

October 16, 2018
New Business

**PLANNING AND
ECONOMIC
DEVELOPMENT
STANDING
COMMITTEE**



October 11, 2018

Councilmember James E. Tate, Jr.
Detroit City Council
1340 Coleman A. Young Municipal Center
Detroit MI 48226

Re: Applicability of Detroit’s Inclusionary Housing Requirements to Cooperative Housing Developments Financed under the National Housing Act Section 213 Program.

Honorable City Council:

On July 23, 2018, the Law Department received a request from Councilmember James E. Tate for a legal opinion as to whether the Inclusionary Housing Requirements in Ordinance No. 26-17 apply to cooperative housing developments financed under the National Housing Act of 1934, 12 U.S.C. 1715e, and whether the investment of HOME Investment Partnership Program funds affects the applicability of the ordinance. A copy of the request is attached as Exhibit A.

Questions Presented

1. **Whether the City of Detroit Inclusionary Housing Requirements apply to Cooperative Housing Developments financed under the National Housing Act Section 213 Program.**
2. **Whether the commitment of HOME Investment Partnership Program funds affects the applicability of the ordinance.**

Applicable Law and Analysis

1. **Whether the City of Detroit Inclusionary Housing Requirements apply to Cooperative Housing Developments financed under the National Housing Act Section 213 Program.**

The answer is “**it depends.**” The City’s inclusionary housing requirements will apply to cooperative housing developments financed under the Section 213 program if the City sells or transfers land for less than its true cash value for residential housing, or subsidizes a housing development project with city or federal grant funds.

Ordinance No. 26-17 Inclusionary Housing Requirements

City of Detroit Ordinance No. 26-17 requires that certain residential housing projects set aside a specific percentage of the total number of units for affordable housing. A project is subject to the ordinance if the development involves a “qualifying transaction.” A “qualifying transaction” is defined to mean any of the following:

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- (1) Type 1 - The sale or transfer of City-owned real property at less than true cash value which is intended to be developed for a residential housing project; or
- (2) Type 2 - Direct monetary support from the City of at least \$500,000 for a residential housing project; or
- (3) Type 3 - Commitment of Department of Housing and Urban Development Community Development Block Grant funds controlled by the City of at least \$500,000 for a residential housing project; or
- (4) Type 4 - Commitment of Department of Housing and Urban Development (HUD) HOME Investment Partnership Program funds controlled by the City of at least \$500,000 for a residential housing project; or
- (5) Type 5 - Commitment of at least \$500,000 through an as yet unidentified State of Michigan or Federal housing development program.

National Housing Act of 1934, 12 U.S.C. 1715e

The National Housing Act of 1934, 12 U.S.C. 1715e (“Section 213 Program”) controls and regulates cooperative housing developments that receive federally insured mortgages under the statute. The Section 213 Program is used to finance cooperative housing projects. To qualify for financing under the program, the developer must form a nonprofit cooperative housing corporation organized for the sole purpose of constructing the cooperative units for the members of the corporation. The program has per unit mortgage limits, which vary according to the size of the units, the type of structure, and the location of the project. The program imposes no restrictions on the income or characteristics of the cooperative housing project, and requires no local or federal appropriation or assistance that would subject it to local laws or regulations.

In short, a cooperative housing development that receives a federally insured mortgage is not subject to the City’s ordinance unless the development involves one of the above-enumerated qualified transactions. However, the developer or cooperative housing development can voluntarily comply with the City’s affordability requirements.

2. Whether the commitment of HOME Investment Partnership Program funds affects the applicability of the Ordinance No. 26-17.

The answer is “no” The Supremacy Clause of the United States Constitution instructs that the Constitution and laws of the United States are “the supreme Law of the Land . . . any [t]hing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI cl. 2. “[S]tate and local laws that conflict with federal law are ‘without effect.’” N.Y. SMSA Ltd. P’ship v. Town of Clarkstown, 612 F.3d 97, 103 (2d Cir. 2010) (quoting Altria Grp., Inc. v. Good, 555 U.S. 70, 76, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008)).



In general, three types of preemption exist: (1) express preemption, where the federal statute expressly preempts local law; (2) field preemption, “where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state or [local] law;” and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives. *N.Y. SMSA Ltd. P’ship*, 612 F. 3rd at 104.

With respect to the first and second preclusions, preemption does not apply. The rules and regulations of the Home Investment Partnership Program (the “HOME Program” or “HOME funds”) contain no express preemption provision, and HUD has not promulgated regulations so as to occupy the field to the extent that local regulation is prohibited.

