UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

FOREST PARK II, a Minnesota Limited Partnership, Plaintiff, vs. KATHERINE HADLEY, in her capacity as Commissioner of the MINNESOTA HOUSING FINANCE AGENCY, et al., Defendants.	Case No. 02-CV-480-MJD/SRN **MEMORANDUM IN SUPPORT OF DEFENDANT, FOREST PARK TENANTS ASSOCIATION'S MOTION FOR A TEMPORARY INJUNCTION OR FOR PARTIAL SUMMARY JUDGMENT AND A PERMANENT INJUNCTION**.

Oral Argument Requested

INTRODUCTION

This action involves the termination by plaintiff of a housing subsidy contract under the federal section 236 mortgage subsidy program, without the one year notice to the local government, the Metropolitan Council, the Minnesota Housing Finance Agency (MHFA), and tenants required by Minn. Stat. § 471.9997 and the one year notice to the tenants required by Minn. Stat. § 504B.255[1]. In response to letters from defendant Forest Park II Tenants Association (hereafter, "Association") demanding compliance with the state law, the plaintiff brought this lawsuit admitting that it had not complied with Minn. Stat. §§ 471.9997 and 504B.255 but seeking a declaratory judgment that the statutes were preempted by federal law and seeking an injunction prohibiting enforcement of the state statutes. The lawsuit named as defendants the Association, the individual tenants, and the state and local agencies entitled to notice under the statutes. The Association has brought

a counter claim seeking a declaratory judgment that the state laws are not preempted and injunctive relief requiring compliance.

Because the plaintiff has indicated that prepayment of the federally insured and subsidized mortgage on Forest Park II Apartments may occur as early as May 1, 2002, there is great urgency. Prepayment of the mortgage will eliminate the federal interest rate subsidy to the property and the regulatory agreement with HUD which regulates rents and provides a preference for low income occupancy. A substantial majority of tenants represented by the Association will experience significant rent increases as a result of prepayment of the mortgage. Defendant, Association, has brought motions seeking, in the alternative: 1) a preliminary injunction based on the threatened violation of Minn. Stat. §§ 471.9997 and 504B.255 prohibiting plaintiff from prepaying the mortgage until the court may render a decision on the merits; or, alternatively, 2) advancement of the action on the Association's counterclaim and consolidation with the hearing on the motion for preliminary injunction pursuant to Fed. R. Civ. P. 65(a)(2), and entry of partial summary judgment on the Association's counterclaim and a permanent injunction prohibiting plaintiff from prepaying its federally subsidized mortgage until plaintiff has complied with Minn. Stat. §§ 471.9997 and 504B.255 and the one year notice period has run.

FACTS

A. Statutory Background

1. The Section 236 Mortgage Subsidy Program

Forest Park II Apartments is a 60 unit complex located in Forest Lake, Minnesota. Complaint ¶ 1. Forest Park II is subject to a mortgage which is insured and subsidized

[1] The plaintiff's complaint and the Association's Answer incorrectly cite the general notice statute as § 504B.265 instead of the correct citation of § 504B.255.

under the federal section 236 program. *Id.* The section 236 program provides mortgage insurance and interest reduction payments to subsidize a project's market rate mortgage so the monthly debt service payments are those of an uninsured 1% mortgage. This assistance, enacted as part of the Housing and Urban Development Act of 1968, P.L. 90-448, was available to owners if they agreed to affordability restrictions. *Id.* These mortgages were typically 40-year mortgages. *Id.* Forest Park II is no exception; its mortgage term expires on March 1, 2015. Mortgage Note, Declaration of Ann Norton (hereafter "Norton Decl."), Ex. 1.

HUD entered into a standard regulatory agreement with section 236 owners which, with applicable HUD regulations, limits occupancy to lower income households and limits rent levels to those necessary to pay operating expenses, debt service and a modest return on equity.[2] The regulatory agreement and its limitations on occupancy and rent remain in effect only as long as the mortgage is in effect.

2. The Minnesota Statutes.
Two Minnesota laws, Minn. Stat. § 504B.255 and Minn. Stat. § 471.9997 are at issue in this case.

Minn. Stat. § 504B.255 provides in pertinent part:

> "The landlord of federally subsidized rental housing must give residential tenants of federally subsidized rental housing a one-year written notice under the following conditions:
>
> * * *
>
> (3) the landlord will prepay a mortgage and the prepayment will result in the termination of any federal use restriction that apply to the housing;"

Minn. Stat. § 471.9997, the tenant impact statement law provides:

471.9997 Federally assisted rental housing; impact statement.

[2] Tenants pay 30% of income for rent, but no less than a "base rent" necessary to cover costs plus debt service on a 1% mortgage and no more than the rent necessary to cover costs plus full debt service (the "market rent"). Owners must also agree to impose occupancy preferences for lower income tenants. Regulatory Agreement, Norton Decl., Ex. 2.

> At least 12 months before termination of participation in a federally assisted rental housing program, including project-based section 8 and section 236 rental housing, the owner of the federally assisted rental housing **must** submit a statement regarding the impact of termination on the residents of the rental housing to the governing body of the local government unit in which the housing is located. The impact statement **must** identify the number of units that will no longer be subject to rent restrictions imposed by the federal program, the estimated rents that will be charged as compared to rents charged under the federal program, and actions the owner will take to assist displaced tenants in obtaining other housing. A copy of the impact statement **must** be provided to each resident of the affected building, the Minnesota housing finance agency, and, if the property is located in the metropolitan area as defined in section 473.121, subdivision 2, the metropolitan council. (Emphasis added.)

The plaintiff has not complied with either statute. The plaintiff has not provided a one year notice to the tenants or a tenant impact statement, or the information on the number of units which will be affected by the prepayment or the actions taken to assist tenants in obtaining other housing, to the residents, the local governing body, the Metropolitan Council or the MHFA. Complaint ¶¶ 21, 22; Norton Decl. ¶ 4, Ex. 3[3].

