

**INCLUSIONARY ZONING:
HOUSING AFFORDABILITY SUBCOMMITTEE
RECOMMENDATIONS
TO THE CITY OF MADISON HOUSING COMMITTEE**

January 16, 2003

SUBCOMMITTEE MEMBERS

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Inclusionary Zoning: Recommendations for Madison

16 January 03

Background

The Department of Planning and Development estimates that about 20% of Madison's 'affordable housing' includes some form of public assistance in its financing; other portions of the 'affordable' housing stock are aged and less desirable, or limited in usefulness to Madison's changing population. In many cases, dwelling units of the public and privately owned affordable housing stock are concentrated in relatively few neighborhoods. Given Madison's relatively high wages and low unemployment, private developers have indicated to the Housing Affordability Subcommittee that the private housing market can produce housing affordable to 100% of the area median income households, but has not routinely included such housing or more affordable housing in all of the new neighborhoods. Density (and speed of the review process) has often been the key characteristic to produce affordability, and increasing density without consideration of neighborhood character is resisted by many neighborhoods that have had to live with the results of ill-conceived projects.

Over the past ten-plus years Madison's residential developments have largely been larger tracts at the periphery of the already developed areas. A downtown residential market, largely TIF-assisted, has also been established. Over the next ten years City development staff believes the large tract developments will exhaust available land, and Madison will see more of the smaller, in-fill developments.

Council Charge to the Housing Committee

The Common Council charged the Madison Housing Committee (and its Affordability Subcommittee) to evaluate Inclusionary Zoning as a tool to produce and disperse affordable housing.

The Subcommittee has spent nearly all of its eighteen meetings in 2002 on this subject. The Subcommittee has listened to many voices over the past ten months, representing the spectrum of views of those individuals and businesses active in some way in housing and housing issues. The Subcommittee, and its parent committee, the Housing Committee, have debated within themselves about common goals, highest needs, best options, best practices, and tactical strategies to achieve more housing that Madison citizens can afford within the prudent limits of Madison resources.

This report outlines some of the common goals adopted by the Committee, examines several major issues and sub-issues debated by the Committee, and then makes some conceptual recommendations for the Council's consideration. Adoption of an inclusionary zoning is a large step forward for the Council. Adoption would send the message that all neighborhoods are critical in their role of providing a range for housing choices; that broadening diversity within the housing stock is a desirable goal, and that expanding housing opportunities enhances consumer choice and an expanded market for housing developers.

Once the Council adopts the report in some form, the Committee believes the next step is to work with the City Attorney's office, other City staff, the Plan Commission, developers and affordable housing advocates to craft an ordinance that reflects the Council's aims, and that would help implement improvements in the local housing production system by mid-June.

Committee's Goals to Expand and Disperse Affordable Housing Throughout the Market

The current proposal for enhanced housing production is based on the twin notions that the Madison area needs to produce a greater number of housing units that are affordable to working households and that are geographically dispersed. The Committee is particularly concerned about those households earning in the \$25,000 to \$45,000 annual income range. Because of a number of factors associated with the Madison housing market, such as population growth, relative economic strength, the Isthmus land configuration, Madison's quality of life, and the continuing influence of students on the housing market, Madison has both enjoyed and suffered from a relatively tight housing market. Both the Census of 1990 and of 2000 documented the relatively low vacancy rates in both the for-sale and the rental markets. Sale price figures for single-family housing show a price rise that is greater than average incomes. Growth of nearby suburbs and increased commuter trips (even from outside of Dane County into the Madison area) reinforce the conclusion that current housing production levels do not meet the Madison area market demand for housing across a range of incomes. Hence demand for affordable units cannot simply be met through the current level of production or the current level of sales and rentals of the older, currently built housing units.

What does the proposal envision as a **set of goals** for the increased housing?

Affordable: The proposal seeks to increase the number of 'affordable' units, that is, to increase the number of housing units in the rental and for-sale, owner markets that could be occupied by rental households earning around \$34,000 per year, and owner households earning around \$48,000 per year. (These target beneficiary households are rental households of 4 who earn about 50% of the median income, and owner households of 4 persons who earn about 70% of the median income.) Affordable in this context would mean that the housing costs for the unit would be more than 30% of the annual income relative to household size. This standard of 30% is the national public standard for housing costs, which the Federal Department of Housing and Urban Development uses in many of its housing programs. Households that pay more than 30% tend to have more problems retaining their housing, and experience a housing cost burden.

The Committee recommends that if the dwelling unit meets some energy conservation performance standards, the permitted housing cost for the unit be raised to 34% of the target household income. This raise in permitted cost levels encourages the construction of units that carry less expensive operating costs for the household over time, and allow a family to shift more of its household budget to capital needs, and presumably a better housing product in the long run.

Scattered site or diverse locations: One of the end goals of the Committee is to create these new housing units throughout the Madison community. By encouraging the addition of these affordable units as part of every new development over 10 units in size, the Committee believes that the resulting new units would be located in diverse locations, wherever there was new development or redevelopment of current housing. The Committee believes that these scattered units would better facilitate the integration of their households into the fabric of the immediate neighborhood, contribute to community vitality, and reduce the likelihood of concentrated pockets of poverty.

