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TO: Ralph Blessing, Land Use Bureau Chief
Valerie Rosenson, Legislative Officer, Board of Representatives

FROM: Michael Toma, Assistant Corporation Counsel *MST*

DATE: September 3, 2020

RE: Proposed Affordable Housing Trust Fund Ordinance

You asked the following questions about the proposed Affordable Housing Trust Fund ordinance. Our answers appear below the questions.

Question: There seems to be a legal opinion that stated that fee-in-lieu money collected by the City cannot be used for rental assistance but must be used for "brick and mortar" affordable housing projects. Would that limitation still be applicable if the city's fee-in-lieu funds were transferred into the Trust Fund, which also allows for rental assistance?

Answer: Attorney Dana Lee did author such an opinion. The reason for his conclusion was that state law (C.G.S. 8-2i) expressly requires that fee-in-lieu money be used for constructing, rehabilitating or repairing below market rate units. This statutory requirement on the use of the funds cannot be avoided by transferring the fee-in-lieu funds into an Affordable Housing Trust Fund, for the reason that the City cannot by ordinance supersede this state statute. That is, the Board of Representatives could not adopt an ordinance providing that fee-in-lieu money that has been collected by the City's Zoning Board pursuant to C.G.S. 8-2i can be used without complying with the restrictions on the use of such funds set forth in the statute. Therefore, any provision in the proposed ordinance purporting to authorize the use of fee-in-lieu funds for anything other than the constructing, rehabilitating or repairing of below market units would not be valid.

There is a clause in C.G.S. 7-148, which is the general municipal powers statute, authorizing municipalities to create trust funds, and this statute does not place restrictions on the use of the money in a fund created under this statute. However, since there is also a statute, C.G.S. 8-2i, that specifically regulates the use of fee-in-lieu money, the Board of Representatives could not rely on the general grant of authority in C.G.S. 7-148 to override C.G.S. 8-2i on the use of fee-in-lieu funds. When engaging in statutory construction, specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling. Lagueux v. Leonardj, 148 Conn.App. 234 (2014).

Question: The second issue concerns the relationship between the Trust Fund and the Purchasing Ordinance. The idea behind the Trust Fund is to simplify and de-politicize the distribution of funds for affordable housing purposes. If, however, every project that the Trust Fund supports must go through the City's purchasing process that requires contract approval from the Planning Board, Board of Finance and Board of Representatives then the Trust Fund as currently conceived would not create many new efficiencies.

An example: The Land Use Bureau has issued an RFP for an Affordable Housing Study. The money was appropriated through the normal budget process and a contract was prepared by Legal and Purchasing and is now going through the process. If the Trust Fund were to initiate the Study it would have the money - but would the contract for the consultant still be subject to the purchasing ordinance? And, if yes, is there a way to modify the Affordable Housing Trust Fund Ordinance and or Purchasing Ordinance to change that?

Answer: In general, the Purchasing Ordinance would apply to expenditures of funds from the Affordable Housing Trust Fund, subject to the caveat discussed below. Charter section C5-50-2(j) provides, in pertinent part:

In accordance with regulations to be prescribed by ordinance, the Office of Administration shall purchase and be responsible for the proper receipt of all articles, materials, supplies and insurance, including those related to capital projects, for all offices, departments, boards, commissions, authorities and agencies. [emphasis added]

Therefore, the Purchasing Ordinance applies to the Trust Fund, as it is an “authority” or “agency” of the City.

Whether a particular use of funds from the Trust Fund would be subject to the requirements of the Purchasing Ordinance depends on whether goods or services are being purchased, as the Purchasing Ordinance only applies to purchases of goods or services.¹ As an example, the proposed ordinance authorizes the use of funds for the provision of favorable financing to developers of affordable housing. The offering of favorable financing, if performed directly by the City without the assistance of a hired professional, would not involve the purchase of any service, and so the Purchasing Ordinance would not be triggered. On the other hand, selecting a consultant to perform a study is a use of funds that would trigger the Purchasing Ordinance’s requirement to use a competitive process to select the consultant.

Because Charter section C5-50-2(j) requires the City to make purchases for all authorities and agencies of the City, including the Trust Fund, the Board of Representatives cannot by ordinance completely exempt the Trust Fund from the Purchasing Ordinance. However, this Charter section, by its express terms, concerns purchases of “all articles, materials, supplies and insurance.” Consequently, an argument could be made that services, such as professional consulting or financial services, are not covered by the Charter section and therefore the Board of Representatives could exempt the Trust Fund from the Purchasing Ordinance when the Trust Fund purchases such services. Whether it would be a good idea for the Board of Representatives to do so should be carefully considered, as the Trustees of the Trust Fund have a fiduciary responsibility to spend its funds wisely, and the competitive process required by the Purchasing Ordinance helps to achieve that objective.

¹ The opening section of the Purchasing Ordinance, Sec. 23-14, provides that pursuant to Section C5-50-2(j) of the Charter, regulations governing the purchasing of goods and services are hereby established.