3. The Federal Low Income Housing Preservation Act, ELIPHA and LIHPRHA

The plaintiff's complaint asserts that the Minnesota laws are preempted by HUD regulation, 24 C.F.R. § 248.183. Complaint ¶¶ 4, 24, 26. This regulation is part of the HUD regulations adopted to implement the Emergency Low Income Housing Preservation Act of 1987 (ELIHPA) and the Low Income Housing Preservation and Resident Homeownership Act of 1990 (LIHPRHA). See generally, 24 C.F.R. § 248 (2001).

In 1987, concerned by the specter of more than 330,000 low income housing units being lost through prepayment of subsidized mortgages, Congress passed ELIHPA, Title

[3] The only difference between the two laws is that the Tenant Impact Statement law §471.9997 requires that the year's notice be given to parties in addition to the tenants and contain information about the impact of the prepayment. Because its requirements are somewhat more extensive than § 504B.255 most of the discussion herein will focus on § 471.9997

II of P.L. 100-242. ELIHPA prohibited prepayment except in accordance with a plan of action approved by HUD. HUD was authorized to offer incentives to preserve the housing as affordable. Congress stated that it passed ELIHPA to:

> (1) preserve and retain to the maximum extent practicable as housing affordable to low income families or persons those privately owned dwelling units that were produced for such purpose with federal assistance;
> (2) minimize the involuntary displacement of tenants currently residing in such housing; and
> (3) continue the partnership between all levels of government and the private sector in the production and operation of housing that is affordable to low income Americans.

P.L. 100-242, Sec. 202(b), 100th Cong., USCCAN, 101 Stat. 1878 (1987).

In 1990, Congress amended ELIHPA with LIHPRHA, P.L. 101-625, Title VI, Subtitle A, codified at 12 U.S.C. §§ 4101-4125. LIHPRHA also prohibited prepayment of a subsidized mortgage except in accordance with a plan of action approved by HUD and provided that any prepayment not in compliance was "null and void, and any low-income affordability restrictions on the housing shall continue to apply . . ." 12 U.S.C. § 4101 (2001). The statute provided for notice to HUD, the tenants, and local government of an owner's intent to prepay. § 4102. HUD was then to offer a package of incentives to the owners. §§ 4103-4106, 4109, 4110, 4112. An owner who rejected the incentives could prepay, but only by submitting to HUD a plan of action which protected the current tenants and only with a HUD finding that the prepayment would not adversely affect the low income housing supply. § 4108, 4113.

One part of this comprehensive program was a preemption provision, § 4122, which rendered ineffective certain state and local laws restricting or inhibiting prepayments of mortgages on LIHPRHA-eligible buildings, defined as "eligible low-income housing". This section reads as follows:

> 12 U.S.C. § 4122. Preemption of State and local laws

> (a) In general. No State or political subdivision of a State may establish, continue in effect, or enforce any law or regulation that-- (1) restricts or inhibits the prepayment of any mortgage described in section 229(1) [12 USCS @ 4119(1)] (or the voluntary termination of any insurance contract pursuant to section 229 of the National Housing Act [12 USCS @ 1715t]) on eligible low income housing; (2) restricts or inhibits an owner of such housing from receiving the authorized annual return provided under section 214 [12 USCS @ 4104]; (3) is inconsistent with any provision of this subtitle, including any law, regulation, or other restriction that limits or impairs the ability of any owner of eligible low income housing to receive incentives authorized under this subtitle (including authorization to increase rental rates, transfer the housing, obtain secondary financing, or use the proceeds of any of such incentives); or (4) in its applicability to low-income housing is limited only to eligible low-income housing for which the owner has prepaid the mortgage or terminated the insurance contract.
>
> Any law, regulation, or restriction described under paragraph (1), (2), (3), or (4) shall be ineffective and any eligible low-income housing exempt from the law, regulation, or restriction, only to the extent that it violates the provisions of this subsection.
>
> (b) Effect. This section shall not prevent the establishment, continuing in effect, or enforcement of any law or regulation of any State or political subdivision of a State not inconsistent with the provisions of this subtitle, such as any law or regulation relating to building standards, zoning limitations, health, safety, or habitability standards for housing, rent control, or conversion of rental housing to condominium or cooperative ownership, to the extent such law or regulation is of general applicability to both housing receiving Federal assistance and nonassisted housing. This section shall not preempt, annul, or alter any contractual restrictions or obligations existing before the date of the enactment of the Cranston-Gonzalez National Affordable Housing Act [enacted Nov. 28, 1990] that prevent or limit an owner of eligible low-income housing from prepaying the mortgage on the housing (or terminating the insurance contract on the housing).

This preemption provision specifically did not preempt local laws "not inconsistent with the provisions" of LIHPRHA. § 4122(b). HUD's regulations repeat the prepayment provisions of ELIPHA and LIHPRHA and specifically state that a mortgagee's acceptance of prepayment in violation of the regulations is grounds for administrative sanctions imposed by HUD. 24 C.F.R. §§ 248.103(a) and (e). The regulations also repeat the preemption provision. § 248.183

4. Congress Has Replaced ELIPHA and LIHPRHA With a Right to Prepay and With Section 8 Voucher Assistance.

Beginning in 1996, Congress adopted a series of funding and policy decisions that rendered LIHPRHA inoperable and established an alternative set of prepayment provisions. *See*, Pub. L. 104-120, the Housing Opportunity Program Extension Act (HOPE) of 1996, Norton Decl. Ex. 5, permitting prepayments notwithstanding the requirements of LIHPRHA and providing for enhanced vouchers for residents of prepayment properties. Congress began to short-fund the program in 1996, and starting in FY '98, Congress provided no funding to operate LIHPRHA. Simultaneously, Congress permitted owners to prepay their mortgages and provided for section 8 vouchers to the tenants.[4] This scheme of alternative prepayment provisions was made permanent in 1999 with Section 219 of P.L. 105-276. Norton Decl., Ex. 6. In 2000, in section 532 of P.L. 106-74, Congress authorized a number of incentives for owners of section 236 projects who agree to continue low income affordability restrictions. In Title V of that law, codified at 42 U.S.C. § 1437f(t), Congress made permanent the enhanced voucher program for residents of prepayment properties. Thus, Congress has completely replaced the preservation provisions of LIHPRHA with an alternative set of laws addressing prepayment rights, preservation incentives, and tenant protections. Although LIHPRHA has never been formally repealed, these subsequent Congressional enactments have rendered the program inoperable and impliedly repealed except with respect to projects which received preservation incentives under LIHPRHA.