Similar in external appearance, bedroom count, phasing, and quality of work:

The Committee believes that some proposals to increase the number of affordable units might result in relatively identifiable 'low income housing' units or housing that would depreciate much more rapidly than well-built housing. Chicago's Cabrini Green and the Robert Taylor homes are two examples that dot the literature of previous failures and illuminate the current discussion about desirable outcomes. On the other hand, some Madison developments in the past have designed as affordable only the 'smaller units' or solely the basement units as the affordable ones. To avoid great disparity in units and the likely stigmas attached, the Committee identified these criteria as part of the set of end-goals as they discussed various means to achieve enhanced housing production.

Safe and adaptable to a changing population:

The Committee reviewed other inclusionary zoning and building code experiences, and identified several building performance criteria that it concluded should be incorporated into the final set of goals for the housing units. The proposal addresses the issues of physical accessibility and usability for its occupants and visitors, safety relative to radon exposure, and indoor air quality.

These five criteria, affordable, scattered, comparable, safe and usable, become the central specifications for consideration of different methods to produce the desired housing.

Tools to Achieve Affordability

Given the range of sites for future housing, from 'Greenfield' to 'in-fill', the Committee determined that more than a single density bonus is needed to achieve affordability. The Committee recommends an incentive-based, Planned Unit Development-type approach with a menu of measures tailored to individual sites and development scenarios.

The Committee identified these tools as the primary types of incentives to achieve affordability, in addition to the current range of financial assistance programs:

- a) **Increased density:**
Density limits do not actively add to costs but are a potential source of additional project revenue through the sale or rental of those added market rate units that can offset the possible reduction in revenue from the affordable units.
- b) **Site design infrastructure:**
Street widths, two-side sidewalks, storm water management systems, design standards, and other site conditions do contribute to development costs and hence to housing prices. The Committee believes there are some opportunities for additional balancing of these standards with the goal of affordability.
- c) **Administrative processes and fees:**
The Committee heard some comments that suggested opportunities for savings or trade-offs in these areas that might lead to lowering costs while achieving current public goals.

d) Expedited permit processing:

Time for processing adds to holding costs and is reflected in housing prices to both renters and buyers. The processes for development review are multi-phased, and some of these are within the control of the City. To the extent that the City can increase the pace and predictability of those phases that it can control, the cost of development can be decreased, and those savings applied to affordability goals.

Committee's Perspectives on the Legal Framework and Market Environment

What are the major features of the legal and market environment within which a Madison system would work?

The Committee reviewed various legal opinions and examined the market environment of other communities that have effective 'inclusionary zoning' programs.

The Committee believes that there is a strong, legitimate and well-documented case for a municipality to use its police and welfare powers to guide the shape, location, and form of the local housing market. The State of Wisconsin has recognized building inspection, zoning, financial assistance, and most recently, the role of housing in comprehensive planning for a community and its quality of life. The committee noted that several features characterize Madison's housing market that make it different from other areas throughout the country with inclusionary zoning programs:

- ◆ State statute on rent control: The Madison City Attorney's Office has indicated that State statutes prohibit a Wisconsin city from enacting legislation that would impose rent controls, but does permit a city to enact legislation that would impose price controls on housing built for sale to owner-occupants.
- ◆ Size of legislative jurisdiction: Many of the other inclusionary zoning programs operate within a broader state context that encourages affordable housing as a matter of state policy. Massachusetts, New Jersey, California and Maryland each have adopted a strong framework that reinforces 'local' jurisdiction zoning for affordable housing.
- ◆ Size of the housing market: The research literature on inclusionary zoning suggests that it works best where the scope of the requirements captures the dimension of the market. This congruity helps to minimize the marginal effects of 'free rider' developers who choose to locate their developments outside the boundaries of the inclusionary zoning legislation but close enough to the housing demand to create a viable development. Hence many of the effective inclusionary zoning programs have involved entire counties or larger metropolitan areas, which more closely approximated the housing market area. Madison's housing market extends into communities like Middleton, Fitchburg, Sun Prairie and Stoughton, and is beginning to operate more on a regional basis than simply a dynamic within the city of Madison itself.

What does this mean for inclusionary zoning legislation? The Housing Committee reviewed the issue of 'mandatory' versus 'voluntary' -- should the City require all developers to provide affordable housing units within their developments (a universal requirement); or only in certain circumstances, should the City negotiate with the developer to provide some benefit to encourage affordable units within the development (incentive-based)? The Committee concluded that the initial proposal should suggest an incentive-based system. Why?

- Given the legal ruling that the City could not impose inclusionary zoning on rental housing, the Committee expressed a preference for treating both rental housing and for-sale housing in a comparable manner.
- Given the boundary of the Madison's jurisdiction and the larger size of the actual housing market, the committee was concerned that any proposal affecting a smaller portion of the actual market offer enough benefits to developers to avoid cost-shifting to other developments or units. A mandatory affordable housing ordinance within the City of Madison may lead most of the new housing development to areas outside the City and encourage such negative side effects as greater sprawl, congestion, and income disparities.
- Building performance standards cannot be included under a 'universal' approach because the State's uniformity provisions require equal treatment for mandatory requirements under the State uniform minimum building codes. Additional building performance standards are permitted under a voluntary, incentive-based approach.
- Given the controversial nature of this initial proposal, the Committee believes that a balanced incentive-based proposal would be quicker to implement than a 'universal' proposal. An incentive-based system would also be easier to adjust on the basis of initial experience, and implement as part of the next negotiated development. The Committee estimated that the delay in implementation for a mandatory system would probably take at least two years of court discussion.

