary's definition of "income," cited by the parties. City Council's clear, and broad, definition of "source of income" is the proper focal point of this order.

2. The Commission Has Previously Held That Section 8 Funding and Other Forms of Governmental Assistance Are Protected Sources of Income

The Commission has on at least two occasions endorsed the legal theory that a complainant can prove source of income discrimination by showing that they were denied a rental opportunity because they intended to make use of Section 8 funding. See Huff v. American Management & Rental Service, CCHR No. 97-H-187, at 5 (Jan. 20, 1999); McGee v. Sims, 94-H-131, at 8 (Oct. 18, 1995). In Huff, Complainant alleged that Respondent denied her the opportunity to rent an apartment because of her source of income (i.e., her intended use of a Section 8 voucher to pay part of her rent). Although the Commission entered a default judgment against Respondent, it nevertheless held that Complainant had to establish a *prima facie* case to recover any damages. Huff, at 5. Complainant proved a *prima facie* case of source of income discrimination, the Commission held, by "establish[ing] by a preponderance of the evidence that she was rejected as a potential tenant by [Respondent] because part of the income which she intended to use to rent an apartment came from her Section 8 voucher." Id. The Commission further held that "Respondent [wa]s liable for damages because of its refusal to rent to [Complainant] because of her source of income, which was in part, the Section 8 [voucher]." Id. The Commission never would have held that Complainant Huff proved a prima facie case of housing discrimination if, as Respondent contends, Section 8 funding was not a "source of income" within the meaning of the Ordinance.

Similarly, the Commission held in McGee that "[i]t would be a violation of the Ordinance for [Respondent] to refuse to rent the House to [Complainant] because Section 8 funding was her

source of income for paying all or part of the rent." McGee, at 8.[4] In addition, the Commission has in two other cases allowed source of income claims for persons who received other forms of government assistance. McCutchen v. Robinson, CCHR No. 95-H-84, at 4 (May 20, 1998) (Complainant received food stamps and a supplement from Public Aid); Cooper & Ashmon v. Parkview Realty, 91-FHO-48-5633, at 3 (Sept. 8, 1992) (Complainants received Supplemental Security Income; Aid to the Aged, Blind and Disabled; and Public Aid).

Respondent contends that these prior rulings of the Commission "have no precedential value here." Reply, at 6. Respondent is incorrect. Commission Regulation 240.620(d) states that "[a]ll decisions of the Commission shall have precedential value." Consequently, the Commission is not free to disregard its prior decisions, as Respondent urges. Respondent also seeks to downplay the Commission's decision in McGee because the issue of whether Section 8 is a source of income was not explicitly addressed. While this is true, the fact that the Commission has repeatedly interpreted the Ordinance to protect persons who receive Section 8 and other forms of government assistance from discrimination based on their source of income provides additional support for the conclusion that Section 8 is a protected source of income. If the Commission had determined that the receipt of government assistance was not a protected "source of income," it could have *sua sponte* dismissed the above cases for lack of subject matter jurisdiction. See Regulation 210.330(a).

The parties have also directed the Commission's attention to decisions from other jurisdictions to support their respective positions on the question of whether Section 8 funding is a protected source of income under the Ordinance. "In interpreting the Ordinance, the

---

[4] While the Commission endorsed Complainant McGee's legal theory, it ultimately found that she failed to prove that she was discriminated against. McGee, at 11.

Commission shall look to decisions interpreting other relevant laws for guidance." Regulation 270.510; McClinton, at 19 n.5. Several jurisdictions from around the country have passed anti-discrimination laws that offer protection against source of income discrimination. See, e.g., Hays v. City of Urbana, 104 F.3d 102, 103 (7th Cir.), cert. denied, 520 U.S. 1265 (1997) (discussing the City of Urbana's ordinance); Knapp v. Eagle Property Management Corp., 54 F.3d 1272 (7th Cir. 1995) (discussing Wisconsin law); Commission On Human Rights v. Sullivan Associates, 1998 WL 395196 (Conn.Super.Ct. 1998) (discussing Connecticut law); Franklin Tower One, L.L.C. v. N.M., 304 N.J.Super. 586, 701 A.2d 739, 740 (N.J.Super.Ct.App.Div. 1997), aff'd, 1999 WL 155956 (N.J. 1999) (discussing New Jersey law). Courts from some of these jurisdictions have had occasion to determine whether or not Section 8 funding is within the scope of their local anti-discrimination laws. The Commission will find these decisions are "instructive" only if the laws under consideration do not contain language that is "significantly different" from the text of the Ordinance. See, e.g., Holloway, et al. v. Chicago Police Department, CCHR Nos. 97-PA-15 et al., at 13 (Sept. 30, 1998).

Respondent relies on the Seventh Circuit Court of Appeals' decision in Knapp v. Eagle Property Management Corp., *supra*.[5] In Knapp, the Seventh Circuit was determining whether a Section 8 voucher constitutes a "lawful source of income" under Wisconsin's Open Housing Act, which prohibits landlords from discriminating in housing on such a basis. Knapp, 54 F.3d at 1282. Under Wisconsin law, "lawful source of income" includes but is not limited to:

---

[5] Complainants, for their part, cite to the New Jersey Superior Court's decision in Franklin Tower to support their position on this issue. However, Franklin Tower provides little assistance in interpreting the Ordinance because the New Jersey statute -- which prohibits discrimination based on "the source of any lawful rent payment to be paid for the house or apartment" -- uses language that is significantly different from the text of the Ordinance. Franklin Tower, 701 A.2d at 740; see also Holloway, CCHR Nos. 97-PA-15 et al., at 13.

> lawful compensation or lawful remuneration in exchange for goods or services provided, profit from financial investments, any negotiable draft, coupon, or voucher representing voluntary value such as food stamps, social security, public assistance or unemployment compensation benefits.

Knapp, 54 F.3d at 1282, quoting Wis.Admin.Code § IND 89.01(8).

