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DES MOINES, IOWA

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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CITY OF DES MOINES, IOWA, Plaintiff, v. SECRETARY OF HOUSING AND URBAN DEVELOPMENT, Defendant.	* * * * * * * * * * * *	4-99-CV-90625 MEMORANDUM OPINION AND ORDER

I. Background

Plaintiff, City of Des Moines (the "City"), brought this action in the Iowa State District Court for Polk County, regarding the structures at 1256 E. 25th Street, Des Moines, Polk County, Iowa. Defendant, Secretary of the Department of Housing and Urban Development ("HUD"), is the titleholder of record of the buildings at that address. HUD removed this action to federal court pursuant to 28 U.S.C § 1442(a)(1).

The facts in this case are not disputed. The City alleges that the structures located upon this property are dangerous to the public health and safety, are a nuisance, and violate various sections of the Municipal Housing Code of Des Moines.[1] The Notice of Inspection attached to the Petition states that the main structure, detached garage, and shed are in poor repair. The City requested in its Petition that "the Court declare the structures located upon this property a public nuisance and enter an order directing the Defendant . . . to immediately vacate and secure the structures, renovate or remove the structures and level the ground upon which they stand." There

[1]The City alleges violations of the following provisions of the Municipal Housing Code of Des Moines: 14-10, 14-12, 14-13, 14-14, 14-16, 14-34, 03.04, 04.01.02, 04.09, 07.10, 07.11.

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is no indication that HUD has remedied any of the conditions listed in the Notice of Inspection.

The action is before the Court on HUD's motion to dismiss. Originally, HUD cited two grounds for this motion. First, HUD argued that the City's claim should be dismissed for want of subject matter jurisdiction on sovereign immunity grounds. *See* Fed. R. Civ. P. 12(b)(1). Second, HUD argued that the City's claim should be dismissed for failure to state a claim upon which relief can be granted because the claim was barred under the federal Supremacy Clause. *See* Fed. R. Civ. P. 12(b)(6).

On May 4, 2000, the Court issued a memorandum opinion and order on HUD's motion to dismiss. The Court denied HUD's motion to dismiss on sovereign immunity grounds and ordered the parties to supplement their briefs with respect to Supremacy Clause grounds for dismissal. Thus, the only remaining basis for dismissal is HUD's claim that the City has failed to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Both the City and HUD have supplemented their briefs accordingly. The matter is fully submitted.

II. Standard for 12(b)(6) Motion to Dismiss

In addressing a motion to dismiss under Rule 12(b)(6), this Court "is constrained by a stringent standard . . . . A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no* set of facts in support of his claim which would entitle him to relief." *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 545-46 (8th Cir. 1997) (quoting *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982) (citation omitted) (emphasis added)).

In addition, the complaint must be liberally construed in the light most favorable to the plaintiff and should not be dismissed simply because the court is doubtful that the plaintiff will

be able to prove all of the necessary factual allegations. *See Parnes*, 122 F.3d at 546. Finally, when considering a motion to dismiss for failure to state a claim, a court must accept the facts alleged in the complaint as true. *See Cruz v. Beto*, 405 U.S. 319, 322 (1972). The Supreme Court has articulated the test as follows:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183, 191 (1984). A motion to dismiss should be granted "only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995).

III. Discussion

The sole issue before the Court is whether the Supremacy Clause bars the City's lawsuit against HUD. The Supremacy Clause provides that the laws of the United States shall be the supreme law of the land. U.S. Const. art. VI, cl. 2. There are two ways for state and local law to run afoul of the Supremacy Clause: (1) the law may directly regulate or discriminate against the government (and therefore violate the intergovernmental immunity doctrine) or (2) the law may conflict with (and therefore be preempted by) an affirmative command of Congress. *North Dakota v. United States*, 495 U.S. 423, 434 (1990). HUD argues that the City's codes run afoul of the Supremacy Clause in both respects. The Court agrees.

A. Intergovernmental Immunity

The proscription that a state or local entity may not directly regulate the federal government or discriminate against the federal government is known as the doctrine of intergovernmental immunity. *See North Dakota*, 495 U.S. at 436. The City's attempt to apply its housing code to property owned by HUD is an attempt to directly regulate the federal government. The City's claim against HUD is therefore barred by the doctrine of intergovernmental immunity.

The doctrine of intergovernmental immunity was first articulated in *M'Culloch v. Maryland*, 17 U.S. 316, 425-437 (1819). In *M'Culloch*, the Court struck down a state tax imposed on a federally chartered bank. *Id.* at 437. In doing so, the Court held that "the states have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *Id.* at 436. Chief Justice Marshall explained: "If any one proposition could command the universal assent of mankind, we might expect it would be this–that the government of the Union, though limited in its powers, is supreme within it sphere of action." *Id.* at 405.