The Committee did adjust its initial target of affordable units within a development (from 10% to 15%) as a way to try to achieve a comparable level of affordable unit production, assuming no delays under a universal model. (See Appendix B for a chart on levels of production under comparable scenarios for a more detailed discussion of this.)

Committee's Recommendations on Operational Features of an IZ Ordinance

The Committee identified several key decision points regarding the design of an inclusionary zoning/bonus system.

A developer could offset the marginal costs of affordable units by use of greater density, faster processing review, adjustments in administrative requirements such as signage or street width, or City cash assistance in the development. Hence, the Committee recommends that at any time a developer voluntarily requests some City assistance, the City negotiate the inclusion of affordable units within the development as part of the *quid pro quo* to permit the developer to proceed with the development. In this sense, the City would incorporate 'affordable housing' into its set of criteria as grounds for approval of any development, along with such other standard criteria as land use plan compliance, good design, historic preservation, integrated transportation and transportation demand management.

What are the types of development and requests for City 'assistance' that would suggest that the City negotiate for the inclusion of affordable housing units within the development?

The Committee suggests that any request from a developer for 'assistance' which has the effect of increasing development potential over the existing underlying zoning should trigger City expectations about the inclusion of affordable units within the development. The Committee identified four types of 'triggers':

- a) Request for a planned unit development;
- b) Request for a subdivision of the land that would lead to greater density;
- c) Request for expedited review or administrative relief adjustment or waivers of City standards;
- d) Request for financial assistance.

When the use of greater density is appropriate, the Committee recommends that the City use these operating definitions for the original residential base:

- a) Where the existing zoning is already zoned residential, use the existing residential district;
- b) Where the existing zoning is Agricultural, use R-1 as the base;
- c) Where the existing zoning is commercial, etc., use the surrounding residential zoning as the base.

Is there a threshold or size of development that is too small to be included within this proposal?

Yes. The Committee recommends that the City not expect a development of ten or fewer units to include affordable units, even if it involves one of the trigger events stated above, (unless the funding assistance requires affordable units per se).

The Committee does envision that some developments will not be economically viable if affordable housing units are expected to be incorporated into the development itself. The Committee recommends that the City use an economic test as a method to determine where a development can provide affordable units within the development. The 'economic test' would be limited to the capital and operating costs to make the units affordable, and the Plan Commission would need to make a finding in order for the buy-out to proceed. If economically infeasible, then the developer could opt to provide affordable units offsite. However, these alternative affordable units must be located within the same census tract in order to achieve some of the goals of community integration outlined above. As an alternative, if economically infeasible within the development and within the census tract, the City may also approve a cash buy-out method. The Committee suggests that the City calculate a predictable amount per unit that capitalizes the difference needed to build a new units affordable to a household at 100% of the median income and one affordable to the target income level for the type of housing provided (i.e., 70% of median for buyers and 50% for renters). (See appendix C.)

What would be the process for decision-making and negotiation that is inherent in the Committee's proposal?

The proposal calls for a negotiation of the inclusion of affordable units whenever a developer requests one or more of the four types of City assistance. Hence the negotiation about affordable units must be incorporated into the regular zoning application process, which starts with staff discussion and is finally approved by either the Plan Commission and/or the Common Council, depending upon the type of request and the nature of the benefit. Staff from several different units or divisions, including Planning, Public Works, Traffic Engineering, Community and Economic Development, and CDBG, must be involved in the initial reviews and work together to integrate the City's set of expectations and benefits. The Plan Commission would play the lead role in the approval of the zoning and land use policy decisions, and either the Board of Estimates, the Community Development Authority, or the CDBG

Commission would play the lead policy role in the determination of financial assistance, depending upon the appropriate revenue source, if financial assistance were involved.

Committee’s Recommendations by Reference to Resolution Issues

In December 2001, the Madison Common Council adopted resolution #30749 directing the Housing Committee to evaluate inclusionary zoning and density bonus alternatives, and make recommendations to the Common Council for action. The Housing Affordability Subcommittee of the Housing Committee identified ten major content issues related to the inclusionary zoning, and the charges outlined in the resolution assigning the subcommittee the task of developing an ordinance. The Subcommittee has also discussed its work with a group of alders involved in parallel yet distinct discussions that focus on the inclusion of ‘affordability’ in the criteria to be used to assess applications for planned unit developments (‘PUDs’). This alder group has proposed an ordinance that would require a certain level of affordability within a PUD project in consideration for the concessions negotiated as part of the PUD.

Given that the City Attorney’s Office has drafted language to amend the PUD provisions to include affordable housing, and that there are developers already to initiate such a recommendation, the Committee recommends its speedy passage and implementation in early 2003, while the broader IZ ordinance is being drafted.

The Table below reflects the current decision status of the Housing Committee in its examination of inclusionary zoning/density bonus tools.