In determining whether Section 8 funding constitutes a "source of income" under this provision, the court first noted that the receipt of a Section 8 voucher "does not clearly equate to the other forms of aid specified in the statute." Id. Although the court nevertheless noted that "this form of assistance [i.e., Section 8] could arguably be included within the Wisconsin Act, [it] decline[d] to ascribe such an intent to the state legislature because of the potential problems in doing so." Id. Thus, it was the absence of legislative intent to include Section 8 within the statute along with "the absence of [statutory] language clearly including such assistance" that led the Seventh Circuit to conclude that Section 8 was not within the scope of the Wisconsin statute.[6] Id., at 1282-83.

The Seventh Circuit's decision in Knapp is inapposite for two reasons. First, the definition of "source of income" that is applicable to the Wisconsin statute is significantly different from the definition that is incorporated within the Ordinance. The Wisconsin definition explicitly lists several funding sources that constitute sources of income for purposes of that statute. Consistent with well-settled principles of statutory construction,[7] the Knapp court construed the statute as

---

[6] The Commission reads Knapp to find that Section 8 funding is "arguably" (id., at 1282), although not "clearly" (id., at 1283), included within the scope of the Wisconsin statute.

[7] As the Illinois Supreme Court has recognized, where a statute "specifically enumerates" several items that are within its coverage and states that other items may be covered as well, unspecified items will be included only if they are "not of a quality superior to or different from [] those specifically enumerated." People v. Capuzi, 20 Ill.2d 486, 170 N.E.2d 625, 629-30 (1960).

applying to non-listed sources of funding only if they could be "clearly equate[d]" to the forms of aid that were explicitly listed. Knapp, 54 F.3d at 1282. The Ordinance's general definition of "source of income," by contrast, is open-ended and contains no explicit list of covered funding sources. This type of statutory language is consistent with a legislative intent that the phrase "source of income" be broadly construed. See, e.g., People v. Scharlau, 142 Ill.2d 180, 565 N.E.2d 1319, 1325 (1990).

Second, unlike Knapp in which the legislature's intent regarding the statute's scope was unclear, Chicago's City Council clearly expressed its policy that "all residents" of the city should be able to obtain housing without suffering discrimination. Chicago Municipal Code, §5-08-010; *supra*, at 6. Interpreting the Ordinance to include Section 8 and other forms of governmental assistance as "sources of income" is consistent with the City Council's stated purpose of protecting all of the city's residents against housing discrimination. Moreover, Section 8 funding is within the plain language of the Ordinance's definition of "source of income." *Supra*, at Part III(A)(1). Had Chicago's City Council intended to exclude any particular sources of income from the coverage of the Ordinance, it certainly could have done so.[8] In sum: because Knapp is inapposite, it does not -- contrary to Respondent's contention -- dictate the result in this case.

---

[8] For example, Cook County's Human Rights Ordinance bars "source of income" discrimination in housing and it uses the same definition of "source of income" as used by the Chicago City Council. Cook County Human Rights Ordinance, Art. II(R). However, the Cook County Board included within the County's Ordinance's housing coverage a provision that explicitly excludes Section 8 funding from the protection of the Ordinance. Cook County Human Rights Ordinance, Art. VI(C)(5).

B. The Ordinance Is Not Preempted by Federal Law

Under federal law, participation in the Section 8 program is voluntary. See, e.g., Hays, 104 F.3d at 102. Because the Chicago Fair Housing Ordinance protects persons who receive Section 8 funding from suffering discrimination on account of their "source of income," *supra*, Part III(A), Chicago landlords who lease apartments that fall within the Section 8 fair-market rents must rent to Section 8 voucher holders or face civil liability. In this sense, the City of Chicago has mandated that its landlords participate in the Section 8 program. See Hays, 104 F.3d at 102-03. Respondent contends that the Ordinance is preempted by provisions of federal law to the extent that the Ordinance deprives landlords of their "right" not to participate in the Section 8 program.

Under its constitutional authority, the federal government is empowered to preempt state or local laws to the extent it believes such action to be necessary. See Ophthalmic Mutual Insurance Co. v. Musser, 143 F.3d 1062, 1066 (7th Cir. 1998). However,

> [c]ourts do not lightly attribute to Congress or to a federal agency the intent to preempt state or local laws. Indeed, when regulation is of a field traditionally occupied by the States, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the **clear and manifest** purpose of Congress."

Dehart v. Town of Austin, 39 F.3d 718, 720 (7th Cir. 1994), quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (emphasis added by the Seventh Circuit); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518 (1992) (there is a "presumption against the pre-emption of state police power regulations"); Musser, 143 F.3d at 1066; see also Franklin Tower One, L.L.C. v. N.M., 1999 WL 155956 at *7 (N.J. 1999) (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982)) ("states traditionally have had broad power to regulate housing conditions and relationships between landlord and tenants").

The Chicago Fair Housing Ordinance was passed through a proper exercise of the police power. See Chicago Real Estate Board v. City of Chicago, 36 Ill.2d 530, 224 N.E.2d 793, 801 (1967); see also Page v. City of Chicago Commission on Human Relations, No. 1-97-1621 (1st Dist., Sep. 30, 1998) (this is a published opinion, but reporter citations are not yet available) and Smith v. Goodchild, CCHR No. 98-H-177 (Apr. 13, 1999). Consequently, Respondent bears the arduous burden of showing that it was the "clear and manifest" purpose of Congress to preempt the Ordinance. Rice, 331 U.S. at 230; Musser, 143 F.3d at 1066; Dehart, 39 F.3d at 720; see Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984) (placing the burden of establishing preemption on the party asserting it).

State laws and local ordinances are preempted under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, in three circumstances:

> (1) where Congress has expressly preempted state law ("express preemption");
>
> (2) where state law purports to regulate conduct in a field that Congress intended the federal government to occupy exclusively ("field preemption"); and
>
> (3) where state law actually conflicts with federal law in that it is either impossible for a private party to comply with both state and federal requirements or the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ("conflict preemption").

English v. General Electric Co., 496 U.S. 72, 78 (1990); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 713 (1985) (noting that the constitutionality of local ordinances is analyzed the same way as that of statewide laws for purposes of the Supremacy Clause). Respondent, to its credit, concedes that there has been no "express preemption" or "field preemption" of the Ordinance. Reply, at 15.

