

TESTIMONY OF
JEFFREY H. GELMAN
REAL ESTATE AND HOUSING ATTORNEY
GREENSTEIN DELORME & LUCHS, P.C.

ON
ZONING COMMISSION CASE # 04-33, INCLUSIONARY ZONING

July 25, 2005

Good evening members of the Zoning Commission. I am Jeff Gelman, a real estate and housing attorney with the law firm of Greenstein DeLorme & Luchs, P.C. I have devoted the majority of my time during the past twenty years focusing on the creation and preservation of low-income housing. I have volunteered thousands of hours of time assisting non-profits and associations to provide housing and supportive services to the homeless and lower-income families and individuals, and I have served on many advisory groups, committees and task forces on housing policy, housing programs, economic and community development and public housing. I have worked extensively with most of the housing programs that have existed during the past twenty years, both locally and nationally, and I have experienced what works and what does not work in creating and preserving affordable housing.

I am extremely concerned that mandatory inclusionary zoning, as currently proposed, will not work in the District of Columbia for many reasons. I will use my few minutes to focus my remarks on certain misconceptions and on the experience of other jurisdictions, and the conclusion that inclusionary zoning as a means of creating affordable inclusive housing has had extremely mixed results and is at best an inefficient and excessively expensive way of creating a relatively small number of affordable units compared to other more effective housing programs.

I and most others concerned with the proposals for mandatory inclusionary zoning fully agree that there is a great need for more affordable housing with a greater degree of economic integration than will occur by market forces. I am also in agreement with the goals expressed in Council Resolution 16-218 adopted July 6, 2005 for the need of more affordable housing and to create and maintain the diversity of mixed-income neighborhoods. However, in calling for the adoption of a mandatory inclusionary zoning program for Washington, the Resolution relies upon incorrect assumptions and factual misunderstandings. I and many others opposing these particular proposals agree with the stated goals, but believe that following the path of mandatory inclusionary zoning will divert resources and distract public officials from more effective and proven affordable housing programs.

The Council Resolution cites that hundreds of cities and counties around the United States have enacted inclusionary zoning, but this is a tiny fraction of cities

ZONING COMMISSION
CASE No. 04-33
EXHIBIT No. 04

ZONING COMMISSION
District of Columbia
CASE NO. 04-33
EXHIBIT NO. 64

and counties in America. If inclusionary zoning was so successful, as the proponents have claimed - that it will not cost the government any resources - that it will not cost the developers because of extra density and other subsidies - that it will keep housing prices lower and create mixed-income communities, then why have so many cities and counties not adopted mandatory inclusionary zoning and instead pursued other more effective affordable housing programs? Many of the programs in other cities and counties are no where as sweeping or comprehensive as the current proposals for the District of Columbia, and it is misinformation to imply that hundreds of cities and counties have already paved a path down this road which the District of Columbia is considering.

In Ellen McCarthy's testimony to the D.C. Council on January 25, 2005, she stated that inclusionary zoning "is not likely to be a major source of affordable units, and is usually not powerful enough to reach very low incomes without additional subsidies." She noted that the District of Columbia generated approximately 17,000 affordable housing units in the last five years, and if mandatory inclusionary zoning had existed during that same five year period, only approximately 780 affordable units would have been generated. Ms. McCarthy further noted "[i]f the balance between affordable units and bonus density is not struck correctly, NO housing will be produced. Not only does this cause problems in terms of meeting the District's goals of increasing our tax base, it means that no affordable units, which depend on the market rate units being constructed, will be produced." I urge each of you to read Ms. McCarthy's prior testimony to the D.C. Council, for it raises many important, but yet unresolved, concerns with mandatory inclusionary zoning.

Newspapers and trade journals report everyday new innovative programs using government subsidies to create affordable housing and leverage private capital. Probably the biggest misconception in the Council Resolution and in the proposed mandatory inclusionary zoning proposals is that it will "prevent rising prices from driving out low- and moderate-income residents... [Section 2(3)(C) of Council Resolution]. Unless a mandatory inclusionary proposal provides "sufficient compensation in the form of density bonuses, zoning variances, and other incentives" [Section 2(9) of Council Resolution], the uncompensated costs of a mandatory inclusionary zoning program will make all other housing more expensive, making Washington exactly what we are all trying to avoid – a City of the very rich and the very poor.