ITEM FOR DECISION	DECISION	COMMENT
Scoping		
Small development exemption	Developments of Dwelling units of 10 or less would be exempted	Avoid administrative complexities in small developments (where less than one AH units would result)
Rental - Mandatory vs. Incentive	Recommends incentive-based system ('voluntary')	Incentive-based avoids statutory prohibition on 'rent control', reduces disincentive to build outside City, and permits higher standards regarding building performance
Owner-occupied – Mandatory vs. Incentive	Recommends incentive-based system ('voluntary')	Incentive-based reduces disincentive to build outside City, permits higher standards regarding building condition and offers promise of private market cooperation.
Affordability		
Target Renter beneficiaries	Recommends target household at 50% of MSA median income	Developers have stated their ability to produce units at 80% of median income, and tax credits help produce units affordable at 60%. Greater need is for lower incomes.
Target Owner-occupant beneficiaries	Recommends target house pricing affordable at 70% MSA median income and household at 80% of MSA median income to allow underwriting tailoring	Developers have stated their ability to produce attached for-sale units at 80% of median income. Greater need is for lower incomes.
MSA (Sec. 8, annually adjusted) cf. City (Census data)	Metropolitan statistical area	This is the same base that is used by many other housing programs such as Section 8, LIHTC and CDBG.
Underwriting – 30% of monthly income, 34% if energy conservation features provided	Recommends units be defined as 'affordable' if housing costs are 30% or less of household income at target household level; if unit meets energy conservation performance standards, allow up to 34% of income for housing costs.	This provides incentives (in the form of higher permitted prices or rents) to build in conservation measures (recognizing that households will spent less on energy costs).
Production		
# AH DU's in a development	Recommends 15% of units in a development	This target % approximates the number of affordable dwelling units likely to be produced under a 'universal' proposal at 10%.
Density Bonus	Recommends bonus be negotiated within guidelines to be developed later	One of four types of assistance the City can offer; needs to be tailored to individual development proposal
Definition of “residential base” for bonus:	Recommends three categories: a) Existing Residential = existing residential district b) Agricultural = R-1 c) Commercial, etc. = use surrounding residential	This addresses variance in definition of the residential base when dealing with different original land use zoning designations.

ITEM FOR DECISION	DECISION	COMMENT
Building Standards		
Appearance	Recommends similar materials to market rate dwelling units	
Bedroom count	Recommends similar mix to market rate dwelling units	
Size & Amenities	Recommends that size and amenities need not be the same as market rate dwelling units, but that affordable units not be less than 85% of the median market rate dwelling units	Amenities such as extra off street parking for the non-affordable units can help cut the cost of production for the affordable units.
Location of affordable units	Recommends that the dwelling units be site specific but as dispersed as practical	This helps to integrate (de-concentrate) the affordable units.
Phased developments	Recommends that the affordable units be phased in at the same rate as market rate units	This helps to integrate (de-concentrate) the affordable units, and does not leave the affordable units until the last phase.
Accessibility	Recommends that 1) 1 accessible for every 5 affordable; 2) Including a curbless shower 3) Each affordable DU within 24" of grade or on a floor served by an elevator shall have step-free entry into the unit and 4) If a multi-level DU shall have its entry level rooms, including a half bath accessible; 5) All door hardware shall be levers; 6) all plumbing controls shall be single-lever	Closely follows the state multi-family code provisions in required features
Energy Conservation	Recommends enhanced underwriting if the unit achieves energy conservation of at least 115% of state code minimum	Lo-cost features easily offset by enhanced underwriting
Health & Safety	Recommends direct venting for hot water heaters if located within the dwelling unit, and passive radon venting system if sub-slab is exposed during rehab or construction	
Structural Impracticability	Recommends exceptions to Access, Energy conservation and Health & Safety standards in adaptive re-use developments where structurally impractical	Allows regulatory flexibility in particular for existing building situations
"City Assistance"		
Direct financial assistance (e.g., TIF, CDBG)	Recommends this as one of four 'triggers' for discussion of inclusionary units	
PUD	Recommends this as one of four 'triggers' for discussion of inclusionary units	
Rezoning such as raw land subdivision or in-fill development	Recommends this as one of four 'triggers' for discussion of inclusionary units	
Expedited review or administrative relief (such as right of way design)	Recommends this as one of four 'triggers' for discussion of inclusionary units	
First Rights of Refusal		
Rental DU's To CDA and non-profits Initial offering or renewals	No requirements	
Owner-occupied DU's To CDA and non-profits	1) No requirement at initial offering 2) Within the Period of Affordability, re-sales can be to income-eligible buyers or to CDA and other non-profits. 3) City should negotiate to obtain some right of first refusal for the CDA and other non-profits when the units are offered for sale after the period of affordability ends	
Buy-out		
Economic test for buy-out as an alternative to provision of affordable units within the development.	Recommends calculation be limited to non-affordability to target group based on capital costs and/or operating costs; Finding by Plan Commission required	
If economically infeasible, then Developer can op to provide off-site	Recommends that If economically infeasible, then Developer can op to provide offsite but must be near-by, meaning within the same census tract	
Cash Buy-out Method to calculate amount per dwelling unit if economically infeasible within development and within census tract	Payment to Housing Trust Fund (method calculates capitalized difference needed to build a new unit affordable to 100% of median income, and one affordable to established target income level (.e. 70% for buyers and 50% for renters). (Method D)	Uses annually adjusted income levels to determine affordability