[4] Beginning in 1996, Congress began reducing funding for LIHPRHA, permitting owners of covered projects to prepay their subsidized loans, and providing voucher assistance. Pub. L. No. 104-120, §§ 2(b) (HOPE), 110 Stat. 834 (Mar. 28 1996); Pub. L. No. 104-134, §§ 101(e), Title II, paragraph entitled Annual Contributions for Assisted Housing, 110 Stat. 1321 (Apr. 26, 1996) ($624 million, permitting prepayment and providing vouchers); Pub. L. No. 104-204, 110 Stat. 2874, 2885 (Sept. 26, 1996) ($350 million to fund primarily transfers, permitting prepayment and providing vouchers); Pub. L. No. 105-65, 111 Stat. 1343, 1355-56 (Oct. 27, 1997) (no preservation funding, only $10 million for transaction costs); Pub. L. No. 105-276 (Oct. 21, 1998) (no funds); Pub. L. No. 106-74, 113 Stat. 1047 (Oct. 20, 1999) (no funds); Pub. L. No. 106-377, 114 Stat. 1441 (Oct. 27, 2000) (no funds).

Under LIHPRHA, HUD was responsible for implementing all aspects of this comprehensive prepayment statute. It is HUD's position that

> …even though LIHPRHA has never been repealed by Congress, because HUD does not have authority to accept new preservation applications or to enter into new plans of action, it has continued to implement and enforce the provisions of LIHPRHA only as to those owners who were in the program prior to the passage of HOPE in 1996.

HUD Letter Brief, Norton Decl., ¶ 5, Ex. 4.

HUD has concluded that no state law could be inconsistent with LIHPRHA for a property which was not in the LIHPRHA preservation program prior to 1996 and that § 4122(b) therefore exempted state laws from the preemption provision except for LIHPRHA-preserved properties:

> The preemption provision in LIHPRHA at Section 232, 12 U.S.C. § 4122, was intended to afford protection to owners of properties that were, or are, operating under the LIHPRHA preservation program…Section 4122(b) states that the section 'shall not prevent the establishment, continuing in effect, or enforcement of any law or regulation of any State…not inconsistent with the provisions of this subchapter.' Thus, a state law could not be inconsistent with the provisions of LIHPRHA for an owner who was never involved in the LIHPRHA Preservation Program and never operated under a LIHPRHA plan of action.

HUD Letter Brief, Norton Decl., ¶ 5, Ex. 4.

B. The Plaintiffs' Proposed Prepayment

On October 25, 2001 the plaintiff sent to the tenants written notice of its intent to prepay the section 236 mortgage loan on May 1, 2002. Norton Decl., Ex. 3. This notice was sent pursuant to a federal law requiring at least 150 days notice of such a prepayment. P.L. 105-276, Sec. 219(b)(3); Norton Decl., Ex. 6. A copy was also sent to the MHFA. Norton Decl., Ex. 3. This notice did not provide the one year notice, nor the information on the number of units affected, estimated rent increases resulting from the prepayment, nor actions to be taken to assist displaced tenants required by Minn. Stat. §

471.9997.[5] The MHFA confirmed in writing to the plaintiff that this notice did not meet the requirements of Minn. Stat. § 471.9997. Norton Decl., Ex. 7. No notice has been provided to local government nor to the Metropolitan Council as required by this law. The plaintiff's complaint confirms its ongoing refusal to comply with § 471.9997 and § 504B.255. Complaint ¶¶ 21, 22.

The failure of the plaintiff to comply with the requirements of Minn. Stat. §§ 471.9997 and 504B.255 has meant that the tenants and governmental entities entitled to one year notice have not had an adequate opportunity to explore possible preservation alternatives to prepayment. *See, 215 Alliance v. Cuomo*, 61 F.Supp.2d 879, 887, (similar federal notice statute was intended to provide an "opportunity to do something" to prevent loss of project based subsidy); *See also*, Declaration of Charles Warner (hereafter "Warner Decl."), ¶¶ 11-14, indicating necessity of adequate notice to achieve preservation objectives.

If the Forest Park II mortgage is prepaid on May 1, these 60 units will be permanently and irretrievably lost as affordable housing. The metropolitan area is in the midst of a severe shortage of housing affordable to low income families and the loss of these units will exacerbate that shortage, to the detriment of current residents of Forest Park II as well as to future low income applicants. Warner Decl., ¶¶ 5-7.

HUD is planning to provide the tenants with section 8 vouchers which will cover the difference between a tenant rent payment based on 30% of income and the new rents the owner will charge. However, even with voucher assistance, approximately two thirds of the current tenants will suffer rent increases as a result of the prepayment, averaging $134/month and threatening them with displacement from their homes. Norton Decl., ¶¶

[5] Information on projected rents and number of units was apparently sent to HUD, but not to the tenants or any of the public entities required to be notified under Minn.Stat. § 471.9997.

9-10, Exs. 8 & 9; Declarations of Antoinette Smith ("Smith Decl."), ¶5, and Declaration of Tammy Sanz ("Sanz Decl."), ¶ 5.

ARGUMENT

The Association seeks, in the alternative: 1) a preliminary injunction to preserve the status quo during the pendency of this action or 2) partial summary judgment on its counterclaim based on Minn. Stat. §§ 471.9997 and 504B.255 and entry of a permanent injunction prohibiting prepayment of the section 236 mortgage until the plaintiff has fully complied with the state laws and the one-year notice period has run. Because the plaintiff has indicated an intent to prepay on May 1, 2002, (Complaint, ¶ 2) there is great urgency in having this matter determined quickly. Pursuant to Rule 65(a)(2), Fed. R. Civ. P. the court may advance and consolidate the motion on summary judgment and permanent injunction with the motion for preliminary injunction[6].

