

U. S. Department of Housing and Urban Development



Office Of Counsel

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City of Brooklyn Park
5200 85th Avenue North
Brooklyn Park, MN 55443

██████████ Building Official
City of Brooklyn Park
5200 85th Avenue North
Brooklyn Park, MN 55443

Dear Sirs:

Our office was asked by HUD's Santa Ana Homeownership Center to write to you in reference to the applicability of the City of Brooklyn Park's Point of Sale Housing Inspection Program to the sale to third parties of single family homes in Brooklyn Park owned by the Secretary of Housing and Urban Development under HUD's REO Property Disposition program. We are seeking a determination from the City of Brooklyn Park that the Point of Sale Program is not applicable to such sales by HUD based on an understanding of HUD's program as well the existence of clearly applicable and established federal law.

We believe that a number of HUD's homes in Brooklyn Park would require repairs if they are subject to inspection under this program. So, if the program is applicable to HUD, it appears that HUD would be required to make various repairs to its properties before they could be effectively sold and transferred to the ownership and occupancy by its purchasers.

HUD's Program

The basics of HUD's REO Property Disposition program are as follows. Private lenders make qualified mortgage loans and the Department insures the lenders against loss on those loans. After mortgage loans go into default, the lenders foreclose on the properties involved and obtain title to the properties out of the foreclosure. In order to receive payment on their mortgage insurance claim with HUD, the lenders then subsequently convey title to these properties to HUD (the Secretary of HUD specifically) and, typically, a deed from the lender to the Secretary is recorded.

HUD then sells these foreclosed properties to the general public, usually to owner occupant purchasers, or sometimes HUD sells some of its properties to nonprofit entities or local government agencies for use in housing programs for low and moderate-income persons. If no

owner occupant purchasers are interested in a property after a period of exclusive availability to such buyers, HUD will open its properties to purchase by investors.

By statute and regulation, HUD is to sell its properties as fast as it can preferably to owner occupants in order to rebuild communities and to replenish its mortgage insurance funds for use in insuring more home mortgages for more Americans.

* Preemption and Immunity under Federal Law

We believe that two different established doctrines of federal Constitutional law create both a preemption of HUD's statutorily mandated sales program over the City of Brooklyn Park's ordinance mandating seller compliance with the Point of Sale Housing Inspection Program and that would make HUD immune from any attempt by the City to enforce this law against HUD. These doctrines are explained in some detail below.

Basically, under the federal doctrine of "conflict preemption," a state or local government cannot hold the federal government to local standards of repair or improvement for federally owned properties at least when those standards conflict with federal regulations and interfere with the accomplishment of a congressional objective. Here, the National Housing Act gives the Secretary broad discretion to decide how to manage and dispose of its single family REO properties. Many years ago, the Secretary, in turn, adopted REO regulations that call for the quick sale of HUD-owned properties on an "as-is" basis without repair or improvement – specifically rejecting an approach it had previously tried that called for substantial repair and improvement of the properties. For HUD to follow the City of Brooklyn Park's ordinance would conflict with HUD's REO "as-is" sales regulations and interfere with the accomplishment of the long-standing sales program that the Secretary implemented in his Congressionally authorized discretion.

Similarly, the federal doctrine of "intergovernmental immunity" prevents the application of state or local regulatory powers to federally owned property unless Congress provides a clear indication that the state or locality is meant to have such power. It is very likely that the City of Brooklyn Park's Point of Sale Housing Inspection Program would be found to be an invalid attempt by the City to assert such regulatory powers against HUD as the owner of single family homes. Under the National Housing Act scheme described above, you can see that Congress has not given state or localities such power over HUD REO properties. The case law on these doctrines talks about the need for HUD to be free of even inspection requirements like those in the Point of Sale Program.

As recently as 2001, in a case brought by HUD, the federal courts applied these doctrines to the HUD REO program to find that HUD is not subject to the nuisance abatement code of the City of St. Paul, Minnesota, and that HUD must be free to carry out its nationwide program without being subject to a vast array of state or local requirements. See, U.S. v. City of St. Paul, 258 F.3d 750 (8th Cir. 2001) and the underlying district court opinion, copies of which we have enclosed for your review or for the review of your legal department. See also, City of Country Club Hills v. HUD, No. 99 C 7139, 2001 WL 1117276 (N.D.Ill. Sept. 17, 2001) in which these

doctrines were applied to bar application of a city's nuisance ordinances to HUD in a case brought against HUD. A copy of that opinion is also enclosed.

These comments are intended to be entirely informational at this point in time, although these doctrines seem to be clearly implicated by the Point of Sale Housing Inspection Program. Obviously, we cannot predict whether the appropriate parties within HUD would formally and legally pursue such arguments against the City's program and we would not be the office within HUD to decide whether or when to pursue such a case. We believe, however, that there are more than ample bases as discussed above to ask the City to determine that the Point of Sale Program is not applicable to HUD's sales of its properties located within the City so that these legal issues become moot.

If you have question about this letter or wish to discuss this issue with our office please contact Ken Roland, Attorney-Advisor, at 303-672-5368. We will look forward to a response from the City to our request in this matter as soon as is reasonably possible.

Sincerely,

Lisa Coronado
Deputy Regional Counsel

Enclosures