ITEM FOR DECISION	DECISION	COMMENT
Term of Affordability		
Rental DU's	40 years Recapture of appreciated equity on pro-rated per square foot basis, if no longer to be used for affordable housing within this period	
Ownership DU's	40 years Recapture of 50% appreciated equity share based on Buy-out provision, if no longer to be sold to target level household for affordable housing within this period	Shared equity appreciation encourages owner's improvements
Administration		
Comparable to PUD process	Staff negotiate; Plan Commission makes findings and approves	Utilizes existing mechanism which has worked well
Multi-jurisdictional timing		
Immediate vs. wait for some portion of 69 governmental units to adopt	Move to implement Ask other jurisdictions to join	Immediate implementation starts reduction of Madison's affordable housing deficit, and allows others to see how inclusionary zoning can work

Summary and Conclusion

Madison's population grew by 17,288 people between the 1990 and the 2000 census (from 190,766 to 208,054). The City of Madison housing stock also grew by over 12,490 dwelling units between 1990 and 2000 (from 79,903 to 92,394). In each of the years from 1990 to 2002, the City issued over 950 dwelling-unit permits each year, to help create an annual average of 1,423 dwelling units. In 2001 alone, the City issued permits for 1,168 rental units, for 498 condominiums, and for 824 single-family detached dwellings.

In spite of that production, the median home value of a single-family house in Dane County rose from \$77,400 in 1989 to almost \$147,964 (a 91% increase), and reached almost \$163,000 (in 2001 dollars) in 2001. (In December 2002, the average sale price for a house was \$225,721; the median sales price was \$181,000.)

In spite of the addition of nearly 8,000 rental units during the decade 1991 to 2001, the fair market rent levels for a two-bedroom rose \$222, (from \$461/month to \$711/month), or 45%.

To address these issues, the City must continue to operate its successful rent and ownership assistance programs and must continue to use its assistance, permitting, and inspection programs to preserve, rehab, and create a balanced, diverse, and quality housing stock. The City, working with the private sector, also needs to take some additional steps to address the issues of affordability and production.

It is the Committee's opinion that inclusionary zoning is one of those policy steps and tools that will help address a portion of the affordability challenge. Yet the Committee recognizes that 'density' alone is not sufficient to make all of these new dwelling units affordable; that there are other factors available in real estate development that can reduce costs and produce affordability; and that some, but not necessarily all, will be pertinent to a given site. Therefore, the Committee proposes a flexible site-specific process. The Committee concludes that a public permitting system based upon a negotiated set of incentives and public affordability goals will encourage the flexibility and site-specific consideration needed for an inclusionary zoning program to best work in Madison and create a higher level of affordable housing production that best integrates affordable housing into the broad range of the new housing market.

Appendices:

Appendix A: Opinions Regarding the Legality of Inclusionary Zoning in Wisconsin

Appendix B: Discussion of Issues Regarding an Overall Housing Production Program

Appendix C: Method of Calculating Buy-out

APPENDIX A

A BRIEF SYNOPSIS OF THE HOUSING AFFORDABILITY SUBCOMMITTEE'S REVIEW OF THE LEGAL ISSUES RELATED TO INCLUSIONARY ZONING

In resolution #30,749, the Common Council charged the Housing Committee with the task of reviewing the legal issues related to inclusionary zoning.

The Committee consulted with Assistant City Attorney Kitty Noonan regarding the applicability of Wisconsin statutes to the issue, and the relevance of court cases concerning zoning and affordable housing.

State statute on rent control

In an opinion to the Subcommittee dated February 6, 2002, Noonan indicated that the City could require developers of for-sale housing to set aside a certain percentage of units at set prices, but could not require developers of rental housing to provide a certain amount of housing at specified rent levels. Her February 6 memo cited Sec 66.1015 of the Statute that prohibits City residential rental control. The memo concluded, however, that a City could enter into an agreement with a developer to provide units at a specific rent level if the agreement is "in the context of a voluntary program. A property owner could obtain some benefit, such as increased housing density, in return for agreeing to provide a certain amount of housing at specified rents."

In October 2002, the Subcommittee received a memo from UW Law School Professor Jane E. Larson, and UW Law School students Avram Bekson and Sarah Davis, providing an assessment of city inclusionary zoning powers. The memo concluded that a 'carefully drafted ordinance may mandate the inclusion of low- and moderate -income housing in new multifamily residential developments within the City". The memo provided a comparative review of state laws regarding zoning. The memo also suggested that the legislative history of the Wisconsin passage of the statute prohibiting rent control does not provide enough context to discern the motivation or purposes of the Wisconsin bill. The memo concluded that the proposed inclusionary zoning ordinance differs from the traditional meaning of rental control as used in the statutes, and is based upon the land use power of government and not on the power of economic regulation. Because it is a part of an agreement with a developer about future units, a mandatory requirement to include affordable housing within a development is a misunderstanding of the City's intended 'requirement', which should be construed as 'a nonnegotiable condition of the agreement' to development. Hence Larson et al. conclude that the power to enact a mandatory' inclusionary zoning ordinance is permitted by State law.