The Eighth Circuit has established four factors that determine whether preliminary injunctive relief will be ordered: (1) the threat of irreparable harm to the moving party; (2) the balance between this harm and the injury that granting the injunction will inflict on the party to be enjoined; (3) the probability that the moving party will succeed on the merits; and (4) the effect on the public interest. *Dataphase Systems, Inc. v. C L Systems, Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc); *Little Earth of United Tribes Inc. v. HUD*, 584 F. Supp. 1301, 1302 (D. Minn. 1983). As demonstrated in Section A, below, all four factors support the Association's motion in this case. In Section B, below, the Association demonstrates that no bond should be required for entry of a preliminary injunction.

[6] In Freedom Resource Center v. South Park Apartments, a state district court recently issued partial summary judgment and a permanent injunction in a case remarkably similar to this one. (Clay County Dist. Ct. File # C2-01-2165. Order dated 2-8-02, attached hereto as Ex. 11 to Norton Decl.) The court enjoined the owner from opting out of the section 8 program without first complying with Minn. Stat. § 471.9997.

Alternatively, the Association seeks partial summary judgment and entry of a permanent injunction requiring the plaintiff to renew the contract until there has been full compliance with the requirements of the state laws. As demonstrated in Section C., below, the Association is entitled to summary judgment on its claim that plaintiff's threatened prepayment violates both state laws, because there are no disputed issues of material fact and the Association is entitled to judgment as a matter of law. Rule 56(c) Fed. R. Civ. P. The court may enter a permanent injunction to prevent irreparable harm to a party who lacks an adequate alternative remedy at law. The argument at Section C., below, demonstrates that the Association is entitled to a permanent injunction.

A. The Association Is Entitled to a Preliminary Injunction

1. The Threat of Irreparable Harm

Irreparable harm to the moving party creates the urgency justifying immediate relief, and is, therefore, a vital element of injunctive relief. Although the injury can take many forms, it must be of such a nature that a legal remedy will not make the injured party whole. *Allen v. Minnesota,* 867 F. Supp. 853, 858-59 (D. Minn. 1994). *See generally* 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1 (2d ed. 1995).

The plaintiff intends to prepay the section 236 mortgage and terminate the regulatory agreement. Once these actions have occurred, Forest Park II Apartments will be permanently and irreparably lost as an affordable housing resource. The threatened harm to the residents represented by the Association is twofold. First, many residents are threatened with substantial rent increases, which may lead to the loss of their homes. Norton Decl., ¶¶ 9-10, Exhibits 8 & 9; Smith Decl., ¶ 5, and Sanz Decl., ¶ 5. This threat is real and imminent. Norton Decl., ¶ 10.

Courts have repeatedly recognized that substantial rent increases and the risk of losing one's housing are irreparable injuries supporting preliminary relief. *McNeill v. New York City Housing Authority*, 719 F. Supp. 233, 254 (S.D.N.Y. 1989) (public housing authority enjoined from collecting increased rents); *Brown v. Artery Organization, Inc*., 654 F. Supp. 1106, 1118-19 (D.D.C. 1987) (landlord enjoined from evicting tenants during conversion of complex to high rent units; "it is axiomatic that wrongful eviction constitutes irreparable injury"); *Mitchell v. HUD*, 569 F. Supp. 701 (N.D. Cal. 1983); *Gibson v. Harris*, 438 F. Supp. 487, 490-91 (E.D. Va. 1977); *Tenants for Justice v. Hills*, 413 F. Supp. 389, 393 (E.D. Pa. 1975) (landlords enjoined from evicting tenants when HUD foreclosed on a subsidized project and sold it without rent restrictions*); Bloodworth v. Oxford Village Townhouses, Inc*., 377 F. Supp. 709, 719 (N.D. Ga. 1974).

Second, the tenant impact statement law, was passed as part of a biannual appropriation of $20 million to the MHFA to be used "to finance the acquisition, rehabilitation, and debt restructuring of federally assisted rental property" threatened with conversion to market rate. 1998 Minn. Laws, c 389, art. 14, sec. 1, 2. With this substantial financing commitment, the Legislature recognized the important public purpose involved in preserving the affordability of federally subsidized housing and provided public resources to make such preservation a reality. Congress has also made substantial incentives available to owners of 236 projects who agree to extend low income occupancy restrictions. P.L. 106-74, Sec. 532. There are numerous instances of successful preservation of such projects. Warner Decl., ¶¶ 9-13. However, negotiation and implementation of such preservation efforts is complex and time consuming, often requiring at least a year. *Id.* at ¶¶ 11-13. The plaintiff's refusal to comply with the state

one year notice statutes substantially undermines any possibility of finding a long-term alternative to the loss of this housing. *Id*. at ¶¶ 13-14.

There is a separate kind of irreparable injury to the Association itself. Its goal is to preserve Forest Park II as affordable housing for current and future members. Prepayment harms the Association's ability to keep the project affordable for future low income applicants. Such applicants will not have vouchers available to them and will be unable to afford the new, and much higher, rents.

2. Balance of Hardships

Since the plaintiff has operated this housing as a 236 project for 27 years, (Complaint, ¶ 2), the hardship of continuing to do so for a few more months until the court can make a determination on the merits can hardly be sufficient to outweigh the irreparable harm to the Association and residents from a failure to grant the requested injunction. Further, any such hardship is attributable to the plaintiff's refusal to conform to the unambiguous, and hardly burdensome, requirements of state law.

3. Likelihood of Success on the Merits

Plaintiff's complaint bases the relief sought on two claims. First, plaintiff asserts that Minn. Stat. §§ 471.9997 and 504B.255 are preempted by 24 C.F.R. § 248.183 and by the prepayment notice requirements of Section 219 of P.L. 105-276 (Complaint, ¶¶ 4, 24). This argument involves both express preemption (by 24 C.F.R. § 248.183) and conflict preemption (by Section 219 of P.L. 105-276). These arguments are rebutted in sections a. and b. below. Second, plaintiff assertion that the state laws violate the contracts clause, Art. I, Sec. 10 of the U.S. Constitution. This argument is rebutted in section c. below.

a. There is No Express Preemption of the Minnesota laws.

Plaintiff argues that Minn. Stat. §§ 471.9997 and 504B.255 are expressly

preempted by 24 C.F.R. § 248.183. To the contrary, these laws are not preempted by federal law which by their own terms and legislative history do not and were not intended to apply to either this property or these state laws.

