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April 24, 2006

Ms. Sharon Schellin
Acting Secretary to the Zoning Commission
Office of Zoning
441 Fourth Street, NW
Suite 200 South
Washington, D.C. 20001

Re: Zoning Commission Case No. 04-33
Comments on Notice of Proposed Rulemaking
On Mandatory Inclusionary Zoning

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Dear Ms. Schellin:

I have been a real estate finance and development attorney practicing in the District of Columbia for the past twenty years, with a significant emphasis representing companies building and preserving affordable housing. I have also been the Chair of the Housing Committee for the District of Columbia Building Industry Association for the past ten years and have worked closely with the District of Columbia Government on various housing programs and policies.

I offer the following comments and suggestions as my own personal remarks as a long-time affordable housing practitioner in the District of Columbia. My comments and suggestions are separate from the comments being provided by the District of Columbia Building Industry Association ("DCBIA") although I participated in the formulation of those comments as well.

OBSERVATIONS

I. THE PROPOSED INCLUSIONARY TEXT AMENDMENTS REFLECT THE WORST PRINCIPLES IN AFFORDABLE HOUSING POLICY AND PROGRAMS.

First, successful housing programs should motivate and encourage the development of affordable housing. The Zoning Commission's MIZ program does not.

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There is a significant imbalance (as well as fluctuations) between costs of providing affordable units in new residential construction and the value of the bonus density that may be used for additional market rate units under the proposed MIZ program. The primary reason that mandatory inclusionary zoning programs have had marginal results in other jurisdictions is the inflexibility of the programs and the inadequate recognition of the unique cost structures of each project. The only reason that such mandatory programs may have shown any minimal success is due to the strength of market forces and not because the programs encouraged or motivated development of affordable housing. Unlike the proposed MIZ program, successful housing programs tie the requirement of providing affordable housing to a sufficient subsidy so that the projects retain financial viability.

Second, there are very predictable negative consequences of the proposed MIZ program which greatly outweigh the projected benefits of the proposed program.

The District of Columbia Government's own projections of how many affordable units may be generated by the proposed MIZ program is a tiny fraction of the number of affordable units already successfully being built and preserved under existing and proven housing programs. The proposed MIZ program runs counter to the Government's own stated objective of producing a greater number of affordable units. The proponents of the proposed MIZ program and the Office of Planning have acknowledged that many more affordable housing units could be produced throughout the residential neighborhoods of the District for the cost which will be incurred by developers and the Government from developing affordable units under the proposed MIZ program in some of the highest cost areas and high-rise projects in the District. The Chair of the Zoning Commission herself stated in one of its public hearings that the value of the proposed program is its symbolic value which carries the message that the Government cares for its lower-income residents. Unfortunately, such pronouncements and symbolism does not produce affordable housing and deflects attention from housing programs that have proven track records.

Third, the proposed MIZ program runs counter to the District's more important objective of creating the greatest number of affordable units and seeking not to further contribute to the increase in sales prices and rental rates of housing.

The acknowledged objective of the proposed MIZ program is not to generate a large number of affordable units but to include affordable units in housing projects that would not otherwise be affordable to low-income persons. The targeted lower-income categories of 80% AMI and 50% AMI are way too low for the proposed bonus densities to offset. Better results (although still unimpressive) have been shown to occur under inclusionary zoning programs when the target was "work-force housing" of 80% to 120% AMI. The proposed affordable set-aside requirements on bonus density, at 75% for stick-built construction and 50% for steel and concrete construction, are much too high. Although it is the Government's general objective to obtain as much affordable housing as possible, this proposed program does the opposite by establishing the set-aside requirements too high which will cause the price of all other housing to

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increase even faster. In an effort to recoup uncompensated costs imposed by the high set-aside requirements, developers will push the price of all units other than the MIZ units higher and higher. And since the proposed MIZ program is essentially a city-wide program with general applicability to developments of 10 units or more, the MIZ program is redefining and effecting the entire housing market of new construction in the District. This will put the surrounding jurisdictions at a greatly increased competitive advantage. It is incorrect to believe that the surrounding jurisdictions' inclusionary programs are similar to the proposed D.C. MIZ program or that the availability of additional space to accommodate additional density is the same in each of these different jurisdictions.