Noonan's review of the Larson memo found the arguments 'unpersuasive' to the critical distinction between Wisconsin law and the law of other states relative to inclusionary zoning and rent control, and cited the opinion of a Wisconsin Attorney General that adds some context to the meaning of 'rent control' in Wisconsin. Her memo concludes that it would be hard to imagine that the court would not call it (a proposed mandatory IZ) rent control.

'Takings' issues

Noonan indicated to the Subcommittee that laws and court interpretation regarding the constitutional issues of taking, that is, government seizure of property without fair process and just compensation, were numerous and often case-specific. She indicated that validity of an inclusionary zoning ordinance with regard to taking would depend on the degree of governmental interference with the use of the property by the owner. Again, a voluntary agreement between City and developer shifts the basis of the legal argument, and reduces the applicability of takings argument.

State statute on impact fee

As an alternative to inclusionary zoning, some committee members had asked whether a city could merely add on a separate 'affordable housing fee' to all developments. Noonan cited Sec. 660617 (2) Stats. in concluding that an impact fee ordinance could not impose an in -lieu fee for affordable housing because its use does not meet the definition of 'capital cost' required by the statute. In order to meet that definition, the capital costs covered by the surcharge to the impact fee would need to be a capital cost of the project itself. The memo does conclude that the Statute does permit an exemption from the required impact fees in return for providing low cost housing on the site.

State limits on Construction requirements

The Subcommittee was also interested in whether the City was permitted to require more restrictive construction standards than the State 1-2 family and multi-family dwelling codes. Noonan concluded that the Wisconsin Administrative Code did prohibit a city from adopting an ordinance beyond the requirements of the codes. A city

could, however, adopt an ordinance that would provide a developer with a benefit for constructing lower income housing that included stricter construction standards.

The Subcommittee discussed these interpretations on several occasions, and also examined several other opinions from other groups comparing the implications of a 'voluntary' agreement with a 'mandatory' requirement. In light of the Subcommittee's goal to include both types of housing (rental and for-sale), in light of the desire to include some additional level of building standards, in recognition of the fact that it is critical to obtain developer cooperation in providing additional affordable housing, the Subcommittee decided to recommend an inclusionary zoning system that negotiates with developers the City's tangible benefits of density, standards, timing, or financial assistance for affordable housing units.

Attached to this sheet is the original opinion from Assistant City Attorney Kitty Noonan.
(Copies of all the documents cited above are available from the CDBG Office, or by calling 267.0740.)

**CITY OF MADISON
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266-4511**

February 6, 2002

MEMORANDUM

TO: Housing Affordability Subcommittee of the City's Housing Committee

FROM: Katherine C. Noonan, Assistant City Attorney

SUBJECT: **Authority of the City to enact an Inclusionary Zoning Program**

Questions 1 and 2: Is the City permitted to require a developer to set aside a certain percentage of housing units at affordable rate, as a condition of zoning approval? If not, may the City offer a bonus or incentive to a developer if the developer voluntarily enters into an agreement to provide a certain percentage of housing units at affordable rates?

Sec. 66.1015, Stats. prohibits the City from requiring that housing be offered at specified rent levels.¹ The general prohibition against municipal regulation of rents is found in subsection (1). Subsection (2) creates several exceptions to the general prohibition. Of interest to the issue of inclusionary zoning ordinances is the exception in (2)(b) that allows a city to enter into an agreement "... with a private person who regulates rent or fees charged for a residential rental dwelling unit." I believe that the general prohibition prevents the City from *requiring* a property owner to provide a certain amount of housing at specified rents, and that exception (2)(b) would not allow the City to impose the same requirement by simply calling the requirement an agreement. Reading (2)(b) to allow the City to *require* property owners to sign an agreement that regulates rent would render the general prohibition meaningless. I do believe, however, that (2)(b) would allow an agreement to be made with a private property owner to offer housing at specified rents if it is in the context of a voluntary program. A property owner could obtain some benefit, such as increased housing density, in return for agreeing to provide a certain amount of housing at specified rents. This interpretation of Sec. 66.1015, Stats. retains meaning in the general provision and does not allow the "exception to swallow the rule."

¹

Municipal Rent Control Prohibited.

(1) No city, village, town, or county may regulate the amount of rent or fees charged for the use of a residential rental dwelling unit.

(2) This section does not prohibit a city, village, town, county. Or housing authority or the Wisconsin Housing and Economic Development Authority from doing any of the following:

- (a) Entering into a rental agreement which regulates rent or fees charged for the use of a residential rental dwelling unit it owns or operates.
- (b) Entering into an agreement with a private person who regulates rent or fees charged for a residential rental dwelling unit.

There is no Wisconsin case law interpreting Sec. 66.1015, Stats., which was enacted in 1991. A 1973 Attorney General Opinion, issued before there was a statutory prohibition against rent control, determined that statutory authorizing legislation would be necessary for a city to enact a rent control ordinance. *73 Op. Att. Gen. 276*. The question of conflicting local and state provisions was not considered as no conflict existed at the time, however, an express conflict, as well as lack of authorizing legislation, likely would not receive a more favorable analysis by a court. In 2000, the Colorado Supreme Court considered a challenge to a local ordinance that required property owners of new development to provide affordable housing for 40% of the employees serving the new development. In the face of a statutory prohibition on local rent control, the court struck down the ordinance as impermissibly conflicting with the statutory prohibition.² *Town of Telluride v. Lot Thirty-Four Venture, LLC*, 3 P.3d 30 (2000).