I became involved in the study of inclusionary zoning about four years ago and participated in numerous meetings with the proponents of mandatory inclusionary zoning. Their early proposals involved other government subsidies, but as they learned that the use of such other subsidies would merely transfer such subsidies from affordable housing providers to market rate housing providers under mandatory inclusionary zoning, the proponents began crossing these other subsidies off their list and began stating that additional density alone was sufficient compensation for the cost of creating affordable units. With sufficient additional

density for market rate units, and under the right market conditions, this may be true, but it is certainly not true under the current inclusionary zoning proposals and certainly not true under all types of market conditions or construction types. Under the current proposals, mandatory inclusionary zoning is merely an additional tax because under the current proposals the developers have to work longer and harder to merely break-even or to minimize the net loss. The proponents' proposal is a classroom model and has little resemblance to the practical aspects of the housing market or the risks and costs of housing development.

I greatly encourage the public officials of Washington to continue on the course of increasing funding of the existing housing programs and creating new innovative programs that do not distort market rate housing by increasing the costs and risks involved in housing development. It is much better to take the fruits of market rate housing, increased tax revenues, and channel these funds directly to create and preserve affordable housing. Inclusionary zoning has a role in creating affordable housing if utilized in a sufficiently incentive-based voluntary program, as are other successful housing programs. You often hear from the proponents of mandatory inclusionary zoning that "voluntary" programs do not work, but they do not tell you that such programs fail not because they were voluntary but because they lacked adequate incentives and proper administration.

Contrary to the Council Resolutions' statement that inclusionary zoning is one of the most effective tools in the affordable housing toolkit, the experience of the following jurisdictions clearly shows inclusionary zoning is one of the least effective tools with very mixed results:

- **Boston, MA (population 589,141): 200 units produced during the last five years**
- **San Francisco, CA (population 776,733): 128 units produced from 1992 to 2000, 90 units produced in 2001 and 2002**
- **Denver, CO (population 554,636): 804 planned units since 2002**
- **San Diego, CA (population 1,223,341): 1,200 units produced between 1992 and 2003**
- **Sacramento, CA (population 407,075): 465 units completed**

THE DISTRICT OF COLUMBIA UNDER ITS VARIOUS HOUSING PROGRAMS HAS PRESERVED AND PRODUCED APPROXIMATELY 17,000 AFFORDABLE HOUSING UNITS IN THE LAST 5 YEARS.

- **The Enterprise Foundation Issue Brief titled "Inclusionary Zoning: Program Design Considerations" states "anecdotal evidence indicates that so-called 'voluntary' programs are more common and have produced much more affordable**

housing than local mandatory requirements.” “An ordinance that is too aggressive with the pricing of affordable housing can have the effect of devaluing the land and might be considered a ‘taking’. [I]t is best to allow developers maximum flexibility in how they provide affordable housing. Otherwise, putting an \$80,000 home on a \$200,000 lot could be an absurd result.”

- **About 20% of the communities in California now have inclusionary zoning, more than four times the national average. The average city in California produced fewer than 15 affordable units per year after passing an inclusionary zoning ordinance. It is estimated that the total present value of lost government revenue due to Bay Area inclusionary zoning ordinances is \$553 million – enough to build many affordable housing projects.**

- **In a 13 city study in California, average production of housing fell the year following the adoption of inclusionary zoning. In eight of these cities with data for the seven years prior and the seven years following inclusionary zoning, 17,296 fewer homes were produced during the seven years after adoption of inclusionary zoning. In those same cities only 770 affordable units were produced.**

- **In the 27 years preceding mid-2004 that inclusionary zoning has been implemented in Los Angeles and Orange counties, the policies have produced 6,379 affordable units, of which 4,469 were in Irvine, which built a number of these units to settle a lawsuit. The average is just 236 affordable units per year, with 165 in Irvine and 71 in all other cities. Taking into account the length of time that each program has been in effect, the average jurisdiction with inclusionary zoning has produced just 34 units each year since adoption of its inclusionary zoning requirement.**

