



U.S. Department of Housing and Urban Development
New York State Office
Jacob K. Javits Federal Building
26 Federal Plaza
New York, New York 10278-0068
<http://www.hud.gov/local/nyn/nynopen.html>

January 30, 2009

The Honorable Jonathan Rosenbluth
Union TWP Municipal Court
981 Caldwell Avenue
Union, New Jersey 07083

Re: CCS-2009-010527 – Violation for 1502 Oakland Avenue
State of New Jersey vs. Secretary of Housing and Urban Development

Dear Judge Rosenbluth:

The U.S. Department of Housing and Urban Development (“HUD”) has been cited in the above referenced matter. On behalf of HUD, I request that the above citation be dismissed. HUD has notified its property management company of the violation. In addition, we request that the citation be dismissed because case law provides that HUD is not subject to local code violations under the doctrines of sovereign and intergovernmental immunity and preemption.

I. The Supremacy Clause

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 in which state and local law may violate the Supremacy Clause: (1) the law may conflict with (and therefore be preempted by) an affirmative command of Congress or (2) the law may directly regulate or discriminate against the federal government (and therefore violate the intergovernmental immunity doctrine). See North Dakota v. United States, 495 U.S. 423, 434 (1990).

A. Preemption

By virtue of the Supremacy Clause of the United States Constitution, federal law – which “encompasses both federal statutes themselves and the federal regulations that are properly adopted in accordance with statutory authorization,” can preempt state law. City of New York v. FCC, 486 U.S. 57, 63 (1988). Federal law may so “occupy the field” of a given area that state law is deemed preempted. See Heart of Am. Grain Inspection Service v. Missouri Department of Agriculture, 123 F.3d 1098 (8th Cir. 1997). Courts have made clear that “federal regulations, no less than federal statutes, may have a preemptive effect.” Southeastern Fisheries Ass’n v. Mosbacher, 773 F.Supp. 435, 440 (D.D.C. 1991). If regulations are “statutorily authorized,” the courts consider, as “part of the pre-emption analysis[,] whether the regulations evidence a desire to occupy a field completely.” R.J. Reynolds Tobacco Company v. Durham

County, 479 U.S. 130, 149 (1986). Furthermore, the statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purpose thereof.” City of New York, 486 U.S. at 64. Therefore, in addition to local codes being preempted if federal law occupies the field that those codes regulate, HUD regulations regarding the management and sale of HUD properties will preempt local codes if those codes frustrate the purpose of the regulations.

The National Housing Act (NHA) and its accompanying regulations demonstrate that federal policies regarding the disposition of federal property owned pursuant to that Act are not made subject to local housing codes. Congress granted HUD broad authority to dispose of homes it acquires under the Single Family Mortgage Insurance Program. The pertinent statute states:

Notwithstanding any other provision of law relating to the acquisition, handling, or disposal of real property by the United States, the Secretary shall have the power to deal with, complete, rent, renovate, modernize, insure, or sell for cash or credit, in his discretion, any properties conveyed to him in exchange for debentures and certificates of claims as provided in this section.... The Secretary 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 Secretary may sell real and personal property acquired by the Secretary pursuant to the provisions of this Act on such terms and conditions as the Secretary may prescribe.

12 U.S.C. § 1710(g) (emphasis added).

Moreover, HUD regulations implementing the NHA clearly show that the Secretary of HUD has chosen to avail himself of that discretion and occupy the field regarding the disposition of HUD properties. The regulations leave it to “HUD [to] issue detailed policies and procedures that must be followed in specific areas.” 24 C.F.R. § 291.1(a).

In Commonwealth of Massachusetts v. Hills, 437 F. Supp. 351 (D. Mass. 1977), 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, the Secretary was not subject to prosecution under the state sanitary code. “To allow subjection to such prosecution would interfere with the HUD Secretary’s official duties in maintaining property acquired by HUD as authorized by [the NHA.]” Id. at 353; see also, Booker v. Edwards, 99 F.3d 1165, 1169 (D.C. Cir. 1996) (“It is enough that the agency, with appropriate Congressional authorization, intended to encompass the area in question—an intent relatively readily found for activities characteristically governed by federal law such as the disposition of federal property.”)

Similarly, Union Township’s Municipal Code, as applied to properties owned by HUD, is preempted by NHA’s grant of discretion to the Secretary to handle property owned by the United States.

B. 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. An attempt to apply municipal codes to property owned by HUD is an attempt to directly regulate the federal government and is barred by the doctrine of intergovernmental immunity.

The doctrine of intergovernmental immunity was first articulated in the seminal opinion in McCulloch v. Maryland, 17 U.S. 316 (1819). The McCulloch court wrote, “[t]he primary purpose which the supremacy of the Federal Government serves is the carrying out, free from individual state control or interference, the measures of government created ... for the benefit of [all].” Id. at 435. The Court went on to hold that “[t]he states have no power, by taxation or otherwise, to retard, impede, burden, or on 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.

Only if Congress expressly permits the regulation, may a state or local government regulate a federal function or facility. See Goodyear Atomic Corporation v. Miller, 486 U.S. 174, 180 (1988) (“It 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.”). See also Mayo v. United States, 319 U.S. 441, 445 (1943) (“[T]he activities of the Federal Government are free from regulation by any state.”).

Because HUD is an agency of the Federal Government, its activities must remain free from regulation by states or localities, including regulation of its properties under the Union Township Municipal Code. Moreover, HUD’s extensive regulatory scheme applies uniformly to all HUD owned properties nationwide. The efficiency of this scheme would be rendered moot if HUD were subject to a multitude of distinct local ordinances.

In this matter, Union Township is attempting to use its municipal code to burden the United States Government, by ordering HUD to take affirmative actions because of HUD’s ownership of real property. Furthermore, Union Township is burdening HUD’s ability to manage and dispose of its properties quickly and efficiently by attempting to force HUD to comply with local property maintenance codes. Union Township is thereby impermissibly interfering with the federal government’s ability to execute its function of returning properties to the market as quickly and cheaply as possible. Union Township’s enforcement of its municipal code, as applied to properties owned by HUD, is barred by the doctrine of intergovernmental immunity.

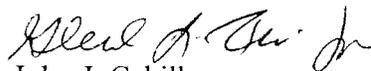
II. Sovereign Immunity

The United States, its agencies, and federal officials acting within the scope of their official functions are subject to suit only if the Government's sovereign immunity has been waived for the cause sought to be asserted. United States v. Mitchell, 445 U.S. 535, 538 (1980); Dugan v. Rank, 372 U.S. 609, 620 (1963). This waiver of sovereign immunity must be unequivocally expressed by Congress, Mitchell at 538, and the plaintiff bears the burden of showing that the government has consented to suit. Cominotto v. United States, 802 F.2d 1127, 1129 (9th Cir. 1986). The State of New Jersey has not and cannot establish that the United States has waived its jurisdiction to be sued in Union Township Municipal Court for violation of the municipal code. See Commonwealth of Massachusetts, 437 F.Supp. at 354 ("The court agrees with [HUD's] contention ... that the government has not waived its immunity with regard to any penalty imposed for violations of the State Sanitary Code.")

Conclusion

For all the reasons set forth above, we respectfully ask that the citation issued for 1502 Oakland Avenue be dismissed. If this matter is not dismissed, we request a continuance so that we may have the U.S. Attorney's Office appear on our behalf and have the matter removed to federal court. If you have any questions, or wish to discuss this matter, please call Louis Gioia, Attorney-Advisor, at 212-542-7211.

Sincerely,



John J. Cahill
Regional Counsel for
New York/New Jersey