II. THE PROPOSED MIZ PROGRAM IS NOT AN ADDITIONAL "TOOL" IN THE "TOOLBOX" OF AFFORDABLE HOUSING.

First, it has been incorrectly asserted that the proposed MIZ program is another "tool" in the "toolbox" of creating affordable housing.

The proposed MIZ program is unlike other affordable housing programs. Other affordable housing programs are voluntary and incentive-based. This ensures that those seeking participation in these programs have underwritten the cost of providing the affordable housing set-aside against the subsidy being offered under the housing program. Programs that have an imbalance are abandoned and programs that have a balance between costs and benefits succeed. Unlike many other jurisdictions, the District has no shortage of dedicated affordable housing providers. The problem has been a shortage of financial resources.

Second, the proposed MIZ program is not market or revenue neutral.

Successful housing programs have added to the housing market by directing financial resources and providing tax incentives to encourage investment in affordable housing. The proposed MIZ program is a "tax" on the production of new housing by adding direct and indirect costs that will not be compensated for by the allocation of bonus density and by the extra time involved in designing and constructing higher density projects, often in the face of community opposition.

Third, the Zoning Commission and the Office of Planning received many comments and suggestions from market rate and affordable housing providers concerning the inefficiency and ineffectiveness of the proposed mandatory program.

The market rate and affordable housing providers offered many good suggestions which are not reflected in the proposed program. An inclusionary zoning program could be successfully crafted for the District, one that is based on adequate incentives and enticements. Unfortunately, except for the last several years, the District Government dedicated very few District tax dollars to affordable housing. In fact, the District's recent funding of the Housing Production Trust Fund from District tax revenues has only been possible because of the recent

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increase in economic development resulting from a strengthening of the market. The proposed MIZ program will serve as a restrictive covenant on property throughout most of the District and serve as a basis to challenge real estate assessments and reduce tax revenue collected by the District. Would it not be better to avoid interfering with economic development and continue to channel the greater tax revenues generated by economic development into social programs such as affordable housing?

III. THE OVERWHELMING VIEW OF DEVELOPERS, INCLUDING MARKET RATE DEVELOPERS, AFFORDABLE HOUSING DEVELOPERS AND MINORITY-OWNED DEVELOPERS, IS THAT THIS PROPOSED MIZ PROGRAM DOES NOT WORK AND WILL HAVE SEVERE CONSEQUENCES FOR THEIR BUSINESSES AND ALL RELATED BUSINESSES, SUCH AS THE CONSTRUCTION TRADES, SURVEYING FIRMS, ENVIRONMENTAL FIRMS, ARCHITECTURAL AND ENGINEERING FIRMS, AND MAINTENANCE AND JANITORIAL SERVICE FIRMS.

First, developers' opposition is opposition to this particular MIZ program and to any MIZ program that is inflexible and imposes unreasonable and unrealistic requirements.

Although many developers and others participated in discussions with the Office of Planning to develop a program that would have a much higher probability of working in the District, the resulting proposed MIZ program being promulgated by the Zoning Commission is not a reflection or product of that effort or expertise. The development community greatly supports affordable housing, and many of those developers are themselves either full or part-time affordable housing developers.

Second, there has been considerable open-mindedness and optimism of developers that a properly crafted inclusionary zoning program could work in the District.

