Beacon
CENTER OF TENNESSEE

December 8, 2016

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

Re: Ordinance BL2016-133

Dear Metro Council:

We are the legal directors for Southeastern Legal Foundation and the Beacon Center of Tennessee, and we continue to monitor the content of ordinances relating to so-called "inclusionary zoning," particularly as it relates to legal issues raised in similar matters across the United States. On July 21, 2016, we sent you a letter offering our initial analysis of substitute ordinance No. BL2016-133 in the hope of assisting with your ongoing discussion. On September 6, 2016, the Metro Nashville Council adopted its final version of BL2016-133 (the "Ordinance"). We write today because the Ordinance sets forth an affordable housing mandate applicable to both rental and for-sale residential developments and that mandate clearly violates the United States Constitution and Tennessee state law.

Allow us first to once again 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). As you are aware, in response to this case Metro is currently in the process of revising the ordinance for the third time to address the very serious constitutional problems brought to light by the lawsuit.

Introduction

On September 6, 2016, the Metropolitan Government of Nashville adopted the Ordinance. Through the Ordinance, Metro amended various sections of Title 17 of the Metropolitan Zoning Code related to affordable housing mandates.

The 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 law is mandatory and it addresses applicability in both Section 2 and Section 4. First, Section 2 amends Chapter 17.40.780 of the Metropolitan Code and provides in relevant part that:

> When additional residential development entitlements are gained through an amendment to the official zoning map or when public resources or property is provided for a residential development, the rental residential units *shall* be subject to the provisions of this Section as long as adequate financial incentives from the Metropolitan Government of Nashville and Davidson County are available. A property owner or developer with for-sale residential units may participate in the incentives of this Section.

BL2016-133 at Section 1.17.40.780(B)(1) (emphasis added). Next, Section 4 amends Chapter 17.40 of the Metropolitan Code by inserting a new Section 17.40.55 which provides:

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[1] The Ordinance exempts residential developments with fewer than five units from the affordable housing mandate. BL2016-133 at Section 1.17.40-780(B)(2)-(3).

> As an incentive to encourage developers and property owners to meet the affordable and workforce housing goals set forth in this Title, *all* proposed residential development that seeks to increase development entitlements beyond that permitted by the current base zoning district *shall* comply with Section 17.40.780.

BL2016-133 at Section 4 (emphasis added). Thus, the Ordinance 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 the wake of the Council's actions, Metro officials and advocates for the law publicly stated that the law was only intended to apply to apartment units. Thus, the mandatory language found in Section 4 appears to run against the stated intentions of the final bill. Either it should not be in the final bill, or the Council was misled about the law that was passed. One thing is sure: Section 4's usage of the word, "shall," leaves open the possibility that the affordable housing mandates may apply to residential development to the same degree as apartments, in contravention of the many public statements.

We understand that the Metropolitan Government insists that the mandate only applies to rental residential developments and that the requirement in Section 4 that "*all* proposed residential development" comply with the mandate set forth in Section 2 is somehow overridden by the conflicting language set forth in Section 2 that developers with "for-sale residential units *may* participate in the incentives of" Section 2. Not only is this reading incorrect, but it is also misleading to all Nashvillians.

An ordinance cannot be both voluntary and mandatory at the same time – it is either one or the other. And here, where there is a provision that forces builders to set-aside a portion of their development project to sell at below-market or below-cost prices, or in lieu pay a steep fine, there can be no doubt that the Ordinance sets forth a forced mandate. If the Metropolitan Government truly did not intend for the affordable housing mandate to apply to for-sale residential developments, then Section 4 is unnecessary. Metro should amend the Ordinance to remove Section 4 in its entirety.

The Affordable Housing Mandate Violates State and Federal Law

As we explained previously, in layman's terms, affordable housing mandates like the one passed by the Metropolitan Government invite legal challenges because they 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 automobile dealers to address transportation by losing money on the cars 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. This is fundamental to the constitutional right to use and enjoy private property.

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 Ordinance Violates Tennessee Law

As the Metropolitan Government is no doubt aware, just last year the General Assembly 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 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 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 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 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 Ordinance is Constitutionally Problematic

The 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 adopted 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 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 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 Ordinance, the government seeks to take advantage of that, and in doing so violates the Fifth Amendment to the United States Constitution.

Metro should fix this ordinance

We respectfully request Metro fix the law to address the serious legal and constitutional problems therein. For the reasons explained above, Metro's law will not be able to withstand a legal challenge and the city will, as it has recently been forced to do in the *Anderson* case, return the law back to the Council in any event. Fixing it now, in advance of lawsuit, will spare the city the time and expense of litigation.

We are fully prepared to litigate this matter if need be. Metro may not be so indifferent to the rights of its citizens. If nothing else, the confusion surrounding the contradictory language in Section 4 warrants an amendment. If Metro actually means that Section 4 is not mandatory, then it should think nothing of making the law actually reflect this change. If Metro does not fix the law, then we will have no choice but to assume that Metro will only do so if ordered by a court.

Unfortunately, this may come at great taxpayer expense. In addition to paying for your own attorneys, the Court may order Metro to pay the

attorneys' fees of the opposing parties.[2] Such an award is unnecessary if Metro does what it will ultimately do in the end anyway: change your unconstitutional and illegal law.

Yours in Freedom,

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[2] Under the Civil Rights Act (42 U.S.C. § 1988) a court "not merely 'may' but *must* award fees to the prevailing plaintiff." *Indep. Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989) (emphasis preserved); *see Hensely v. Eckerhart*, 461 U.S. 424, 429 (1983). "[B]ased on Congress's experience with over 50 fee-shifting provisions in other statutes, dating back to Reconstruction-era civil rights statutes," Section 1988 was enacted as a statutory presumption for the granting of fee awards to prevailing parties. *Id.* at 444, n.3; *see also Keith v. Howerton*, 165 S.W.3d 248, 252 (Tenn. Ct. App. 2004) (prevailing party "will ordinarily be entitled to full compensation for time and effort expended in the representation").The awarding of full attorney fees serves an important public interest by empowering persons otherwise without means to protect their rights. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 559 (2010).

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