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September 8, 2005

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By Courier

Carol J. Mitten, Chairman
Zoning Commission for the District of Columbia
441 Fourth Street, NW
Suite 210 South
Washington, DC 2001

Re: Zoning Commission Case No. 04-33 (Text Amendments to Require the
Provision of Affordable Housing – Inclusionary Zoning)

Dear Chairman Mitten and Members of the Commission:

Enclosed please find my testimony with regard to the above-referenced case. While I do not believe that a mandatory Inclusionary Zoning ("IZ") requirement is the best option for the City at this time, I have attempted to suggest some feasible alternatives to the current proposal

My primary opposition to the proposed IZ program is its potentially chilling effect on residential development in the District. The District is currently experiencing a residential renaissance that has resulted in residential developments on commercially zoned lots. The benefits of the residential revival have been evident throughout the entire District –revitalizing entire neighborhoods and involving parts of the City that had previously been ignored for years, such as locations east of the Anacostia River, and along the Georgia Avenue Corridor. To now impose such a significant affordable housing requirement as is being proposed, would effectively bring residential development to a halt, undermining the developers' goals of bringing more residential developments to the District, and the Commission's goal of providing more affordable housing. I believe, however, that there are options available to the City that would allow it to avoid this result.

If the Commission decides that it must implement a mandatory program, I propose that rather than requiring 50% of bonus density be dedicated to affordable housing, the Commission should initiate the program requiring approximately 15% of bonus density be dedicated. A 15% requirement, which is the current set aside proportion generally used with PUDs, will be more acceptable to developers, which are a necessary component of the District's IZ plan. In reality, the number of affordable units created

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with a 15% set aside may be likely to resemble the total number of affordable units created with a 50% set aside after taking into consideration those projects that will be abandoned as economically infeasible. The only difference is that the revived residential market will not have been sacrificed in the process.

One problem with requiring 50% of bonus density to be set aside for affordable housing is that it will shock the residential market. The effects on the market will be immediate and long lasting, and the City will not be able to reverse those effects simply by later decreasing the requirement. For that reason, I believe it makes more sense to start with a lower required set aside. The success of the program must be demonstrated before a higher number should be considered.

Secondly, if a mandatory program is adopted, all Board of Zoning Adjustment ("BZA") applications filed before setdown of the mapping case must be exempt from the IZ program. These applicants purchased their property and created development plans without the restrictions of the IZ program in mind. Applying IZ to these properties will require the applicants to completely revise their plans in order to pursue a development that makes financial sense, if such a feat is possible. This will result in a drastic waste of resources and will cause some applicants to abandon their plans altogether.

Additionally, the program should not apply to Planned Unit Development ("PUD") applications. PUDs already provide a significant number of affordable units, as well as many other amenities that serve the community. Increasing the required affordable set-aside would make PUDs economically infeasible. At the very least, the application of IZ to PUDs must be considered only prospectively and on a case-by-case basis and the traditional vesting rule must be waived. The Office of Planning has recommended that PUD applications submitted before January 6, 2006, be exempt from the IZ requirements. While this is critically important for pending PUDs, there still remain a number of details to be considered regarding the application of IZ to future PUDs, which will require a separate hearing.

The Commission is not in a position at this time to make any decisions on the applicability of the IZ program to PUDs in light of the fact that its notice did not specifically indicate that the PUD regulations were also subject to revision. Amending PUD regulations at this time would violate D.C. law. See D.C. Code § 2-505(a) (stating that before adopting, amending or repealing any rule, the applicable agency must provide "notice of the intended action"); D.C. Code § 6-6413.03 (stating before amending a regulation, the Zoning Commission must provide notice consisting of "a general summary of the proposed amendment or amendments of the regulation or regulations and

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the boundaries of the territory or territories included in the amendment or amendments of the map or maps, and the time and place of the hearing"); 11 DCMR § 3014 (indicating that notice for rulemaking hearings "shall include a general summary of the application or petition under consideration, .[and] the action of the Commission prayed for...").