There are two arguments here. The first is that advanced by HUD and adopted by the federal district court in the *Kenneth Arms Tenants Association v. Mel Martinez*. Civ. No. S-01-832, N.D. Cal., 2001 U.S. Dist. Lexis 11470; Norton Decl., Ex. 10. In that case, a federal district court upheld a California notice statute similar to the Minnesota laws in the face of a preemption argument identical to the one advanced by Forest Park II. *Id.* HUD's interpretation of the preemption provisions of LIHPRHA was not at issue in the case. However, at the court's request, HUD submitted to the court a description of the agency's policy with respect to the preemption effect of LIHPRHA. As set out at pages 8-9 above, HUD's policy is that state laws are not preempted by the LIHPRHA preemption provision with respect to projects that have never operated under a LIHPRHA plan of action. HUD's interpretation is determinative as to its own regulations. *Auer v. Robbins*, 117 S.Ct. 905, 911 (1997)(agency interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation'").[7] Forest Park II has never operated under a LIHPRHA plan of action and is thus not covered by the regulation relied upon by plaintiff. Declaration of Christine Goepfert, ¶¶ 1-2.

The court in the *Kenneth Arms* case concluded that the comprehensive LIHPRHA process to provide incentives to owners of federally subsidized housing to retain their subsidy programs had been replaced by Congress with a completely different process set out in HOPE, permitting prepayments and replacing the project based subsidy with

[7] Similar to the agency interpretation at issue in *Aue*r, which was submitted in an *amicus* brief, HUD's interpretation regarding preemption in the *Kenneth Arms* case was submitted by letter brief at the court's invitation. The agency's interpretation was not at issue in the *Kenneth Arms* case, and thus, like the agency interpretation in *Auer*, "there is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer* 117 S. Ct. at 912.

voucher assistance. Norton Decl., Ex. 10, p. 18-19. The court noted that HUD continues to apply the provisions of LIHPRHA, including the preemption provisions, only to projects that actually took advantage of LIHPRHA. *Id*.

Because Forest Park II Apartments, like the properties at issue in *Kenneth Arms*, has never been subject to a LIHPRHA plan of action and because its owner, like those of the *Kenneth Arms* properties, rely on HOPE and subsequent similar enactments rather than on LIHPRHA for their right to prepay, the LIHPRHA preemption provisions do not apply. Since it had adopted this position, the court in *Kenneth Arms* did not reach the second argument against express preemption – that Congress never intended § 4122 to preempt state notice laws.

The Minnesota laws do not "restrict or inhibit" prepayment, but instead merely require that owners complete certain steps such as giving notice of their intent to prepay. In *Lifgren v. Yeutter*, 767 F. Supp. 1473 (D.Minn.1991) an owner challenged a similar federal statute requiring owners of Farmers' Home Administration subsidized properties to give notice of prepayment. The court stated:

> "The Preservation Act and regulations relating thereto are not inconsistent with the borrower's option to prepay at any time. Rather, the Preservation Act and its regulations simply provide procedures which must be followed in the event that a borrower evidences an intent to prepay…"

Id. at 1486.

The structure and legislative history of LIHPRHA reinforce the conclusion that the "restrict or inhibit" language of § 4122 was not intended to preempt state notice statutes. Preemption is not simply an issue of application of statutory language to a specific fact situation. It is a constitutional issue raising fundamental issues of federalism. *Jones v. Rath Packing Co*., 97 S.Ct. 1305, 1309, 430 U.S. 519, 525 (1977); *United States v. Bass*, 92 S.Ct. 515, 523, 404 U.S. 336, 349 (1971). Analysis of the

preemptive scope of a federal statute "start[s] with the assumption that the historic police powers of the state are not to be superseded by….Federal Act unless that is the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240, 2250, 518 U.S. 470, 484 (1996); *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608, 2617, 505 U.S. 504, 516 (1992)(citing *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947)). Regulation of housing and protection of tenants are "significant and uniquely local interests with which the [federal] courts should not lightly interfere." *Kargman v. Sullivan*, 552 F.2d 2, 11 (1st Cir. 1977) (also observing that federal subsidized housing policy is "superimposed and consciously interdependent with the substructure of local law relating to housing" and given a conflict in this area, "reconciliation is to be preferred to complete ouster of state law").

The task before the court in a preemption case is to determine the scope of express preemption provisions in light of the presumption against preemption and the requirement of "clear and manifest" Congressional intent to preempt. *Cipollone,* 112 S.Ct. at 2618 (narrow reading of the scope of express preemption language in light of presumption against preemption); *Shaw v. Delta Airlines*, 103 S.Ct. 2890, 2899, 463 U.S. 85, 95 (1983). Courts must closely examine the facts of each case to determine where the line separating the powers of state and federal governments lies and "whether the dangers and hardships of diverse regulation justify foreclosing a state from the exercise of its traditional powers." *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc*., 83 S.Ct. 1022, 1025, 372 U.S. 714, 719 (1963). The Supreme Court in preemption cases has regularly examined the text, structure and purpose of the statute as a whole, and its legislative history to determine whether such a "clear and manifest" intention exists. *Medtronic*, 116 S.Ct. at 2251; *Shaw*, 103 S.Ct. 2890 (1983).

The express language of § 4122 requires a narrow construction of the reach of the preemptive effect. Subdivision (a) concludes with the provision that a local law is preempted "only to the extent that it violates the provisions of this subsection." The legislative history of LIHPRHA makes it clear that state notice laws were not intended to be preempted. The Conference Report on LIHPRHA states:

> In the event of prepayment, HUD would have several tools to protect the existing tenants and assist the affected community in replacing the stock. The tenant protections build upon provisions contained in the House bill as well as in State laws such as the Maryland Assisted Housing Preservation Act.

House Conf. Report at p. 466, U.S. Code Cong. & Admin. News p. 6171.