Many developers and others participated in dozens of meetings and provided extensive analysis and reports on the concepts and details of an inclusionary zoning program for the District. Unfortunately, there is little or no evidence that this extensive amount of effort by the housing industry to craft an inclusionary zoning program for the District has been anything but ignored by the Zoning Commission in the proposed MIZ program. As a result, many developers, both majority and minority owned firms, feel ignored and disenfranchised from the result although they participated in the process. Although I anticipate that the Zoning Commission will receive a fair number of comments from the housing industry raising various concerns and objecting to all or parts of the proposed MIZ program, there will be many more developers who have already decided to forego doing future business in the District and thus see little point in commenting on the proposed MIZ program.

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RECOMMENDATIONS

**WAYS IN WHICH TO MAKE THE
PROPOSED MIZ PROGRAM
LESS LIKELY TO FAIL**

Provide a Fair Notice and Transition Period

Provide for a three (3) year period for the housing market and housing providers to adjust to the new program. The implementation of such a significant program, which will greatly affect land values (and tax assessments and revenues), cause redesigning of planned projects, cause renegotiations of investment and financing arrangements, and incur community concern due to building greater densities, justifies a three (3) year transition period. Otherwise, the District will be facing a destabilizing and chilling effect in the housing market that can easily last for more than three years. Why derail the economic momentum and growth of businesses in the housing industry when a transition period is the answer?

Provide for an Independent and Objective Review of the Results

Include a sunset provision requiring the review by an independent body to report on the success or failure of the program and require the affirmative renewal of the program by the Zoning Commission and the District of Columbia Council after three years following a three (3) year transition period. If the program achieves what the Zoning Commission claims will be achieved, then the Zoning Commission should have no objection including such a provision.

Provide for a Higher Threshold of Units for Program Applicability

Change the applicability of the program from "ten or more dwelling units" to a level of "fifty or more dwelling units" This higher threshold would go a long way in not harming the smaller housing providers, including emerging businesses and minority-owned businesses.

Provide for Exemption of PUDs and Government-Sponsored Sales

Exempt PUDs and government-sponsored sales of properties because these sales already include affordability requirements which are often different from those in the proposed MIZ program and which are tailored to the unique aspects of the properties and communities in which they are located.

Provide for Exemption of Otherwise Affordable Housing Projects

Exempt otherwise affordable housing projects such as those financed under the Housing Production Trust Fund, Tax-Exempt Lower Income Bonds, Lower Income Housing Tax Credits, HOME Program and Community Development Block Grant Program as well as others

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Overlaying the proposed MIZ program will add costs and delay to affordable housing programs, and will distort long understood and established investment patterns in these programs. For example, institutional investors will not adjust easily or at all to an MIZ overlay of bond and tax credit programs where such an overlay does not exist in other jurisdictions. What purpose can there be to overlay the MIZ program on other affordable housing programs other than for the proponents of the MIZ program to claim unjust credit for the production of those affordable units?

Provide for a Reasonable Affordability Period

Reduce the duration of the affordability period to a reasonable period of time. In a for-sale project, the duration will significantly impact the intended beneficiary of the housing by eliminating wealth accumulation and creating disincentives to maintaining the dwelling unit. Homeownership has been encouraged at all levels of government for one primary reason, it has and continues to be the primary manner for a family to build wealth, and the proposed MIZ program denies families the opportunity to build wealth. In a rental project, the duration will significantly impact the housing provider's ability to maintain and recapitalize the project. This situation can be seen in the Federal Section 8 project-based program. The problem was not that housing providers desired to exist the subsidy program and convert their properties to market rate, the problem was that the Federal Government did not come up with a proper continuation of the subsidy program when the original project-based contracts expired at the end of twenty years. In the proposed MIZ program that problem is even more acute since the proposed bonus density subsidy is inadequate from the beginning to offset the cost of the affordable units. At least under the Federal Section 8 project-based program, the subsidy continued for a period of twenty years under the subsidy contract. I propose a ten (10) year affordability period for for-sale housing units and a twenty (20) year affordability period for rental housing units.