Over the years, the Supreme Court has repeated and refined this proscription. In *Johnson v. Maryland*, 254 U.S. 51 (1920), the Court held that a state could not require a postal driver to obtain a license from that state before driving on its roads. However, the Court in *Johnson*, cautioned that where the Federal Government has not promulgated a law on the subject, it may very well be that subjection to local law would extend to general rules that may incidentally affect the Government's operations, as for instance, an ordinance regulating the mode of turning at the corners of streets. *Id.* at 56. In *Mayo v. United States*, the Court, holding that the application of state inspection fees to government fertilizer violated the Supremacy Clause, noted

the following:

> Since the United States is a government of delegated powers, none of which may be exercised throughout the Nation by any one state, it is necessary for uniformity that the laws of the United States be dominant over those of any state. Such dominancy is required also to avoid a breakdown of administration through possible conflicts arising from inconsistent requirements. The supremacy clause of the Constitution states this essential principle. Article VI. A corollary to this principle is that the activities of the Federal Government are free from regulation by any state.

319 U.S. 441, 445 (1943). Finally, in *Goodyear Atomic Corp. v. Miller*, the Court stated that "[i]t is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation." 486 U.S. 174, 180 (1988) (citation omitted).

In *North Dakota*, the Supreme Court expounded on the parameters of the doctrine of intergovernmental immunity. *North Dakota*, 495 U.S. at 434-439. The Court held that "[a] state regulation is invalid only if it regulates the United States directly or discriminates against the federal government or those with whom it deals." *Id.* at 435. The Court explained that it had thoroughly rejected the argument that a state regulation that just indirectly regulates the federal government's activity is unconstitutional. *Id.* at 434. Therefore, the Court held, North Dakota regulations that imposed labeling and reporting requirements on out-of-state liquor suppliers to federal military bases did not violate the intergovernmental immunity doctrine. *Id.* at 436. The regulations did not directly regulate the federal government, because they operated against suppliers, not the Government. *Id.* Nor did the regulations discriminate against the federal government, because they actually provided the federal government an avenue to purchase from wholesalers that civilian retailers could not purchase from. *Id.* at 439.

Two federal district court cases provide additional guidance. A federal district court in

Minnesota has recently dealt with a similar issue now before this Court. In *United States v. City of St. Paul*, the City of St. Paul attempted to have a house owned by HUD declared a nuisance pursuant to the St. Paul housing code. No. 00-258, slip op. (D. Minn. May 1, 2000). The court granted summary judgment for HUD because St. Paul's claim was barred by both the intergovernmental immunity doctrine and the preemption doctrine. *Id.* With respect to intergovernmental immunity, the court found that St. Paul's housing code interfered and burdened HUD's congressionally mandated duties and thus violated the proscription set out in *M'Culloch v. Maryland*, 17 U.S. 316 (1819). *Id.* at 11. In *Commonwealth of Massachusetts v. Hills*, the court held that because federal law vested in the Secretary of HUD the authority to determine what to do with properties conveyed to HUD, she was not subject to prosecution under the state sanitary code. 437 F. Supp. 351 (D. Mass. 1977). The Court finds these cases instructive to the case at hand.

In this case, the City seeks to apply its housing code to HUD property. The City states that the disrepair of the ceilings, floors and walls in the structures are dangerous and that unsecured, vacant buildings pose an attractive nuisance to children and indigents. The City also states that the unsecured structures make rodent habitation probable, and that the rodents could then traverse the neighborhood. For all these reasons, the City claims that the property owned by HUD is in violation of the Municipal Housing Code of the City of Des Moines. In its state court petition, the City wants HUD to "vacate and secure the structures, renovate the structures, or remove the structures." Pet. at 2. This request is not a mere "indirect[] regulat[ion]," *North Dakota*, 495 U.S. at 434, or an "incidental" byproduct of local law, *Johnson*, 254 U.S. at 56. Rather the City seeks to "move directly against the activities of the Government" in the use of its property – a situation that runs the greatest risk of undermining the "fundamental command of

the Supremacy Clause." *North Dakota*, 495 U.S. at 438 n.9 (citation omitted). In short, by virtue of the doctrine of intergovernmental immunity, HUD is not subject to the City's local housing codes.

B. Preemption

In addition to intergovernmental immunity, the Court finds that HUD wins on preemption grounds. By virtue of the Supremacy Clause of the United States Constitution, federal law — which "encompasses both federal statutes themselves and federal regulations that are properly adopted in accordance with statutory authorization," *City of New York v. Federal Communications Comm'n*, 486 U.S. 57, 63 (1988) — can preempt state law. In some cases, federal law may expressly preempt state or local law, *see Kinley Corp. v. Iowa Utilities Bd.*, 999 F.2d 354 (8th Cir. 1993), or federal law may so "occupy the field" of a given area that state law is deemed preempted, *see Heart of Am. Grain Inspection Serv., Inc. v. Missouri Dep't of Agric.*, 123 F.3d 1098 (8th Cir. 1997). Even if, as in this case, Congress has not occupied the field, "state law is naturally preempted to the extent of any conflict with a federal statute, ... [or] where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. National Foreign Trade Council*, — U.S. —, —, 120 S. Ct. 2288, 2294 (2000) (citations and brackets omitted).

