Beacon
CENTER OF TENNESSEE

FREE MARKETS.
INDIVIDUAL LIBERTY.
LIMITED GOVERNMENT.

July 28, 2016

VIA E-Mail
Metropolitan Council Office
Metro Historic Courthouse
One Public Square, Suite 204
P.O. Box 196300
Nashville, TN 37219-639

Re: Substitute Ordinance BL2016-133

Dear Metro Council and Mayor Barry:

We are the legal directors for Southeastern Legal Foundation and the Beacon Center of Tennessee, and we have monitored the content of proposed ordinances relating to so-called "inclusionary zoning," particularly as it relates to legal issues raised in similar matters across the United States. In the hope of assisting with your ongoing discussion from a legal perspective, we would like to offer our initial analysis on areas of concern. In particular, we have taken the time to consider substitute ordinance No. BL2016-133, which passed the Metro Nashville Council on first reading on July 5. But first, please permit us to introduce our organizations.

Southeastern Legal Foundation, founded in 1976, is a national public interest law firm advocating for individual freedom and property rights, limited government, and the free enterprise system. Our clients include individuals, companies, trade associations, and elected representatives. We have represented clients in numerous property rights cases, including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), *Dolan v. City of Tigard*, 512 U.S. 374 (1994) and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Beacon Center of Tennessee is a free market public policy organization and public interest law firm whose mission is to empower Tennesseans to reclaim control of their lives, so that they can freely pursue their version of the American Dream. Property rights, rule of law, and constitutional limits on governmental mandates are central to our goals. We

too have represented Nashvillians who have seen their property rights diminished by Metro regulations in the case of *Anderson v. Metro. Gov't of Nashville and Davidson County*, Case No. 15c3212 (Circuit Court of Davidson County, Tennessee, Twentieth Judicial District, filed Aug. 26, 2015), currently pending in the Eighth Circuit of Davidson County Circuit Court.

Introduction

On July 5, 2016, substitute ordinance BL2016-133 ("Proposed Ordinance") passed first reading. Through the Proposed Ordinance, the Metropolitan Government of Nashville seeks to amend various sections of Title 17 of the Metropolitan Zoning Code related to affordable housing mandates. The Proposed Ordinance has been referred to the Planning Commission Ad-Hoc Affordable Housing Committee Planning & Zoning Committee.

The Proposed Ordinance requires, with one very limited exception,[1] that anyone seeking a residential development entitlement either set aside a certain percentage of units or floor area for affordable or workforce housing, pay a relatively large in lieu fee, or build affordable or workforce housing at a legislatively-directed location.

The proposed affordable housing law is mandatory. It provides in relevant part that:

> Where additional residential development entitlements are sought as specified in this title, including but not limited to, change in uses, height, density or floor area, or where public resources or property is provided, a development with rental residential units *shall* be subject to the provisions of this Section as long as financial incentives from the Metropolitan Government of Nashville and Davidson County are available.

BL2016-133 at 17:40-480(B)(1) (emphasis added). It subjects all applicants of residential development entitlements such as permits and variances, to the affordable housing mandate, even if the applicant does not seek or receive financial incentives from the Metropolitan Government.

In layman's terms, affordable housing mandates like the one proposed by the Metropolitan Government invite legal challenges because they

[1] The Proposed Ordinance exempts residential developments with fewer than five units from the affordable housing mandate. BL2016-133 at 17.40-780(B)(2)-(3).

demand that *private* individuals bear the burden of addressing a *public* concern. It is no more acceptable to expect property owners to address public housing by losing money on the houses they build than it is to expect grocers to address hunger by losing money on the food they sell. If this is a problem that needs to be addressed, then *governments* should address it, not force private parties to do it on their behalf.

A requirement that a property owner must set aside a certain percentage of his or her inventory to sell at below the median market price (or set a certain price at all) is more than just inconsistent with the American tradition and offensive to rudimentary notions of free markets. Forcing developers to sell the homes they build at a loss poses very serious legal and constitutional problems.

The Proposed Ordinance Violates Tennessee Law

As the Metropolitan Government is no doubt aware, the General Assembly recently passed a law prohibiting local governments from enacting affordable housing mandates. The law (currently designated Public Chapter No. 822) took direct aim at measures such as these (emphasis added):

> A local governmental unit *shall not enact, maintain, or enforce any zoning regulation, requirement, or condition of development* imposed by land use or zoning ordinances, resolutions, or regulations or pursuant to any special permit, special exception, or subdivision plan that requires the direct or indirect allocation of a percentage of existing or newly constructed private residential or commercial rental units for long-term retention as affordable or workforce housing.

The Proposed Ordinance is *not* an incentive-based approach, which would be allowed under the new state law. While it requires property owners comply "as long as financial incentives" are available this does not mean it is not mandatory. So long as incentives are available, the mandates are in effect. The property owner applying for the "residential development entitlement," more commonly known as a permit, has no ability to decline the incentives and avoid the mandate. Subpart 3 of the Proposed Ordinance makes the mandatory nature perfectly clear. It provides that the law's mandates "shall not be required" if housing prices stabilize to what the Metropolitan Government deems to be an acceptable level. The obverse of this is that the mandates *shall* be required when the government considers housing to be unacceptably expensive. So while the law's *applicability* might depend on the availability of incentives, this does nothing to make it any less

*mandatory*. When incentives are available, and when the Metropolitan Government thinks housing is too expensive, the developer must comply.

Compulsory compliance with an affordable housing mandate is flatly illegal under Public Chapter No. 822. The Proposed Ordinance provides for a "condition of development," and a "special exception" that "requires the direct or allocation of a percentage" of new construction to be set aside for affordable or workforce housing. These sorts of approaches to addressing affordable housing were preempted as a straightforward application of State law.