Provide for an Economically Viable Bonus Density Set-Aside

Reduce the bonus density set-aside to an appropriate level. Although this area is outside my expertise, I have spoken to many developers and the general conclusion is that any set-aside requirement in excess of one affordable unit for every two market rate units (1:2) should be the maximum and many are more comfortable with one affordable unit for every three market rate units (1:3). The proposed regulations should be revised to base the area of the affordable units as a percentage of the bonus density achieved, and not on a percentage of the overall project. So for example, if 10,000 square feet of bonus density can be achieved, then 25% of that bonus density should be allocated for affordable units.

Provide for the Establishment of Sales Prices to Eliminate Interest Rate Risk

Establish the sales prices or rental rates of the affordable units at the time the units are placed under contract or lease to eliminate interest rate risk to the developer. For example, if an affordable unit is placed under a sales contract one year before the unit is completed and

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conveyed, the sales price would be established under the prevailing interest at the time the sales contract is signed not when the unit is conveyed. This is both favorable to the developer and to the family purchasing the unit because the developer will not have to absorb a decline in the sales price because of rising interest rates and the family can protect themselves from the same risk by locking into an interest rate at the time of signing the sales contract

Provide for Elimination of Arbitrary Allocation of AMI Levels by Zone Districts

Eliminate the arbitrary allocation of AMI levels by zone districts because such allocations run contrary to commonsense and the cost to construct housing due to construct type.

Provide for Exemption of Premium-Priced Units from "Reasonably Dispersed" Requirement

Exempt premium-priced units such as upper floors and full views from the "reasonably dispersed" requirements or builders will find themselves unable to build such units which will deny the District of the tax revenues from these higher income families.

Provide for Establishment of Expedited Process for Relief when Bonus Density cannot be Achieved

Establish an expedited streamline process for obtaining relief from the MIZ program in cases where the bonus density cannot be reasonably achieved

Provide Clarification that Set-Aside Requirements apply only to Achievable Bonus Density

Clarify the language that if the bonus density is not achievable, the project is exempt from the MIZ requirements. Although bonus density may be theoretically possible it may not be achievable in practice. The language stating that 8% of a project must be affordable should be conditioned on the bonus density being achievable.

Provide for Elimination or Revision of Timing of Mayor's Right to Purchase MIZ Units

Eliminate the Mayor's right to purchase up to 25% percent of the affordable units at any time prior to the issuance of the first certificate of occupancy because these units are most often offered to eligible families long before the first certificate of occupancy is issued. Alternatively, revise that language to state that the Mayor has 30 days after being notified by the developer to elect to purchase the affordable units and do not tie the timing to the issuance of the first certificate of occupancy.

CONCLUSION

In conclusion, I encourage the Zoning Commission to suspend proceeding with the proposed MIZ program and to request that the District Government, working with the Office of

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Planning, the Department of Housing and Community Development and the Deputy Mayor for Planning and Economic Development to develop an incentive-based inclusionary zoning program that will work for the District of Columbia, or alternatively, if the Zoning Commission is not willing to suspend proceeding with the proposed MIZ program, then to adopt the recommendations set forth above.

Sincerely,



Jeffrey H. Gelman

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**cc: The Honorable Mayor Anthony Williams
Deputy Mayor Stanley Jackson
Mr. Robert Bobb, City Administrator
The Honorable Linda Cropp, Chairman of the DC Council
The Honorable Sharon Ambrose, DC Council
The Honorable Jack Evans, DC Council
The Honorable Kwame Brown, DC Council
The Honorable Marion Barry, DC Council
The Honorable David A. Catania, DC Council
The Honorable Adrian Fenty, DC Council
The Honorable Jim Graham, DC Council
The Honorable Vincent Gray, DC Council
The Honorable Phil Mendelson, DC Council
The Honorable Vincent Orange, DC Council
The Honorable Kathleen Patterson, DC Council
The Honorable Carol Schwartz, DC Council
Mr. Jalal Green, Director, DC DHCD
Ms. Ellen McCarthy, Director, Office of Planning**

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