1. There Is No Actual Conflict between the Federal Statute and the Ordinance Because It Is Physically Possible to Comply with Both Laws

Respondent presents two reasons that there is an actual conflict between the federal law that created the Section 8 program (42 U.S.C. §1437f) and the Ordinance. First, Respondent asserts that it is impossible to simultaneously comply with the federal law and the Ordinance because the federal law makes participation in Section 8 program optional while the Ordinance mandates participation. Respondent is mistaken. "An actual conflict analysis should be narrow and precise, `to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role.'" Downhour v. Somani, 85 F.3d 261, 266 (6th Cir. 1996), quoting Northwest Central Pipeline Corp. v. State Corp. Commission, 489 U.S. 493, 515 (1989). The applicable standard is whether compliance with both federal and local law is a "physical impossibility," Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), in that some action required by federal law is rendered illegal by local law. See, e.g., Coalition for Economic Equity v. Wilson, 946 F. Supp. 1480, 1512 (N.D.Cal. 1996), vacated on other grounds, 122 F.3d 692 (9th Cir.), as amended 122 F.3d 718 (9th Cir.), cert. denied, 118 S.Ct. 397 (1997)[9]; Holliday v. Bell Helicopters Textron, Inc., 747 F. Supp. 1396, 1401 (D.Haw. 1990) ("Conflict preemption applies only where compliance with state law would prevent the defendant from following federal regulations.")

---

[9] In Wilson, the court held that to show an "actual conflict" by establishing that "an entity cannot simultaneously comply with both Title VII and Proposition 290, a plaintiff must demonstrate that some action required by Title VII simultaneously violates Proposition 209." 946 F. Supp. at 1512.

It is not "physically impossible" for Respondent to simultaneously comply with the federal law and the Ordinance. The federal law does not require Respondent to take any action that is rendered illegal by the Ordinance. Rather, the federal law permits -- but does not require -- action (i.e., participation in the Section 8 program) that the Ordinance requires. Under these circumstances, there is no "actual conflict" between the federal law and the Ordinance. See, e.g., Attorney General v. Brown, 400 Mass. 826, 511 N.E.2d 1103, 1106 (Mass. 1987). In Brown, the defendant landlord claimed that a Massachusetts law that prohibits landlords from discriminating against recipients of housing subsidies, including rental assistance, was preempted by 42 U.S.C. §1437f(a), the law creating the Section 8 program, on the ground that the Massachusetts law mandated that landlords participate in a voluntary federal program. Id. The Massachusetts Supreme Judicial Court rejected defendant's preemption argument and found that "compliance with both statutes is not impossible." Id.

Several other courts, including the United States Supreme Court, have similarly held that the fact that state law contains more stringent or demanding requirements than a federal law on the same subject does not mean that it is physically impossible to comply with both laws. See, e.g., California Federal Savings and Loan Association v. Guerra, 479 U.S. 272, 276, 290-91 (1987); Downhour, 85 F.3d at 265-68; Dehart, 39 F.3d at 720-22; Holliday, 747 F. Supp. at 1401; see also Franklin Tower, 1999 WL 155956 at *8.

2. The Ordinance Is Consistent with the Purposes and Goals of the Section 8 Program

Respondent also contends that an actual conflict exists between the Housing Act and the Ordinance because "[t]he Ordinance stands as an obstacle to the accomplishment and execution of the full purposes and objectives that Congress laid out in the Section 8 program." Reply, at 19.

Respondent focuses on what it characterizes as the Housing Act's "voluntariness provision." Reply, at 12-13, 19-21. Respondent, which appropriated this terminology from the majority opinion in Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998), acknowledges that the text of the Housing Act does not actually contain a "voluntariness provision." Reply, at 12. Nevertheless, Respondent infers from the federal government treatment of the Section 8 program as voluntary for landlords that it has a "federal right" to "refuse Section 8 applications" that cannot be abridged by state and local governments. Reply, at 19-20. Consequently, according to Respondent, the Ordinance "necessarily stands as an obstacle to the federal Section 8 statute because the stricter standard of the Ordinance, requiring landlord participation, inevitably supplants Congressional intent." Reply, at 20-21.

Respondent's argument is multiply flawed. As an initial matter, an examination of the declarations of congressional policy and purpose within the text of the Housing Act, as amended through the Quality Housing and Work Responsibility Act of 1998, reveals that Congress intended the Section 8 program to address matters that have little if anything to do with accommodating the preferences of landlords. Section 2 of the Housing Act (42 U.S.C. §1437) states in pertinent part that:

> (a) DECLARATION OF POLICY. -- It is the policy of the United States --
>
> (1) to promote the general welfare of the nation by employing the funds and credit of the Nation, as provided in this Act --
>
> (A) to assist the States and political subdivisions of States to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families;
>
> (B) to assist States and political subdivisions of States to address the shortage of housing affordable to low-income families; and
>
> . . .

(4) that our Nation should promote the goal of providing decent and affordable housing for all citizens through the efforts and encouragement of Federal, State, and local governments, and by the independent and collective actions of private citizens, organizations, and the private sector.

Section 8 of the Housing Act (42 U.S.C. §1437f) further states:

(a) For the purpose of aiding lower-income families in obtaining a decent place to live and of promoting economically mixed housing, assistance payments may be made with respect to existing housing in accordance with the provisions of this section.

Courts have similarly recognized that the goal of the Housing Act in general, and of the Section 8 program in particular, is to facilitate the provision of "affordable, decent housing for those of low income." Brown, 511 N.E.2d at 1106; see also Franklin Tower, 1999 WL 155956 at *3; Franklin Tower, 701 A.2d at 741 ("The heart of 42 U.S.C.A. §1437f is aiding low-income residents in obtaining affordable housing"); M.T. v. Kentwood Construction Co., 278 N.J.Super. 346, 651 A.2d 101, 103 (N.J.Super.Ct.App.Div. 1994).