The ability of the General Assembly to preempt localities is well-established. As a matter of state constitutional law, local governments are subdivisions of, and thus subservient to, the state. Localities, unlike states, have no inherent authority. Concerns about federalism exist between the states and the federal government that do not exist between the state and localities.

Public Chapter No. 822 permits localities to create incentive-based programs, but not mandatory programs. The Proposed Ordinance is mandatory, and it cannot slip past the clear dictates of Public Chapter No. 822 notwithstanding the fact that it couples mandates with incentives.

The Proposed Ordinance is Constitutionally Problematic

The Proposed Ordinance is also constitutionally infirm. It runs afoul of the Fifth Amendment to the United States Constitution because it requires landowners to give up a constitutional right in exchange for a discretionary benefit and because it forces some people to bear public burdens that should be borne by the public as a whole.

The Takings Clause prohibits the government from takings one's property without just compensation. U.S. Const., amend. V. "One of the principle purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Dolan v. City of Tigard*, 512 U.S.374, 384 (1994) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Through a series of cases developed over the last three decades, the Supreme Court has made clear that the Fifth Amendment not only protects one from a physical taking, but also from governments that misuse the power of land-use regulation. *Koontz v. St. John's River Water Mgmt. Dist.*, 133 S.

Ct. 2586, 2591; *see generally Dolan*, 512 U.S.374; *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

To prevent governments from circumventing the Takings Clause and from trying to accomplish indirectly what they cannot do directly, the Supreme Court applies the "unconstitutional conditions doctrine." Under this well-settled doctrine, "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan*, 512 U.S. at 385. In other words, the Takings Clause prohibits the Metropolitan Government from forcing landowners to choose between a land-use permit and the right to receive just compensation from a taking.

Just as the government may not physically take one's property without just compensation, it also may not require a person to give up a constitutional right to receive a "residential development entitlement." "Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation." *Koontz*, 133 S. Ct. at 2596.

The Metropolitan Government may not bargain with land-use permits in order to bypass their takings obligations. To protect property owners from being forced to surrender their Fifth Amendment right in order to obtain a building permit, a variance or other government benefit related to their property, the Supreme Court applies a heightened level of scrutiny to ordinances like the one at issue here. Under this scrutiny, a "government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." *Koontz*, 133 S. Ct. at 2591.

While the Metropolitan Government may have a legitimate interest in providing affordable housing for its residents, and while making landowners pay for those affordable housing units may increase the supply, the nexus required by *Nollan* engages in a more searching inquiry that cannot be satisfied here. Further, affordable housing mandates are not generally proportional to the impact that residential developments are likely to create and no benefit accrues to the developer. This is especially true for affordable housing mandates that apply to any and all residential development entitlements such as mere room additions resulting from home remodels, like the one proposed here. While the burden rests with the Metropolitan

Government, there is no conceivable argument under which it could satisfy the heightened scrutiny demanded by the Supreme Court.

Finally, the effect of the Proposed Ordinance is the same as a market-wide cap. And there is no question that if the Metropolitan Government enacted an ordinance instituting a market-wide cap on home prices, it would be unconstitutional because the Fifth Amendment protects property owners' right to seek the highest price. *See, e.g., Old Dearborn Distrib. Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 192 (1936).

The Proposed Ordinance is a prime example of the "gimmickry" that the Supreme Court so harshly rejected over two decades ago. *Dolan*, 512 U.S. at 387. The Metropolitan Government knows that to some, a "residential development entitlement" may be worth more than the property interest a developer is forced to give up. Through the Proposed Ordinance, the government seeks to take advantage of that, and in doing so violates the Fifth Amendment to the United States Constitution.

The Proposed Ordinance Runs Afoul of the Tennessee Constitution

In addition to running afoul of the United States Constitution, the Proposed Ordinance implicates several Tennessee constitutional provisions as well. First, it burdens Tennessee's "Law of the Land" Clause found at Article I, Section 8. This prohibits taking away the "freehold, liberties, or privileges," except by judgment of his peers or the law of the land. This constitutional provision protects the right of property. *Harbison v. Knoxville Iron Co.*, 103 Tenn. 421, 429-30, 53 S.W. 955, 957 (1899). *See also Trs. Of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 624 (1819) (New Hampshire's Law of the Land Clause protects the "right to hold and possess property"). According to the Tennessee Supreme Court, the Law of the Land Clause was "intended to secure the individual from the arbitrary exercise of the powers of government, *unrestricted by the established principles of private rights and distributive justice*." *Harbison*, 53 S.W. at 958.

A mandate that a property owner must sell their homes at a particular price set by the government—indeed, that the property owner must *lose* money in the transaction—has no nexus to any established principle of property law. Demanding that a person transfer his or her own property to another is not the law, but rather a "decree under legislative forms." *Loan Ass'n v. Topeka*, 87 U.S. 655, 664 (1874). However laudable the goal of making housing more affordable for some Nashvillians, the fact remains that your law dictates precisely how other Nashvillians must dispose of their own

lawfully held property. Such a law is unknown to the Anglo-American tradition of property rights.

Second, the Tennessee Constitution also prohibits passing laws that are "inconsistent with the general laws of the land." Tenn Const. Art. XI, § 8. The Proposed Ordinance poses troubling questions. It imposes special burdens on some individuals; it provides special benefits to others. Only some Nashvillians will enjoy the legal protection of discounted housing. Only some Nashvillians will be forced to pay for it. The Proposed Ordinance embodies a naked preference that runs afoul of this constitutional provision.

Conclusion

Based on our initial analysis, it is our determination that the Proposed Ordinance clearly violates the United States Constitution, the Tennessee Constitution and Tennessee state law.

Yours in Freedom,

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