Finally, any mandatory program should apply exclusively to residential development and exclude commercial development. Applying an affordable housing requirement to commercial development simply does not make sense.

The current proposals for inclusionary zoning are too extreme. Both the Office of Planning's mandatory proposal and the Campaign for Mandatory Inclusionary Zoning's proposal will undermine the work the District has done to revitalize its residential market and attract individuals to move back to the City. Pursuing either a voluntary program or taking into consideration those aspects of the mandatory program that I have outlined above will help minimize the drastic effects IZ will otherwise have on D C developments.

I appreciate your time and the opportunity to provide additional input regarding the inclusionary zoning proposals. Please let me know if I can be of further help.

Sincerely,

A handwritten signature in black ink, appearing to read 'Allison Prince', written in a cursive style.

Allison Prince

Enclosure

I am Allison Carney Prince of Pillsbury Winthrop Shaw Pittman. I reside at 5450 33rd Street, N.W. I am a 25-year resident of the District of Columbia and a past President of the Board of Jubilee Support Alliance, the fundraising arm of Jubilee Housing, a significant non-profit housing provider.

I would like to begin with some observations of the effect that your *consideration* of this Inclusionary Zoning ("IZ") proposal has had on the climate for residential development in the District of Columbia. During these past few years, the residential market in the District has grown exponentially. Prior to discussions regarding the initiation of the IZ program, I fielded inquiries regarding sites all over the city from developers who were considering residential development – even in commercially zoned areas. Not only was there interest in residential development in commercially zoned areas, which was unprecedented, but there was interest in residential development in parts of the city that had been ignored for decades, including sites east of the Anacostia River, on the Georgia Avenue Corridor, and in Southwest.

Unfortunately, now that the IZ proposal is under consideration, several developers, particularly out-of-town developers, will only consider sites in the Downtown Development District ("DD"), because either they or their financial sources simply cannot handle the risk of an IZ requirement. Developing in DD

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will be more desirable because it is not likely to be part of the mandatory affordable housing program until at least 2008.

The potential that developers will refrain from residential development is not an idle threat. I am familiar with one out-of-town developer who walked away from a 2,000 unit project on a property located in the high density commercial zone because of concern over Inclusionary Zoning. The delicate balance that had once favored residential use on a purely commercial property was upset simply by the *potential* for mandatory affordable housing on that site. I know of at least three other developers who have abandoned similarly large projects because of the fear of the effect that IZ will have on their development. Unfortunately, reluctance to develop residential projects will undermine the effectiveness of the proposed IZ program by decreasing the number of residential developments and thus affordable units. This inevitably will trigger a decline in the District's residential market.

I would like to present a scenario that may be oversimplified, but may help calm concerns that you missed the boat by not adopting a mandatory scheme sooner. Let's assume that IZ was put in place five years ago and that 12,000 housing units were built in the District of Columbia over the last 5 years. Let's assume that half or 6,000 of those units are located in mandatory affordability zones, and let's assume further that fully 10% of those units were required to be

affordable. An inclusionary zoning scheme would have produced 600 units in five years or 120 units per year.

But let's look at this more closely. Of those 6,000 units, some *were* affordable. There are affordable housing projects built by developers and non-profit organizations that specialize in affordable housing. There are affordable units that result from PUDs. Also there are affordable units that result simply because the market rate in some areas *is* affordable, such was the case in a 60-unit apartment building in Anacostia that was approved earlier this year. Furthermore, NCRC projects such as the Wax Museum will produce affordable housing. Thus, we didn't really lose 600 affordable units because at least 300 of the units that were provided *were* affordable units. I can account for 60 in one recent project alone. So what did we really lose? Arguably, we lost 300 affordable units in 5 years or 60 units per year. The real question is whether the City's attempt to capture those 60 units is worth risking the residential market. Given the precarious state of the market, such a maneuver puts hundreds of residential units, as well as the potential to revitalize neighborhoods, at risk. Let me explain.