Contrary to Respondent's suggestion, "the voluntary nature of the Section 8 program is not at the heart of the federal scheme." Franklin Tower, 1999 WL 155956 at *10; Brown, 511 N.E.2d at 1106. Thus, while Congress envisioned voluntary participation, "[n]othing in the statute . . . mandates that landlord participation be voluntary, nor is there any provision that prohibits states from mandating participation." Franklin Tower, 1999 WL 155956 at *10. Furthermore, Congress has taken action in recent years to encourage further participation by landlords. For example, some of the alleged burdens experienced by participating landlords have been "altered or eliminated by the recent amendments to the Section 8 program." Franklin Tower, 1999 WL 155956 at *10, 3. Congress has also repealed the "take one, take all" provision of the Housing Act, 42 U.S.C. §1437f(t)(1)(A), which "prohibited an owner who voluntarily accepted any Section

8 tenant from rejecting others by reason of their status as Section 8 participants." Salute, 136 F.3d at 295. This provision, which was initially enacted "to increase the availability of low-income housing[,] . . . was repealed only because it was having the unintended effect of discouraging landlords from joining the Section 8 program." Franklin Tower, 1999 WL 155956 at *10, 4.[10]

Respondent provides no explanation as to how the preservation of the voluntary nature of the Section 8 program is necessary to fulfill the congressional policy and purpose of increasing the availability of affordable and decent housing for low-income persons. *Supra*, at 17-18. Indeed, to the extent that the voluntary nature of the program facilitates discrimination against Section 8 participants, *infra*, it seemingly undermines the congressional goal of remedying the acute shortage of housing affordable to low-income families. 42 U.S.C. §1437. As the Franklin Tower court recognized, "Allowing landlords to deny housing to . . . individuals because their rent is subsidized by Section 8 vouchers will only exacerbate the existing need [for housing], and in all likelihood, greatly increase the homeless population." Franklin Tower, 701 A.2d at 742 n.2.

Thus, the Ordinance does not stand as an obstacle to the fulfillment of what Congress has identified as the purposes and objectives of the Section 8 program. See Franklin Tower, 1999 WL 155956 at *10 (holding that the New Jersey "statute's anti-discrimination provision to protect tenants who are eligible to receive Section 8 vouchers will neither conflict with nor frustrate the objectives of Congress in enacting the Section 8 program"). On the contrary, there is no doubt

---

[10] The Congressional Committee on Banking, Housing, and Urban Affairs, "in its report on the [A]ct that repealed the `take-one, take-all' provision, anticipated that the repeal would not `adversely affect assisted households because protections will be continued under State . . . and local tenant laws.'" Franklin Tower, 1999 WL 155956 at *4, quoting S.Rep. No. 105-21, at 86 (1997).

that the Ordinance helps to further the provision of affordable and decent housing to low-income individuals in Chicago. Courts and commentators have recognized that:

> Section 8 recipients often cannot find desirable apartments because many landlords simply refuse to rent to such individuals and that low-landlord participation is a serious, if not the most serious, problem with the Section 8 program.

Franklin Towers, 701 A.2d at 742 n.2, citing to M. Malaspina, "Demanding the Best: How to Restructure the Section 8 Household-Based Rental Assistance Program," 14 Yale Law and Policy Review 287, 288, 311 (1996); P. Beck, "Fighting Section 8 Discrimination: The Fair Housing Act's New Frontier," 31 Harvard Civil Rights-Civil Liberties Law Review 155 ("Discrimination against rental subsidy holders seems to be as open and blatant today as was racial discrimination in the years preceding the enactment of the Fair Housing Act of 1968"), at 159 ("The Section 8 program's minimal success in promoting integration is attributable to the wide-spread discrimination against prospective Section 8 tenants by private landlords")(1996) (hereinafter cited as "Beck article").[11] Consequently, the Ordinance -- by prohibiting discrimination against individuals who rely on Section 8 funding to finance their housing -- will expand the housing options available to low-income persons in Chicago and thereby further the goal of the Section 8 program. Courts have reached the same conclusion with respect to other statutes that bar discrimination against Section 8 recipients. See, e.g., Franklin Towers, 1999 WL 155956 at *11; Brown, 511 N.E.2d at 1106.

---

[11] The Section 8 program seems destined to take on an even greater role in the provision of housing for low-income individuals in light of federal budget cuts that have limited the construction of public housing and the federal policy that authorizes the demolition of dilapidated units of existing public housing. Franklin Towers, 701 A.2d at 742 n.2; Beck article, at 159-60.

3. The Fact That Congress Provided for Voluntary Participation in the Section 8 Program Does Not Bar State and Local Governments from Mandating Participation

Respondent's primary contention is that the City of Chicago does not have the power to pass an ordinance that impinges on its "federal right" to refuse to accept Complainants' Section 8 applications. Reply, at 20-21, citing to Salute v. Stratford Greens Garden Apartments, 136 F.3d 293 (2d Cir. 1998) and Orman v. Charles Schwab & Co., Inc., 285 Ill.App.3d 927, 676 N.E.2d 241 (1st Dist. 1996), aff'd, 179 Ill.2d 282, 688 N.E.2d 620 (1997)). However, as the United States Supreme Court has held, "`Ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law.'" English v. General Electric Co., 496 U.S. 72, 89 (1990), quoting California v. ARC America Corp., 490 U.S. 93, 105 (1989); Fragassi v. Neiburger, 269 Ill.App.3d 633, 646 N.E.2d 315, 317 (2d Dist. 1995)(citing English); see also Franklin Tower, 1999 WL 155956 at *8 (observing that "[f]ederal courts have permitted states to impose greater restrictions than those imposed by federal law" and citing cases). Where (as here) a party contends that a local ordinance that was passed pursuant to the historic police powers is preempted, the issue is whether Congress had a clear and manifest intent to preempt such state and local laws. *Supra*, at 13. If there is no evidence of a Congressional intent to preempt, the fact that the local law imposes burdens, duties, or liabilities that exceed those mandated by the federal law is immaterial.