Wisconsin's rent control statute does not apply to non-rental property. There is no specific statutory prohibition against an ordinance requiring property owners to provide a certain percentage of affordable owner-occupied housing. The legal analysis of a challenge to such an ordinance would be based on 5th Amendment law — the 'takings' clause. The published case law is voluminous and increases continually. In general, the limits of such an ordinance would be found in the degree of interference with a property owner's interest in earning a return on her/his investment and would depend on the details of any particular ordinance.

Question 3: What are the limits of the impact fee statutes on requiring developers to provide or contribute to the provision of affordable housing?

Sec. 66.0617(2), Stats. authorizes cities to adopt ordinances to impose impact fees on developers to "...pay for the *capital costs* that are necessary to accommodate land development." The impact fees can be in the form of cash contribution, contributions of land or any other items of value. "Capital costs" means the cost of constructing, expanding, or improving public facilities, and "public facilities" means "...highways, as defined in s. 340.01(22), and other transportation facilities, traffic control devices, facilities for collecting and treating sewage, facilities for collecting and treating storm and surface water, facilities for pumping, storing and distributing water, parks, playgrounds and other recreation facilities, solid waste and recycling facilities, fire protection facilities, law enforcement facilities, emergency medical facilities and libraries ... public facilities does not include facilities owned by a school district." §66.0617(1)(a), (f), Stats. An impact fee ordinance could not impose an in-lieu fee for affordable housing on a developer because such a fee does not meet the definition of "capital costs." Sec. 66.0617(7), Stats., however, authorizes ordinances that allow an exemption from some or all of the required impact fees in return for providing low cost housing. This provision would not allow proceeds from such an exemption to be used for a general housing fund, as it states, "...no amount of an impact fee for which an exemption or reduction is provided under this subsection may be shifted to any other development in the land development in which the low-cost housing is located or to any other land development in the political subdivision." Currently, City impact fee ordinances require a fee only for park and open space, installation of water service, and traffic improvement. §16.23(5)(f) and §20.08, MGO. The remaining impact fees for the capital costs of public facilities are imposed as requirements to construct the particular public facilities. Any of the

² Boulder, CO, one of the municipalities with an affordable housing 'set aside' ordinance, is in the process of revising their ordinance to remove any provisions that have the effect of regulating rent.

above fees/requirements could be exempted for a particular project, with the capital costs being borne by the City instead of the developer.

Question 4: Can the City impose construction requirements more restrictive than the 1-2 family and multifamily dwelling codes?

The Wisconsin Administrative Code prohibits a municipality from adopting ordinances beyond the requirements of the codes that apply to 1- and 2-Family and Multifamily Dwellings. Regarding multifamily dwellings, the current code does not contain the prohibition on more restrictive local ordinances for buildings higher than 60 feet or six stories. As of July 2, 2002, however, those code provisions have been folded into one chapter that applies to all multifamily dwellings and it contains the prohibition against local regulation beyond the requirements of the state code. If the City had an ordinance that provided for a developer receiving a benefit for constructing affordable units, it may be possible to negotiate stricter construction standards than are required in the state code as part of an agreement under such an ordinance. The stricter standards would be evaluated on a case-by-case basis for any development making use of such a program.

APPENDIX B

THE ROLE OF INCLUSIONARY ZONING IN A COMPREHENSIVE HOUSING PLAN

In proposing an incentive-based inclusionary zoning process, the Subcommittee recognizes that local government plays a crucial but limited role in the production, preservation and affordability of housing in the Madison area.

Market economics, Federal and State policies, and population all contribute significantly to the availability and pricing of most of the dwellings units within the Madison area.

Current Plans

From time to time, the Common Council has adopted goals, strategies, and policies that help to influence the local housing market. The Council approved a statement of goals as part of the adoption of the City's Land Use Plan in 1983, and later the goals and strategies inherent within the adoption of the peripheral plan in 1994. In response to Federal requirements related to funding, the City adopted a Comprehensive Housing Affordability Strategy (CHAS) in 1994 and a revised version in 1996. The City's Community and Neighborhood Development plans, and their one or two-year program frameworks, help implement these strategies through funding guidelines adopted for the City's Federal CDBG, HOME, ESG and other related resources related to affordable housing. In addition, the City's Community Development Authority (CDA) now develops an annual housing plan to articulate objectives related to public housing and to section 8 assistance.

In addition to these production, funding and inspection goals, the City Common Council has also acted several times to affirm goals of equal opportunity and non-discrimination in housing, and to facilitate the location of special needs housing throughout the community as a way to better integrate such housing with its neighbors (fair share plans).

Each of these plans speaks to a strategy on the continuum of City efforts to facilitate the production, location, renovation or affordability of housing within its borders.

Current Resources and Programs

The City operates a range of programs and facilitates the funding of programs through community-based non-profits that address various aspects of the affordable housing issue. [An inventory of these programs is located at www.ci.madison.wi.us/cdbg/docs/hsgcharts.pdf (page three and page seven) and a list of the City's policy committees is added to the back of this appendix B.]

Some of these housing programs address the preservation of the housing stock, such as the building inspection program and the rehab loan programs. Some address the production of housing, such as the housing bond program, and many of the CDBG-funded programs.