IZ will undoubtedly result in a decline in market interest in sites that are likely to be mapped with inclusionary zoning. How will this play out? The key to the revitalization of some emerging neighborhoods is the ability to convince some

long time property owners to sell, particularly owners of large tracts. Their basis is low, so they can wait out a bad market or a regulatory change. For example, let's say a large site in the H Street Corridor is commercially zoned. Market economics are now favorable enough that the owner will consider selling and there is strong developer interest. The site is large enough for a 500-unit PUD that would produce approximately 30 affordable units. IZ is adopted. The economics decline, the owner loses the financial incentive to sell. Is there a good chance that he will wait it out or build commercial instead? Absolutely. In this one project, the City has lost 500 units, including 30 affordable units, in the quest for affordable units at the rate of 120 per year in a boom market. Ironically, adoption of the IZ program has in fact *cost* the City 30 affordable units in this scenario.

Having said all that, I can appreciate the fact that you feel compelled to act, even if the tool is not perfect. Accordingly, we should shift our focus to minimizing the extreme impacts this program will have on the residential housing market in the District. I have two critical concerns with a mandatory program: (1) the need to vest Board of Zoning Adjustment ("BZA") applications that have been filed before setdown of the mapping case, and (2) the need to exempt PUD applications from IZ.

With regard to my first concern, BZA applications that have been filed before setdown *must* be exempt. These owners have invested considerable time and money in their projects. They purchased land under a scenario that did not include Inclusionary Zoning, and they must be protected or there will be a severe chilling effect on the entire residential market. Accordingly, the traditional vesting rule must be waived, or a clear effective date included, such that residential projects can proceed while the mapping case is under consideration. The single most damaging step you could take is to set down the mapping case and allow the traditional vesting rule to apply.

Secondly, the IZ program should not be applied to Planned Unit Developments ("PUD"). PUDs already create a significant amount of affordable housing, as well as provide a number of other amenities that benefit the community. IZ requirements with regard to PUDs should be determined on a case by case basis. At the very least, those PUD applications filed before setdown of the mapping case should be exempt. To this end, the Office of Planning has recommended that all PUD applications submitted before January 6, 2006 be exempt from the IZ program. While this will add a degree of certainty to the residential market, the details of how IZ will apply to PUDs after that date remain unclear. Thus, there must be a separate hearing on the effect IZ will have on PUDs.

If you feel you must adopt a mandatory proposal, do it carefully with appropriate exceptions including property in the commercial zones. Additionally, I would propose that the City implement a program that requires 15% of the bonus density be set aside for affordable housing, rather than the proposed 50%. This number has already proved to be a workable number in the PUD program: it provides a sufficient number of affordable units and will not cause a chilling effect on residential development. It is a "happy" medium that will gradually introduce the residential market to the concept of IZ as well as allow the District government to get a handle on administering the program. I recognize the District's instinct to want to do more for affordable housing, however, starting the program at such an extreme level leaves little room for mistakes. If this set aside proves too much for the residential market, the District cannot simply retreat by later decreasing the required set-aside -- the damage to the market will already be done. Alternatively, the District can ease into an IZ program and gradually increase the required set-aside affording the market time to react and giving the City a better idea of what numbers are truly realistic.

As one who has practiced land use law for 20 years, what do I envision will be the inevitable results of a mandatory affordability schemes as now proposed?

1. A long period of adjustment, understanding and interpretation;

2. A long period to hire the staff needed for its administration; no guarantee that the staff can manage the task. We have heard from affordable housing providers who simply do not want to be saddled with the administrative burdens that will cut into their ability to do what you want – build affordable units.
3. A decline in market values; and
4. Perhaps most importantly, a tipping of the delicate balance that now miraculously favors residential development over commercial on some commercial sites. No one wins when we lose even one large residential project that is instead built as commercial or when an office building that is ideal for conversion to residential remains an office building.

The voluntary proposals avoid these effects and revising the mandatory scheme can help minimize some of them. You must consider the true costs of these effects as you evaluate the value of the proposal.

Thank you for your time.