This principle was applied by the Seventh Circuit in Dehart v. Town of Austin, 39 F.3d 718 (7th Cir. 1994). In Dehart, the plaintiff, who bought, bred, raised, and sold exotic and wild animals, was licensed to engage in his business under both federal and state law. Id., at 720. Defendant town passed an ordinance that prohibited businesses from possessing wild animals.

Plaintiff alleged that the local ordinance was preempted by the applicable federal law under which he was licensed, and that the regulation by the town was "excessive because it amount[ed] to a total prohibition" of his business. Id., at 722. After noting that the ordinance was passed pursuant to historic police powers and that the federal law contemplated state and local regulation of animals, the Seventh Circuit held that plaintiff had failed to establish a Congressional intent to preempt the ordinance. Id. Given this, there was no federal preemption notwithstanding the fact that the town's "[o]rdinance produce[d] onerous consequences for [plaintiff's] business." Id.; see also Holliday, 746 F. Supp. at 1401 (rejecting preemption argument notwithstanding the fact that the state law in question imposed "more stringent safety standards" than required by its federal counterpart).

There are many similarities between this case and Dehart. In both cases: (a) the local ordinance restricted the ability of a party to take some action that was permissible under federal law; (b) the local ordinances were passed pursuant to historic police powers (see Chicago Real Estate Board, 224 N.E.2d at 801; Dehart, 39 F.3d at 722); (c) the federal laws in question contemplated that state and local governments would be involved in obtaining the objectives of the federal statute (42 U.S.C. §1437; Dehart, 39 F.3d at 722); (d) there is no "express" or "field" preemption by the federal statute (*supra*, at 14; Dehart, 39 F.3d at 722); and (e) it is physically possible for the party asserting preemption to comply with both the federal and local laws (*supra*, at Part III(A)(1); Dehart, 39 F.3d at 722).

For all of these reasons, the Commission joins the other courts that have concluded that "[i]t does not follow that, merely because Congress provided for voluntary participation [in the Section 8 program], the States are precluded from mandating participation." Brown, 511 N.E.2d

at 1106; Franklin Tower, 1999 WL 155956 at *10; Sullivan Associates, 1998 WL 395196 at *9 ("This court agrees with the basic conclusion that nothing in the federal program prevents a state from mandating participation"); but see Knapp, 54 F.3d at 1282.

Respondent relies heavily on the Seventh Circuit's decision in Knapp. In that case, the Seventh Circuit opined that "[i]t seems questionable . . . to allow a state to make a voluntary federal program mandatory." Knapp, 54 F.3d at 1282. However, the Knapp court did not discuss the preemptive scope of the Housing Act. Indeed, the parties have cited no federal case that has construed the preemptive scope of the Act. Cf. Hays, 104 F.3d at 102-03 (mentioning, but not resolving, the issue of whether the Housing Act preempted a local ordinance that required landlords to participate in the Section 8 program); see also Schiffner v. Motorola, Inc., 297 Ill.App.3d 1099, 697 N.E.2d 868, 872 (1st Dist. 1998) ("since no federal court has yet construed the preemptive scope of the [federal] Act, we can seek no guidance there"). The above-quoted statement from Knapp was not a holding with respect to preemption (or any other issue for that matter). See, e.g., Sullivan Associates, 1998 WL 395196 at *7 (noting that the Knapp court "does question the wisdom of mandating participation in a voluntary federal program, but [it] does not base its decision on this"). Therefore, Knapp does not bind the Commission in its preemption analysis. See, e.g., Scholtens v. Schneider, 173 Ill.2d 375, 671 N.E.2d 657, 667-68 (1996) (finding that the Illinois courts are not bound by a statement within a Seventh Circuit opinion regarding an issue that "was never raised or decided" on the ground that the statements were "pure dicta").

Respondent's reliance on the decisions in Orman v. Charles Schwab & Co., Inc. and Salute v. Stratford Greens Garden Apartments is similarly misplaced. In Orman, plaintiffs brought

various Illinois state law claims seeking to impose liability on defendant stock brokers for engaging in a practice (i.e., the retention of order flow payments) that was permitted by federal regulation. Orman, 676 N.E.2d at 242-43. The Illinois Appellate Court noted that the majority of other state courts considering the issue had found that similar state laws were preempted. Id., at 243. The court found these decisions to be persuasive and stated,

> the securities industry is a national market which must be regulated uniformly. To allow plaintiffs' causes of action to survive in Illinois state courts, [would cause] the federal uniformity goal [to] be frustrated, if not destroyed. If different state disclosure requirements must be met by brokerage firms across the nation, uniformity will not exist. If uniformity is not to prevail, neither rule 10b-10 nor the SEC would serve any function or purpose in regulating disclosure. Accordingly, the goals of the federal government would be frustrated.

Id., at 246. In affirming the Appellate Court's finding of preemption, the Supreme Court held that allowing plaintiffs' state law claims to advance would "obstruct the National Market System that Congress intended to foster in enacting the 1975 Amendments [to the Securities Exchange Act of 1934]." Orman, 688 N.E.2d at 626.[12]

In this case, unlike Orman, Respondent has made no showing that there is a federal interest in maintaining uniformity in a national market. See Downhour, 85 F.3d at 267; Pennsylvania Medical Society v. Marconis, 755 F. Supp. 1305, 1312-13 (W.D.Pa. 1991), aff'd, 942 F.2d 842 (3d Cir. 1991). To the contrary, the "markets" that are affected by the operation of the Section 8 program are local housing markets. See Brown, 511 N.E.2d at 1106 (suggesting that housing

---

[12] State and local governments are also prohibited from enacting more stringent regulations than allowed under federal law where Congress expressly defines the preemptive scope of the federal law to bar any regulations that are not the same as the federal standard. See, e.g., Scurlock v. City of Lynn Haven, 858 F.2d 1521, 1524-25 (11th Cir. 1988). Congress has not, however, explicitly defined the preemptive scope of the Housing Act. See Brown, 511 N.E.2d at 1105.

is an area of "local, rather than national, importance"). The federal government has accommodated the varied needs of local housing markets by providing that "a number of the Section 8 regulations defer to state or local law." Franklin Tower, 1999 WL 155956 at *3 (citing examples). Moreover, "[t]he federal legislation and regulations explicitly contemplate that the states will work with the federal government to implement the Section 8 program," id.; Brown, 511 N.E.2d at 1105-06; and the Department of Housing and Urban Development distributes to Section 8 landlords a handbook that lists permitted tenant screening criteria and "requires Section 8 landlords to `comply with all federal, state, and local fair housing and civil rights laws.'" Franklin Tower, 1999 WL 155956 at *4, quoting Hill v. Group Three Housing Development Corp., 799 F.2d 385, 389 & n.5 (8th Cir. 1986). These facts greatly "reduc[e] the persuasiveness of [Respondent's] argument in favor of preemption." Brown, 511 N.E.2d at 1106.