Congress explicitly intended that LIHPRHA provide protection to tenants that built upon protections already provided in various state laws. Congress did not intend to preempt such state laws, but rather intended LIHPRHA to work in conjunction with them. It is equally clear that Congress intended that such state laws were not considered to conflict with a federal policy of uniform national application of LIHPRHA provisions. *See also California Federal Sav. and Loan Ass'n v. Guerra*, 107 S.Ct. 683, 692, 479 U.S. 285, 289 (1987)(finding "significant" the fact that Congress was aware of and acknowledged in debates existing similar state laws when enacting federal law and "failed to evince the requisite 'clear and manifest' purpose to supersede them.").

The Maryland law, which was specifically cited in the legislative history, was adopted in 1989, the year before Congress enacted LIHPRHA. This state law requires owners to provide to local government and the tenants at least a year before prepayment, information which is more comprehensive than that required by the Minnesota tenant impact statement law. *See*, MD. CODE ANN. 83B, §9-101 et seq. (2001).

If the Maryland law was not intended to be preempted, then clearly the Minnesota laws, which are less far reaching, are certainly not preempted. In addition, throughout

LIHPRHA are requirements that the owner and HUD notify both the tenants and state or local government entities of all activity leading toward prepayment, that state and local entities use this information to assist tenants to preserve affordable housing, and that they assist and coordinate with HUD in implementing the Act. These provisions indicate a Congressional purpose that tenants and state and local governments be fully informed and in a position to effect the preservation purposes of the Act. That Congress did not intend to preempt state and local efforts to assure an effective flow of information regarding prepayment, and that it did not view such local efforts as in conflict with LIHPRHA, are illustrated by the following examples of LIHPRHA requirements:

- The owner's notice to HUD of intent to prepay must be also be filed with the chief executive of the local government jurisdiction and provided to the tenants. 12 U.S.C. § 4102(b) (2001).
- The information which HUD then provides to the owner must be provided to the tenants, "together with other information relating to rights and opportunities" under the Act. § 4106(c).
- The owner's plan of action providing for termination must be submitted to the tenants and the local government, along with all supporting documentation. § 4107(a)(2).
- The local government is to "review the plan and advise the tenants of the housing of any programs that are available to assist the tenants in carrying out the purposes" of LIHPRHA. Id.
- HUD is to coordinate with local public housing agencies to mitigate effects of any displacement caused by prepayment. § 4113(b).
- HUD is required to confer with any appropriate state and local agency to confirm any state or local assistance that may be available to achieve the preservation purposes of LIHPRHA and must give consideration to the views of such agency when making any LIHPRHA determinations. § 4118.

The structure of LIHPRHA and its legislative history demonstrate the lack of the "clear and manifest" intent of Congress required for § 4122 to preempt state notice laws such as Minn. Stat. §§ 471.9997 and 504B.255.

b. There is No Conflict Preemption of the Minnesota laws by Section 219 of P.L. 105-276

The plaintiff seeks a declaration that it may prepay by complying only with the

notice requirements of Section 219(b)(3) of P.L. 105-276 and that Minn. Stat. §§ 471.9997 and 504B.255 are preempted by this federal notice statute. Complaint, ¶ 24. The preemption referred to by plaintiff is "conflict preemption" which occurs either when it is "impossible for a private party to comply with both state and federal requirements" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English v. General Electric Company***,** 110 S.Ct. 2270, 2275, 496 U.S. 72, 80 (1990). This conflict preemption also requires a "clear and manifest" intent of Congress that state law be preempted. *Id*. at 2277.

State law is not preempted simply because it imposes procedural requirements not required by federal law or restrictions more stringent than those imposed by federal law. *Id*. at 2280; *California v. ARC America Corp*., 109 S.Ct. 1661, 1667, 490 U.S. 93, 106 (1989)("ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law"); *Kenneth Arms Tenants Association*, p. 20, Norton Decl., Ex. 10 (similar state laws not subject to conflict preemption simply because they impose procedural requirements not in federal law). Thus, the Minnesota laws are not preempted simply because they require notice which is three months longer than the maximum period required under federal law. It is easy for any owner to comply with both simply by giving the one year notice required by state law and then, within the 150-270 day time frame, giving the notice required by federal law and at least one owner has done so.[8]

When a federal statute expressly preempts some other law, it is impermissible to infer a Congressional intent that there be some wider preemption through application of the conflict preemption concept. *English v. General Electric Company***,** 110 S.Ct. at

[8] The owner of Mountain View Estates, a 52 unit project in Detroit Lakes Minn. prepaid the 236 mortgage in January of 2002. A state law tenant impact statement was provided on 12/14/00 and the federal notice required by P.L. 105-276 was provided on 7/21/01. Declaration of Christine Goepfert , Exhibits 1-3.

2280; *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. at 2618. Section 219 of P.L. 105-276 provides that "notwithstanding" section 211 of LIHPRHA and section 221 of ELIPHA, an owner of low income housing may prepay the mortgage by giving a notice of at least 150, and not more than 270 days.[9] The statute expressly supercedes only sections 211 of LIHPRHA and 221 of ELIPHA (the prepayment prohibitions) and no other laws, certainly no state laws. One principle set out in *English* and *Cipollone* is that "Congress' enactment of a provision defining the pre-emptive reach of a law implies that matters beyond that reach are not preempted." *Cipollone,* 112 S.Ct. at 2618**.**

Here, Congress expressly provided that section 219 was to supercede the prepayment limitations of LIHPRHA. Had Congress intended to preempt any other statutory provisions relating to prepayment, it would have used the phrase "notwithstanding any other provision of law." As in *Cipollone*, the preemptive reach of section 217 must be read "in light of the presumption against" preemption. *Cipollone*, 112 S.Ct. at 2618. On its own terms, section 217 does not "foreclose additional obligations imposed under state law" and therefore does not preempt such obligations. *Id.*

Nor is there the slightest indication that the state one year notice requirement frustrates any Congressional purpose. The legislative history of section 219 provides no hint as to the purpose of the provision requiring the federal notice within 270 days of prepayment. The most likely explanation is that Congress did not want prepayments based on "stale" notices – that is, it did not want owners to be able to simply give an open-ended notice which it could rely on at any time in the future. What is certain is Congressional intent that section 236 projects be preserved as affordable housing. The

[9] LIHPRHA is Title VI of the Cranston-Gonzalez National Affordable Housing Act; LIHPRHA amended ELIPHA (part of the Housing and Community Development Act of 1987 (HCDA)) so that Section 211 of LIHPRHA became Section 211 of the HCDA; Section 604(c) of the Cranston-Gonzalez Act kept ELIPHA

legislative history for section 532 of P.L. 106-74, which provides incentives to section 236 project owners to continue low income occupancy restrictions, states that the title of which section 532 is a part "is designed to address a potentially crisis-level loss of affordable housing for seniors, individuals with disabilities, and other vulnerable families." Compliance by an owner with both the federal and state laws will give full effect to Congress' intentions with respect to section 236 projects. There is, therefore, no conflict preemption.