With respect to the third preclusion, conflict pre-emption can occur in one of two ways: where “compliance with both federal and state or [local] regulations is a physical impossibility,” or “where the challenged state or [local] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Lozano v. City of Hazleton*, 724 F.3d 297, 303 (3d Cir. 2013).

HOME Investment Partnership Program

The HOME Program is a federal block grant program that provides funding to state and local governments to be used exclusively for affordable housing activities benefiting low-income households. There are four broad categories eligible for HOME funds: (1) rehabilitation of owner-occupied housing, (2) assistance to home-buyers, (3) rental-housing activities, and (4) tenant-based rental assistance. HOME funds must be used to assist low-income households, which are defined as households with annual incomes at or below 80% of the area medium income (“AMI”). Owner-occupied housing and home-buyers assistance requires that the purchase price or rehabilitation be no more than 95% of the median purchase price for the area, as published by HUD. Deeper income requirements apply to rental housing and tenant-based rental assistance with at least 90% of the units to be occupied by households at or below 60% of the AMI.

Ordinance No. 26-17 Inclusionary Housing Requirement

Section 14-12-5 of the City of Detroit Ordinance 26-17 requires that Type 1 and Type 2 qualifying transactions commit at least 20% of the dwelling units for rent or lease to be affordable for households earning up to 80% of the AMI. Type 3 and Type 4 qualifying transactions must commit 15% of the dwelling units for rent or lease to be affordable for households earning up to 60% of the AMI, and at least 5% of the units must be affordable for households earning up to 50% of the AMI.

Where a local ordinance stands in direct conflict to a federal regulation, the local law is preempted. *Marshall v. Consumers Power Co.* (1975) 237 N.W.2d 266, 65 Mich. App. 237. In *Michigan Manufactured Housing Association v Robinson Twp.*, 73 F. Supp. 2d 823 (W. D. Mich. 1999), the court held that the National Manufactured Housing and Safety Standard Act and the Department of Housing and Urban Development (HUD) regulations expressly preempted local



zoning ordinance roof-weighting requirements, which were more stringent than those imposed by the federal statute and HUD regulations.

Conversely, courts have held that if the state or local ordinance does not conflict with any HUD requirements . . . then the preemption doctrine does not apply. *Michigan Manufactured Hous. Ass'n*, 73 F. Supp. 2d 823, 826 (W.D. Mich. 1999) In *DeHart v. Town of Austin, Ind.*, 39 F.3d 718 (7th Cir. 1994), the Court held that the town of Austin ordinance prohibiting the possession of wild animals or animals capable of inflicting serious physical harm or death to human beings was not preempted by the federal Animal Welfare Act. The court concluded that the Act expressly contemplated state and local regulation of animals, and there was no showing that it was impossible to comply with both federal and local regulations.

The rules and regulations for the HOME program do not provide evidence of an intent to preempt state or local regulations on affordable housing. In this case, the City's ordinance does not interfere with the objectives of the HOME Program. However, the affordability requirements under the HOME program are more stringent than those imposed under the ordinance and take precedence over the City's ordinance.

CONCLUSION

For the reasons stated above, it is the opinion of the Law Department that absent a specific commitment of city or federal funds, or the sale or transfer of City owned land, the City of Detroit's Inclusionary Housing Requirements ordinance would not apply to cooperative housing development projects. In terms of the HOME Program, any commitment of HOME funds controlled by the City for a housing development project will trigger the affordability requirements under both federal and local regulations.

City of Detroit Law Department

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MARY SHEFFIELD
PRESIDENT PRO TEMPORE
DISTRICT 5

MEMORANDUM

TO: Mr. Jeff Donofrio, Executive Director
Workforce Development

THROUGH: Council Member James Tate, Chair
Planning and Economic Development Standing Committee

FROM: President Pro Tempore Mary Sheffield *(MS)*

DATE: October 12, 2018

RE: Request for Information Regarding Construction Related Workforce Development

Faced with the responsibility of voting on historic levels of tax abatements related to the Ford Development and others, I would like more information about the efficacy of the workforce development programs utilized by the City of Detroit, Detroit at Work Career Center and Michigan Works. This information is critical to my due and diligence and decision-making process.

Therefore, I am requesting the following information:

How many construction related workforce development programs are located in the City of Detroit?

What are the completion and job placement rates of each the program?

How are the training providers being monitored and rated based on their outcomes?

What follow-up, outreach and supportive services are provided to graduates who have yet to be placed?

What is the data regarding the patterns related to the causes of non-placement of graduates?

What are the outreach efforts in the neighborhoods that inform residents about training opportunities?

Thank you!

cc: Honorable Colleagues
Hon. Janice Winfrey, Detroit City Clerk
Stephanie Grimes, Liaison to Council, Mayor's Office