In sum: the Housing Act contemplates a localized approach to providing decent and affordable housing for all citizens that would involve the efforts of all levels of government, private citizens, organizations, and the private sector. *Supra*, at 17-18. "[T]here is no particular `theoretical or logical' reason for national uniformity in this context," nor is there any danger as there might be with other issues, such as transportation or the stock market, "that piecemeal state [or local] regulation will result in an unwieldy system." Downhour, 85 F.3d at 267.

It is not enough, as Respondent contends, that Congress envisioned that the Section 8 program would be a voluntary program on the federal level. The Commission finds instructive the Sixth Circuit's decision in Downhour and the other case law which considered whether states

could enact legislation to ban physicians from engaging in a practice known as "balance billing"[13] notwithstanding the fact that the practice is permitted by the federal Medicare Act, 42 U.S.C. §§1395-1395cc. In Downhour, the plaintiff healthcare practitioners claimed that "Congress has created an inviolable right to balance bill that the state cannot destroy . . . [because] an option to balance bill is necessary to effectuate congressional purposes of maintaining a delicate balance between the competing objectives of providing beneficiaries with medical services they can afford and allowing access to physicians who charge higher fees." Downhour, 85 F.3d at 267. The Sixth Circuit rejected plaintiffs' argument and held,

> Showing a Congressional design to strike a particular balance . . . is not sufficient to shut states out of the process. **The [plaintiffs] must show a need or an intent that the particular balance of cost and access be nationally uniform.** Whether it is wise to stop the federal government from closing all "safety valves" throughout the nation is, of course, an entirely different question from whether it is wise to prevent states from closing one safety valve where it would serve the local interest.

Id., quoting Marconis, 755 F. Supp. at 1312 (emphasis added by the Downhour court). As in Downhour (but unlike in Orman), there is no need for national uniformity with respect to the issue of whether landlord participation in the Section 8 program should be voluntary. *Supra*, at 24-25. Consequently, Orman is inapposite because the factor that caused the court to find preemption is not present here.

The Second Circuit's decision in Salute is inapposite for a different reason. Although Salute dealt with the Housing Act, the decision sheds no light on the question of whether the Housing Act preempts the Ordinance because the issue of preemption was not raised. See Franklin

---

[13] "Balance billing" is the process by which a physician bills his or her patient for the portion of the cost of a medical service that is over and above the amount by which the Medicare program reimburses the physician. See Downhour, 85 F.3d at 264.

Tower, 1999 WL 155956 at *5 ("Whether states are preempted from mandating landlord participation in Section 8 was not at issue in Salute"); see also Schiffner, 697 N.E.2d at 872 ("since no federal court has yet construed the preemptive scope of the [federal] Act, we can seek no guidance there"). Rather, the issue in Salute was whether defendants violated provisions of federal law by failing to rent apartments to two disabled plaintiffs who held Section 8 certificates. Salute, 136 F.3d at 295-96. Plaintiffs brought claims under the now-repealed "take one, take all" provision of the Housing Act, and under the Fair Housing Act, 42 U.S.C. §§3601-3631. Plaintiffs alleged that defendants violated the Fair Housing Act when defendants refused to reasonably accommodate plaintiffs' disabilities by accepting their Section 8 certificates. The Second Circuit rejected plaintiffs' argument, and held that participation in the Section 8 program "should not be forced on landlords" as an accommodation for a disability in light of the voluntary nature of the Section 8 program. Salute, 136 F.3d at 300.[14]

However, whether the Fair Housing Act compels a landlord to participate in the Section 8 program as a reasonable accommodation for a disabled person is a fundamentally different inquiry from the question of whether the Housing Act preempts the Ordinance. The inquiry under the Fair Housing Act focuses on the nature of the proposed accommodation, i.e., does the accommodation pose an undue hardship or a substantial burden? Id., at 300-01. The preemption inquiry, by contrast, focuses on whether it was Congress' intent for the federal law to preempt state and local law on the same subject matter. If there is no evidence of an intent to preempt, the

---

[14] The Second Circuit also held that the "take one, take all" provision is inapplicable where, as in that case, "a landlord's only Section 8 participation has been the acceptance of payments on behalf of existing tenants who became Section 8 certificate holders during their tenancy." Id., at 298.

local law will be allowed to stand even if it produces "onerous consequences" for the business of the party that seeks preemption. See, e.g., Dehart, 39 F.3d at 722. Thus, the fact that it would not be a reasonable accommodation under the Fair Housing Act to force a landlord to participate in the Section 8 program does not mean, without more, that the Housing Act preempts the Ordinance.

In sum: no court that has expressly considered the issue of whether the Housing Act preempts a state or local law that mandates landlord participation in the Section 8 program has found preemption. Respondent in this case has similarly failed to meet its burden of showing that the Ordinance is preempted by the Housing Act.