The preemptive reach of section 219 is closely analogous to that of the federal statute at issue in *English v. General Electric Company*, in which the Supreme Court reversed lower court decisions that a provision of a federal law preempted state law. The Supreme Court noted that on its face, the provision at issue superceded only a different federal law and not state law, that there was no legislative history to the contrary, and that state law is not preempted simply because it imposes liability over and above that authorized by federal law. Likewise, section 219 refers on its face only to other provisions of federal law, there is no legislative history to the contrary, and it does not preempt state laws providing for additional restrictions on prepayment. As in *English*, the clear Congressional intent that state law be preempted is entirely lacking and the state law is therefore not preempted.

c. The Minnesota laws Do Not Violate the Contract Impairment Clause of the U.S. Constitution.

The plaintiff argues that Minn. Stat. §§ 471.9997 and 504B.255 violate the constitutional prohibition against impairment of contractual obligations under Art. I, Sec. 10 of the U.S. Constitution, ("Contract Clause"). A statute does not violate the Contract Clause simply because it affects duties created by contracts entered into before its

in effect for projects subject to it.

enactment; under certain circumstances, the statute may even altogether bar performance under the contract. *Burlington Northern Railroad Co. v. State of Nebraska*, 802 F.2d 994, 1005 (8th Cir. 1986). Contracts are assumed to be subject to the exercise of the police power by state governments and legitimate exercises of this power which affect existing contracts do not necessarily violate the contract clause. *Home Building & Loan Ass'n v. Blaisdell*, 54 S.Ct. 231, 239, 290 U.S. 398, 435 (1934); *Murphy v. Amoco Production Co.*, 729 F.2d 552, 557 (8th Cir. 1984). A Contract Clause challenge to a state statute is analyzed using a three part test. *Angostura Int'l Ltd. v. Melemed*, 25 F. Supp.2d 1008, 1010 (D. Minn. 1998):

> The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. Second, the Court considers whether there is a significant and legitimate public purpose behind the regulation causing the substantial impairment. Finally, the Court must consider whether the adjustment of the rights and responsibilities of the parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption."

Id. (citations omitted).

The threshold inquiry of substantial impairment also involves a three part test: "whether a contractual relationship exists; whether a change in the law impairs that contractual relationship; and whether the impairment is substantial." *Western Nat'l Mutual Ins. Co. v. Lennes*, 46 F.3d 813, 817-18 (8th Cir. 1995); see also *Allen v. State of Minnesota*, 867 F. Supp. 853 (D. Minn. 1994).

The only document relating to a section 236 project which contains any provisions regarding prepayment of the loan is the mortgage note. *Cienega Gardens v. U.S.*, 194 F.3d 1231, 1242 (Fed. Cir. 1998). None of the agreements between the owner and HUD reference prepayment. *Id.*; *Alexander Investment v. U.S.*, 51 Fed. Cl. 102, 106 (2001)(no privity of contract between the U.S. and the owner with respect to a right to prepay because the prepayment provision was not in the regulatory agreement).

Therefore, the Forest Park II note is the only contract at issue. See, Note, Norton Decl. Ex 1.

While the HUD regulations in effect at the time that section 236 mortgages were approved did permit prepayment, these regulations were expressly subject to amendment at any time, subject only to the requirement that such amendment not adversely affect the mortgagee's interests. Thus, the only contract provision on which the owner can rely is a provision in the note which prohibits prepayment for 20 years. Any expectation by the owner that a prepayment could occur after that time was severely limited by HUD's ability to amend the regulations regarding prepayment at any time without regard to the owner's interests. In fact, with ELIPHA and LIHPRHA Congress did drastically limit owners' prepayment rights after the initial 20 year period.

The state laws impair the prepayment provision of the note only if Forest Park II had a "reasonable expectation" that it could prepay its mortgage without giving the one year's notice required. *Lennes*, 46 F.3d at 818. A party's "reasonable expectations" are affected by the regulated nature of an industry in which a party is contracting; heavy regulation of an industry may reduce reasonable expectations. *Id.*; see also *Burlington Northern*, 802 F.2d at 1006 (finding no Contracts Clause violation where "given the highly regulated nature of the railroad industry, Burlington Northern had no reasonable expectation that it could remove from legislative scrutiny aspects of its operations potentially bearing on public safety").

Obviously government-subsidized housing is a highly regulated "industry". Given that the note provides no positive "right" to prepayment, but only a limitation on an express prohibition and that HUD's regulations on prepayment were subject to change without consideration of the owner's interests, the plaintiff had no reasonable expectation regarding ability to prepay without notice. Challenges to the constitutionality of

ELIPHA/LIHPRHA and a similar Rural Housing preservation statute on other theories have been rejected, in part because of the recognition that owners knew from the outset they were incurring the risk of intensive regulation and the possibility of changing rules. *Alexander*, supra, *Parkridge Investors, Ltd. v. Farmers Home Administration*, 13 F.3d 1192, 1198 (8th Cir. 1994).

Further, any contract impairment must be "substantial." *Angostura*, 25 F.Supp. at 1010. The requirement of one year's notice is not much more onerous than the 150-270 day notice already required by the federal program. Additional obligations imposed on contracting parties by state laws must be measured against the general obligations of the parties previously existing to determine if the additional obligations substantially impair the contract as a whole. *See Murphy v. Amoco Production Co.*, 729 F.2d 552, 557 (8th Cir. 1984) (additional liability imposed by state law not significant given preexisting liabilities and cost of the activity).