Some of these housing programs address neighborhood redevelopment goals where housing becomes a major strategy in transforming a neighborhood, such as the CDA's Monona Shores redevelopment or the CDBG-funded Vera Court housing development.

Some of these housing programs address the design, and placement of housing within the community, such as the Planning Unit's new neighborhood development plans and zoning's permitting processes.

The Council has recognized the need to expand the array of City tools to produce more affordable housing within the last 18 months. The Council has adopted a new TIF policy that sets-aside 10% specifically for affordable units. The Council set aside funds to capitalize a Housing Trust Fund.

The Subcommittee views the recommendations concerning inclusionary zoning (IZ) as the development of one more additional tool that the City can use to encourage the development of new affordable housing. Adoption of this new tool should not decrease current efforts to help renters afford their rental housing through the Section 8 assistance program or the State-funded, CAC-administered Rent-Able program. Nor should it diminish the City and CDA's efforts to provide targeted homebuyer assistance to first-time homebuyers through the HOME-BUY program, or the City-funded assistance programs through Common Wealth, the Community Land Trust, Operation Fresh Start, Madison Development Corporation, Movin' Out, or the Urban League.

To this extent, adoption of an inclusionary zoning ordinance would expand the City's range of tools to use in addressing housing issues.

A TABULAR VIEW OF MADISON'S MAJOR POLICY COMMITTEES RELATED TO HOUSING

The City has established policy-related groups intended to help plan, build and preserve housing to meet the needs of Madison's residents, and build a sense of community and strong neighborhoods. These policy groups can be displayed along axes related to the primary function of the Department of Planning and Development.

MAJOR MADISON HOUSING COMMITTEES AVAILABLE TO GROUPS BY INCOME AND TENURE				
FUNCTION	PLAN	BUILD / INVEST / FUND		PRESERVE / ASSURE
PRIMARY CUSTOMER		Direct assistance to Households	Assistance to Groups/ Businesses/ Developers	
ALL HOUSING TYPES	<p><i>Master, Neighborhood and Subdivision plans</i> PLAN COMMISSION</p> <p><i>Housing, Community & Neighborhood Development plans</i> CDBG COMMISSION</p> <p><i>Overall Housing Issues</i> HOUSING COMMITTEE includes tenant-landlord subcommittee and housing affordability subcommittee</p> <p>Ad hoc Alder group working on Affordable housing incentives within the PUD process</p>	<p><i>Direct rent assistance to individual households</i> COMMUNITY DEVELOPMENT AUTHORITY (CDA)</p> <p>Joint City-County Section 8 Rental Housing Provider Advisory Commission (S8 Commission to help improve marketing of Section 8 to rental managers)</p>	<p><i>Assistance to developers to buy, rehab/build</i> CDBG Commission for CDBG/HOME and other funds and TIF 10% set-aside; CDA for TIF and housing revenue bond project that may or may not include affordable units</p> <p>HOUSING TRUST FUND WORK GROUP (ad hoc and joint working group of the CDBG Commission and the Housing Committee's Affordability Subcommittee)</p>	<p>ZONING BOARD OF APPEALS</p> <p>LANDMARKS COMMISSION</p> <p>URBAN DESIGN COMMISSION</p> <p>TENANT-LANDLORD RELATIONS</p> <p>EOC HOUSING</p>

APPENDIX C

CALCULATIONS REGARDING AN IN-LIEU PAYMENT

The Subcommittee proposed that, if the affordable units were economically infeasible within the project itself, then the City and the developer could agree to the provision of affordable units off-site but within the same census tract. If economically infeasible within the same census tract, the developer could provide a payment in lieu to the Housing Trust Fund. The Subcommittee proposed the following method to calculate the amount of the in-lieu payment:

1. The City would determine annually the sales price of a new unit that would be affordable to a household at 100% of the median income.
2. The City would subtract the capital amount that a household at the target income level could afford, based upon the definition of 'affordable unit'. (Note: This capital amount might include the capitalized cost of a condo fee or resident association fee as well, given the definition of 'affordable unit'.) This target income level is 70% for homebuyers and 50% for renters.
3. The City would then multiply the difference by a factor of 1.0 to arrive at the amount to be paid in lieu of providing an affordable unit on the development site or within the same census tract.

ESTIMATES OF UNITS TO BE PRODUCED BY THE INCLUSIONARY ZONING / DENSITY BONUS PROPOSAL

The Subcommittee reviewed building permit data for the last several years and examined several estimates of production. The following figures are based on the proposal that establishes a target level of affordable housing within a development at 15% of the initial dwelling units. Further, it is based upon the average production figures for the last 12 years within the city of Madison:

Base data:

Total permits for dwelling units, 1990 to 1991	
Single-Family	5,912
Condos	1,669
Duplex to 4 units	1,296
5 or more units	8,196
Total	21,054

Assuming that 90% of these permits were part of developments over the Subcommittee's threshold of 10 units within a development and that of the total units, 50% of the units would involve some City 'assistance' (PUD, funding, design standards, or expedited review), then an incentive-based (voluntary) IZ system, with an expectation of a negotiated 15% set-aside for affordable units, would produce approximately 1,575 units over a 12-year period, or about **130 affordable units per year**.