4. Complainant Smith's Complaint Is Not Subject to Dismissal Even If the Housing Act, In Its Present Form, Preempts the Ordinance

Respondent's motion to dismiss Complainant Smith's claim on the ground of preemption fails for an additional reason. Namely, at the time his claim accrued (December 1995), the now repealed "take one, take all" provision of the Housing Act, 42 U.S.C. §1437f(t)(1)(A), "prohibited an owner who voluntarily accepted any Section 8 tenant from rejecting others by reason of their status as Section 8 participants." Salute, 136 F.3d at 295. Complainant Smith alleges that after he told Respondent's representative that he was going to pay his rent with a Section 8 voucher, Respondent's representative denied him the opportunity to rent an apartment and told him that Respondent did not want any more Section 8 tenants. *Supra*, at 3. These allegations state a claim under both the Ordinance and the former "take one, take all" provision (repealed April 26, 1996). See, e.g., Glover v. Crestwood Lake Section 1 Holding Corp., 746 F. Supp. 301, 309 (S.D.N.Y. 1990). Thus, even if Respondent is correct that there is an actual conflict between the Ordinance and the Housing Act in its present form, there was no conflict between the Ordinance and the

Housing Act as it existed at the time Complainant Smith's claim arose insofar as both laws barred landlords who already rented to Section 8 tenants from discriminating against prospective tenants based on their status as Section 8 participants. Therefore, Respondent's effort to gain dismissal of Complainant Smith's claim based on the ground of preemption fails for this additional reason.

C. The Ordinance Does Not Violate Respondent's Procedural Due Process Rights

Respondent contends that the Ordinance violates its procedural due process rights. Reply, at 23-25. Respondent's argument in this regard is as follows:

> Respondent is not complaining about the process being accorded it in this hearing. Rather, Respondent is complaining about the lack of process it will be accorded should Section 8 be construed as a `source of income.' Under such construction, Respondent will have no choice but to participate in the program -- for Respondent would face legal sanction (as it does here) if it refused to participate. Such compelled participation, however, necessarily deprives Respondent of its property without due process of law.

Reply, at 25. Essentially, Respondent is contending that the passage of the Ordinance (presuming that its definition of "source of income" encompasses Section 8 funding) has deprived it of procedural due process.

The Illinois Supreme Court has previously considered the question of whether the City of Chicago's Fair Housing Ordinance denies due process to those persons governed by the law. See Chicago Real Estate Board v. City of Chicago, 36 Ill.2d 530, 224 N.E.2d 793, 801-802 (1967).[15] The court began by noting "that the concept of due process of law has never insulated a business

---

[15] In 1967, when the Chicago Real Estate Board decision was issued, the Ordinance declared it "unlawful for real-estate brokers to discriminate on account of race, color, religion, national origin or ancestry in the sale, rental or financing of residential property in the city." Chicago Real Estate Board, 224 N.E.2d at 797. The Ordinance was subsequently amended to reflect its current, broader scope.

from regulations deemed essential under the police power." Id., at 801. The court then stated the applicable standard:

> [t]he inquiry in due process cases has been whether the evil existed which affected the public, health, safety, morals or general welfare, and whether the legislative means chosen to counter that evil were reasonable. If so, there is a proper exercise of the `elastic police power,' and no want of due process, despite interference with individual property and contract rights.

Id.

There is no question that the "evil" to which the Ordinance is directed (namely, housing discrimination) has a deleterious impact on the public welfare. Id. (listing the adverse effects of housing discrimination); Franklin Tower, 701 A.2d at 742 n.2 (noting the adverse effects of discrimination against Section 8 voucher holders). Moreover, it is well-settled that laws prohibiting discrimination in housing are reasonably calculated to counter the evil effects of such discrimination. Chicago Real Estate Board, 224 N.E.2d at 801. Consequently, "such laws have been repeatedly sustained as a proper exercise of the police power, and not an infringement of due process of law." Id., at 801-02 (and cases cited within). For these reasons, the Illinois Supreme Court held that the Ordinance "cannot be deemed a denial of property without due process of law, even though it may interfere with the rights of [those covered by the law] to contract with persons of their choice." Id., at 802. The Commission agrees with the above analysis, and it concludes that the Ordinance does not violate Respondent's right to due process of law.

D. The Ordinance Does Not Violate the Takings Clause of the Fifth Amendment

Respondent contends that the Ordinance (presuming that its definition of "source of income" encompasses Section 8 funding) violates the "takings" clause of the Fifth Amendment to the United States Constitution (as applied to the states through the Fourteenth Amendment).

Reply, at 25-27. Specifically, Respondent asserts that the Ordinance -- by mandating Respondent's participation in the Section 8 program -- "would impose substantial burdens and costs on Respondent" that would inure to the benefit of Section 8 beneficiaries. Reply, at 26. As a result, according to Respondent, "the Ordinance would have the necessary effect of taking private property from Respondent and giving that property to Section 8 beneficiaries -- all without any, let alone just, compensation being paid to Respondent." Id.

Respondent's "takings" argument does not mandate the dismissal of the Complaints for two reasons. First, Respondent's "takings" claim is premature. As the United States Supreme Court has held:

> a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985). The Commission has not rendered a final ruling as to Respondent's potential liability under the Ordinance. Therefore, Respondent's challenge is not ripe.

Second, and more fundamentally, Respondent has failed to demonstrate in its motion to dismiss the Complaints that a "taking" has (or will) occur if the Ordinance is construed to include Section 8 funding within its definition of "source of income." "[A] land use regulation does not effect a taking if it substantially advances legitimate State interests and does not deny an owner economically viable use of his land." Northern Illinois Home Builders Association, Inc. v. County of DuPage, 165 Ill.2d 25, 649 N.E.2d 384, 389 (1995); see International College of Surgeons v. City of Chicago, 153 F.3d 356, 368 (7th Cir. 1998), quoting Forest Preserve District v. West

Suburban Bank, 161 Ill.2d 448, 641 N.E.2d 493, 497 (1994) ("A taking of private property occurs where governmental regulation radically curtails a property owner's rights such that all economically beneficial or productive use of [the land] is denied'"); Tim Thompson, Inc. v. Village of Hinsdale, 247 Ill.App.3d 863, 617 N.E.2d 1227, 1242 (2d Dist. 1993).