In this case, the local ordinances at issue directly conflict with, and are an obstacle to, a federal statute and its accompanying regulations. In the National Housing Act, 12 U.S.C. §§ 1701-1750, Congress declared a national goal of a "decent home and a suitable living environment for every American family." 12 U.S.C. § 1701t. Congress also declared it a goal to assist low-income families with their housing needs. *Id.* HUD explains that as part of carrying

out that goal, HUD insures the mortgages on qualifying homes. This means it promises to pay lenders in the event low income home-buyers fail to make payments. When the buyer defaults, HUD pays the lender what is owed and takes title to the property. HUD explains that under the Act, Congress gave HUD broad authority concerning the disposal of the properties acquired in this process. Under 12 U.S.C. § 1710(g), the Secretary is empowered to, among other things, "rent, renovate, modernize, insure, or sell for cash or credit, in his discretion, any properties conveyed to him [and] shall by regulation, carry out a program of sales of such properties and shall develop and implement appropriate credit terms and standards to be used in carrying out the program ...." The terms of the statute empower the Secretary to "sell real and personal property ... on such terms and conditions as the Secretary may prescribe." 12 U.S.C. § 1710(g).

Pursuant to § 1710(g), the Secretary promulgated regulations which provide that properties acquired by HUD can be offered for sale "as is." 24 C.F.R. § 291.100(c)(3). If HUD wishes to fix up a piece of property, it can do so; it's just not obligated to. Properties that need renovations sell at a discounted price. HUD explains that selling properties quickly ensures the maximum return to the mortgage insurance fund. *See* 24 C.F.R. § 203.670 ("It is HUD's policy to reduce the inventory of acquired properties in a manner that expands homeownership opportunities, strengthens neighborhoods and communities, and ensures a maximum return to the mortgage insurance fund.").

Prior to the mid-1970s, HUD had a policy to do exactly what the City is now demanding: refurbish and repair to its existing properties. In a 1991 report, the Assistant Secretary stated that the practice of refurbishment was discontinued for three reasons: (1) expensive repairs that were paid for out of the insurance fund were undone by acts of vandalism; (2) the Agency frequently found itself the victim of fraud by those with whom it contracted to perform renovations; (3)

repairs sometimes interfered with the renovation plans of purchasers who preferred to pay less money for property that they could fix themselves. *See* Single Family Property Disposition Program, 56 Fed. Reg. 13996, 13997 (1991).

The National Housing Act and its accompanying regulations demonstrate that federal policies regarding the disposition of federal property, like the one at issue here, are not made subject to local housing codes.[2] The National Housing Act gives HUD and its agents wide latitude to dispose of properties as they deem necessary to fulfill their legislative mandate. The City's attempt to apply its housing code to property owned by HUD "stands as an obstacle to the accomplishment and execution," *Crosby*, — U.S. at —, 120 S. Ct. at 2294, of HUD's Congressionally authorized authority to sell property "as is" and thereby maximize the return to the insurance fund. Forcing HUD to fix up the residence at 1256 E. 25th Street would override the provision of § 291.100(c)(3) which permits HUD to sell that property "as is." Under the Supremacy Clause, that outcome is not possible. *See Hillsborough County*, 471 U.S. at 716 ("[P]resumption that ... local regulation of health and safety matters can constitutionally coexist with federal regulation" can be overcome by showing a "conflict between a particular local provision and the federal scheme"); *City of New York*, 486 U.S. at 63-64 ("[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation and hence render unenforceable state or local laws[.]") (internal quotes and citation omitted); *see also Symens v. Smithkline Beecham Corp.*, 152 F.3d 1050, 1054 (8th Cir. 1998).

The City is correct to point out that there are competing policies at stake here: the City's

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[2] True, the National Housing Act and its accompanying regulations do not expressly oust local law. But given the overall scheme of the statute, the preemptive effect on the local law in this case is still the same. *See Hines v. Davidowitz*, 312 U.S. 52, 68 n.20 (1941) ("For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must, of course, be considered, and that which needs [to] be implied is of no less force than that which is express.").

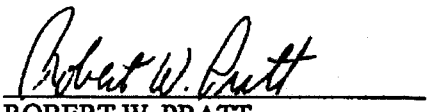
traditional concern in regulating the health and safety of its neighborhoods versus HUD's policy to administer a residential mortgage insurance program in a cost effective way. The Supreme Court has even identified this tension: "It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies." *City of New York*, 486 U.S. at 64. The Supreme Court, however, has instructed that when preemption principles are implicated, "if the agency's choice to pre-empt represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.* (internal quotes and citation omitted). HUD's "as is" policy reasonably accommodates the overall federal policy of addressing the needs of buyers and lenders in the low-income housing market on the one hand, and local housing regulations on the other. The Court therefore holds that those portions of the City's housing code requiring HUD to vacate, repair, or remove the property in question are preempted by the National Housing Act and its implementing regulations.

IV. Conclusion

For the reasons stated above, HUD's motion to dismiss (Clerk's #5) is **granted.**

IT IS SO ORDERED.

Dated this 22nd day of September, 2000.



ROBERT W. PRATT,
U.S. DISTRICT JUDGE