In this case, the Minnesota laws at most impose an additional 215 days' notice (approximately 7 months) on owners intending to prepay mortgages and terminate their section 236 obligations. Given the initial 40 year mortgage and the 20 year minimum before an owner is allowed to terminate, an additional 7 months notice is not a severe impairment of Forest Park II's contract rights. Instead, the effect of the laws on Forest Park II's obligations is "slight." *See, e.g., Burlington Northern*, 802 F.2d at 1006 (finding no substantial impairment of contract where statute requiring manned cabooses where contract at issue only guaranteed railroads the right to negotiate for removal of all cabooses or seek permission to remove cabooses from some of its trains).

Even if the one year notice provisions were found to constitute substantial impairment, the state has demonstrated a significant and legitimate public purpose. *See Lennes*, 56 F.3d at 820. Congress itself has emphasized the important public purpose

involved in preservation of section 236 housing as affordable. See discussion above at page 4. The means chosen to achieve this legitimate public purpose are clearly reasonably related to the preservation purpose. *See*, *Minnesota Ass'n of Health Care Facilities, Inc.*, 742 F.2d 442, 450 (8th Cir. 1984). *Liberty State Bank v. Minnesota Life and Health Ins. Guar. Assn*, 149 F.3d 832,835 (8th Cir. 1998). The one year notice requirements are the same as that which Congress has imposed for termination of a section 8 housing subsidy contract (42 U.S.C. § 1437f(c)(8)), only slightly longer than that currently imposed by Congress for prepayment, and the same as that favorably noted by Congress in discussing the tenant protection provisions of LIHPRHA (the Maryland statute, see pages 18-19 above).

4. Public Policy

Public policy clearly favors granting the proposed preliminary and permanent injunctions. The Minnesota legislature mandated owners to provide the required tenant impact statement one year in advance of termination of the project based federal subsidy. *Teachers Local 59 v. Special School Dist.1*, 512 N.W.2d 107, 112 (Minn.App. 1994)(public policy is set by legislative enactments). The legislature has also clearly established preservation of affordable housing as a major public policy. Warner Decl. ¶ 9. Furthermore, Congress has repeatedly emphasized the importance of public policies preserving affordable housing. The section 236 program was enacted in 1968 as part of a reaffirmation by Congress of the National Housing Goal of "a decent home and a suitable living environment for every American family." H.R. Rep. No. 90-1585 (1968), reprinted in 1968 U.S.C.C.A.N. 2873. This goal is still the cornerstone of the nation's housing policy. 12 U.S.C. § 1701t.

In the administration of the section 236 program, HUD has been directed by Congress to give "the highest priority and emphasis" to meeting the housing needs of

those families for whom the national housing goal has not become a reality. *Id*. Congress has adopted a number of incentives aimed at encouraging section 236 project owners to extend low income use restrictions. P.L. 106-74, § 532. In enacting ELIHPA, later followed by LIHPRHA, Congress declared that the loss of housing such as Forest Park II "would inflict unacceptable harm on current tenants and would precipitate a grave national crisis in the supply of low income housing" and "would irreparably damage hard-won progress toward such important and long-established national objectives as . . . providing a more adequate supply of decent, safe, and sanitary housing that is affordable to low income Americans." ELIHPA, Sec. 202(a)(4) and (5).

B. No Bond Should Be Required.

A bond is often required as a condition of granting preliminary injunctive relief. Rule 65(c), Fed. R. Civ. P. The amount of the bond is within the discretion of the Court to provide security for any costs or damages that might be incurred by a party wrongfully enjoined. As previously discussed, a delay in the proposed conversion of Forest Park II to market rate apartments is not likely to result in damages to the plaintiff. Therefore, a bond is unwarranted.

Even if the plaintiff could prove potential damages, the Court has the discretion to waive the bond requirement in a proper case. *Little Earth of United Tribes, Inc. v. HUD,* 584 F. Supp. 1301, 1303 (D. Minn. 1983)(*citing Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d 692, 701 (7th Cir. 1977)). Ample authority exists for a waiver of the bond if the parties seeking an injunction are indigent or lack the financial ability to provide it; *Id*., 567 F.2d at 701; *Governing Council of Pinoleville Indian Community v. Mendocino County,* 684 F.Supp. 1042, 1047 (N.D. Cal 1988); if requiring security would deny a party's access to judicial review, *People of California v. Tahoe Regional Planning Agency,* 766 F.2d 1319, 1325 (9th Cir. 1985), *aff'd on other grounds*,

775 F.2d 998 (1985); if the parties seeking the injunction establish likelihood of success on the merits, *Id*., 766 F.2d at 1326; or if significant issues of public policy are at stake, *Bass v. Richardson*, 338 F.Supp. 478, 491 (S.D.N.Y. 1971); *Natural Resources Defense Council, Inc. v. Morton*, 337 F.Supp. 167, 169 (D.D.C. 1971); *Kenneth Arms Tenants Association*, pgs. 38-39; Norton Decl. Ex. 10.

Defendant is a newly formed association of low income tenants and is without financial resources. Declaration of Dawn Byland, ¶ 2. Requiring security of this defendant will deny access to judicial review of the claims raised in this lawsuit and the underlying significant public policy issues, a result that is, itself, contrary to the public interest.

In the alternative, the court can avoid any possibility of injury to plaintiff through improvident issuance of temporary relief by advancing the matter and granting partial summary judgment and a permanent injunction rather than temporary relief.

C. Alternatively, the Court Should Advance Defendant's Motion for Summary Judgment and Injunction and Grant Such Relief

The Association is entitled to summary judgment on its counterclaim. The plaintiff admits non-compliance with Minn. Stat. §§ 471.9997 and 504B.255. For the reasons set forth above, these laws have not been preempted by federal law. This is a pure legal issue with no material facts in dispute. Therefore, the Association is entitled to summary judgment pursuant to Fed. R. Civ. P. 56(c). The Association is entitled to the permanent injunction sought because the plaintiff's violation of the state laws is clear, the harm to the Association and the residents it represents will be irreparable (see discussion above), and the Association has no adequate alternative remedy.

CONCLUSION

For the reasons set out above, the court should grant either the preliminary or permanent injunctive relief requested by the Association. If the court chooses to enter preliminary injunctive relief, the court should waive the bond requirement.

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