- **A San Jose State University study from 2004 found that in 45 Bay Area cities where inclusionary zoning was enacted, affordable housing mandates were found to increase the price of new homes by \$22,000 to \$44,000, and in some communities, as much \$100,000 or more to the price of new homes. New housing construction decreased by 31% the year following adoption of inclusionary zoning programs. In the 33 cities with data for the seven years prior and the seven years following inclusionary zoning, 10,662 fewer homes were produced during the seven year period after adoption of inclusionary zoning ordinances. Edward Stringham, Assistant Professor of Economics at San Jose State University, stated that “[i]nclusionary zoning should only be enacted if the goal is to make housing even more expensive and to decrease the quantity of new housing available. Simply put, smart cities will avoid inclusionary zoning.”**

- **The Independent Institute conducted a study and found that inclusionary zoning works like a tax on builders. Builders do not just passively accept lower profits. They build fewer homes and raise the prices on the remaining market-rate homes. That makes all other housing less affordable.**

- **The Deputy Commissioner for the New York Department of Housing Preservation and Development stated that “[m]andatory inclusionary housing is not the panacea people think it is. Mandatory doesn’t get you closer than a voluntary program, because in the end, development is voluntary.” “We believe that our incentives are significant enough that developers will choose to develop affordable housing.”**

- **New Century Housing, Volume 1, Issue 2, October 2000, The Center for Housing Policy, Inclusionary Zoning: A Viable Solution to the Affordable Housing Crisis? concludes that “[i]nclusionary zoning works best when combined with developer incentives. It has delivered the greatest numbers of units when the populations ‘included’ are closest to the median income.”**

- **The Montgomery County Moderately Priced Dwelling Unit law was adopted in 1973 and produced 10,000 MPDUs in the first 20 years and another 1,100 in the next 10 years. It is considered one of the largest and most successful mandatory inclusionary programs in the country. The characteristics of Montgomery County are considerably different from the District of Columbia. Furthermore, the creation of MPDUs occurred primarily in certain lower density areas of Montgomery County, and on average produced only 300 to 350 MPDUs per year, most of which occurred in the early years when there was more developable land available.**

- **Kent Conine of the National Association of Home Builders stated “[t]he more important and immediate policy question is whether inclusionary zoning is the best method of government intervention to achieve the goals of affordability and inclusion for the largest number of people. A legitimate criticism of inclusionary zoning programs is that, in spite of the amount of affordable homes built over two decades, the number of households that benefit from the programs is relatively small compared to the need.” “Rather than rely on the particular tool of inclusionary zoning to bring affordable homeownership to more Americans, we should be rethinking the planning, zoning and housing policies that have the greatest impact on the price of housing.”**

- **According to “Large Cities and Inclusionary Zoning” dated November 2003 by the Business and Professional People for the Public Interest, “[m]ost inclusionary zoning programs around the country include density bonuses, fee waivers, relaxed development standards, an expedited permitting process, or in some cases, outright subsidies that aid the developer in paying for the production of affordable units.”**

- **According to “Locally Initiated Inclusionary Zoning Programs: A Guide for Local Governments in North Carolina and Beyond”, approximately 200 local programs exist which have produced 100,000 affordable homes during the past 32 years. For the number of programs and the number of years, this is a relatively small number of units produced at considerable cost in comparison to other affordable housing programs.**

-
- **In conclusion, the literature and studies of the experiences of other jurisdictions during the past 32 years demonstrate that mandatory inclusionary zoning would be a highly speculative and risky proposition for the District of Columbia. Unlike many of these other jurisdictions that have enacted mandatory inclusionary zoning, the District of Columbia has a large and experienced industry of affordable housing developers, both non-profit and for-profit, and their ability to produce and preserve more affordable homes is only limited by the government's commitment of additional financial resources for this social goal, particularly from the surplus revenues generated from recent market-rate housing development.**

EXHIBITS

- A. Housing Supply and Affordability: Do Affordable Housing Mandates Work? Prepared by: Reason Public Policy Institute, April 2004
- B. Do Affordable Housing Mandates Work? Evidence From Los Angeles County and Orange County, Prepared by: Reason Public Policy Institute, June 2004.
- C. Testimony Before The Council, Prepared by Ellen McCarthy, Interim Director of Planning, D.C. Office of Planning, January 25, 2005
- D. Statement of the District of Columbia Building Industry Association on PR 15-1194, Sense of Council in Support of Inclusion Zoning Resolution of 2004. Prepared by Jeffrey H. Gelman, Chair, December 8, 2004.