In this case, Respondent has utterly failed to demonstrate that an actionable "taking" would occur if the Ordinance is interpreted so that its "source of income" clause encompasses Section 8 funding. The Ordinance substantially advances a legitimate state interest (i.e., assuring that all city residents are able to obtain fair and adequate housing without suffering discrimination) by barring housing discrimination against low-income persons who rely on Section 8 funding to pay their rent. Furthermore, the Complaints -- needless to say -- contain no allegation that Respondent would be deprived of all economically beneficial or productive use of its property if it is mandated by the Ordinance to participate in the Section 8 program.

Without such a showing, the Ordinance -- which was properly enacted pursuant to the police powers, *supra*, at 14 -- does not effect a "taking" notwithstanding the fact that it may, as Respondent contends, impose substantial burdens or costs on landlords.[16] See, e.g., Sherman-Reynolds, Inc. v. Mahin, 47 Ill.2d 323, 265 N.E.2d 640, 643 (1970) ("Regulations imposed by a State in the exercise of its police power . . . are not rendered unconstitutional even though

---

[16] Respondent patently exaggerates the adverse impact that participation in the Section 8 program may have on its operations when it contends that its property will be taken "without any" compensation. Reply, at 26. If it participates in the Section 8 program, Respondent will receive from its tenant and the federal government payment for each and every apartment that it rents to a Section 8 beneficiary. *Supra*, at 5. Furthermore, Congress recently amended the Section 8 program to alter or eliminate some of the alleged burdens experienced by participating landlords. Franklin Tower, 1999 WL 155956 at *10, 3; *supra*, at 18-19.

private property may be injured, interfered with, or damaged without the payment of compensation"); Tim Thompson, 617 N.E.2d at 1245 (rejecting "takings" claim despite the fact that plaintiff was deprived of "its optimally desired use of [its] property"); Rothner v. City of Chicago, 66 Ill.App.3d 428, 383 N.E.2d 1218, 1222-23 (1st Dist. 1978); Greyhound Lines, Inc. v. City of Chicago, 24 Ill.App.3d 718, 321 N.E.2d 293, 305-06 (1st Dist. 1974)(rejecting "takings" claim even though there was "no doubt that the property of the plaintiffs [wa]s adversely affected by the ordinance" in question); see also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964) (summarily rejecting claim that federal civil rights statute which compelled motel owners to accept African-American patrons without discrimination was a "taking of property without just compensation.")

E. The Ordinance Does Not Improperly Infringe on Respondent's Freedom of Contract

Finally, Respondent contends that the Ordinance, by mandating its participation in the Section 8 program (which would entail entering into contracts with the federal government), infringes on its right to freedom of contract and to avoid being subjected to involuntary contracts. Reply, at 27-30 (citing to Salute, 136 F.3d at 298). Respondent concedes that its right to freedom of contract is not absolute, and that "the freedom not to contract may legitimately be restricted by antidiscrimination statutes." Reply, at 29 (citing to Blue Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Association, 110 F.3d 318, 333 (6th Cir. 1997)). In Blue Cross, the Sixth Circuit stated that "[i]t is still hornbook law that the freedom of contract entails the freedom not to contract . . . except as restricted by anti-trust, antidiscrimination, and other statutes." Blue Cross, 110 F.3d at 333; see also Heart of Atlanta, 379 U.S. at 258 (In the face of a properly enacted civil rights law, motel had "no `right' to select its guests as it sees fit.")

Despite Respondent's acknowledgement of the "antidiscrimination exception" to the principle of freedom of contract and the fact that the Ordinance is unquestionably an antidiscrimination statute, Respondent contends that the exception does not apply here. In Respondent's view, "the issue here is whether the City of Chicago can force Respondent into an involuntary contract with the federal government." Reply, at 29 (emphasis in original). The Commission finds Respondent's argument to be without merit for the following reasons.

"The right of individuals to contract as they deem fit is grounded in the due process clause." R.W. Dunteman Co. v. C/G Enterprises, Inc., 181 Ill.2d 153, 692 N.E.2d 306, 314 (1998). Nevertheless, it has long been settled that:

> neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right [to make contracts] is that of the public to regulate it in the common interest.

Nebbia v. People of the State of New York, 291 U.S. 502, 525 (1934). An otherwise constitutional law may restrict the freedom of contract without running afoul of the due process clause so long as it has "a reasonable relation to a proper legislative purpose, and [it is] neither arbitrary nor discriminatory." Id., at 537; National Western Life Insurance Co. v. Commodore Care Improvement District, 678 F.2d 24, 26-27 & n.7 (5th Cir. 1982); People v. Patton, 57 Ill.2d 43, 309 N.E.2d 572, 544 (1974) (quoting Nebbia); R.W. Dunteman, 692 N.E.2d at 314.

In this case, the Ordinance has a reasonable relationship to a proper legislative purpose, *supra*, at 30, and it is neither arbitrary nor discriminatory. See, e.g., Chicago Real Estate Board, 224 N.E.2d at 801-02 (finding that the Ordinance complies with the requirements of the due

process clause). Respondent makes no argument to the contrary.[17] Consequently, the Ordinance "cannot be deemed a denial of property without due process of law, even though it may interfere with the rights of [Respondent] to contract with persons of [its] choice." Id., at 802; see also Heart of Atlanta, 379 U.S. at 258; Nebbia, 291 U.S. at 539 ("The Constitution does not secure to any one the liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people").

IV. CONCLUSION

For all of the above reasons, the Respondent's motion to dismiss is DENIED.

A PARTY MAY OBTAIN REVIEW OF THIS ORDER ONLY AFTER THE COMMISSION HAS ISSUED AN ORDER DISMISSING THE COMPLAINT OR RULING UPON AN ADMINISTRATIVE HEARING.

for: CHICAGO COMMISSION ON HUMAN RELATIONS

by: Clarence N. Wood
Chair/Commissioner

---

[17] Rather, Respondent relies on its contention that the Constitution prohibits the City of Chicago from forcing landlords to participate in the Section 8 program. Reply, at 29-30 (citing Salute, 136 F.3d at 298). However, as discussed above, the Commission has joined courts from three other jurisdictions in concluding that federal law does not prevent states from mandating participation in the Section 8 program, *supra*, at 16-20, 23-24, and it has found Salute to be inapposite. *Supra*, at 26-28.