PHED COMMITTEE #2
January 20, 2011

MEMORANDUM

January 19, 2011

TO: Planning, Housing, and Economic Development Committee

FROM: Linda McMillan, Senior Legislative Analyst

SUBJECT: **Status Report**: Bill 13/38-07, Moderately Priced Dwelling Units (MPDU) - Amendments

This memo provides an update to the PHED Committee on the status of Bill 13/38-07 which was the subject of several worksessions by the previous PHED Committee. This session is not scheduled as a worksession on the bill, but rather as an opportunity for the Committee to ask questions about the work that has been completed to date. A Committee worksession on the bill has been scheduled for January 31st.

A. Background on Bill 13/38-07

Bill 13-07, Moderately Priced Dwelling Units (MPDU) – Amendments, sponsored by Councilmember Leventhal, Andrews, and Trachtenberg, was introduced on June 26, 2007. A public hearing was held on July 19, 2007 and a Committee worksession was held on July 23, 2007. The main provisions of this bill are to eliminate alternative payments ("buy-outs") and to give priority for certain handicapped equipped MPDUs to MPDU-qualified people with disabilities.

Bill 38-07, Moderately Priced Housing - Amendments, sponsored by the Council President at the request of the County Executive, was introduced on December 11, 2007. A public hearing was held on February 5, 2008. Six Committee worksessions on the bill were held with the last on September 14, 2009. The main provisions of this bill are to eliminate alternative payments ("buy-outs"), move to an affordability pricing method for for-sale MPDUs (rental is already based on affordability), revise control periods, standards for alternative locations, and various other standards, procedures, and terminology, including a revision to the policy statement.

The previous PHED Committee agreed that the two bills should be combined and therefore the bill is now combined Bill 13/38-07. **The packet from the September 14, 2009 worksession, which includes the most recent draft of Bill 13-38/07 is attached at ©68-105.**

At the September 14, 2009 worksession, the previous PHED Committee asked that representatives from Council staff and Executive staff meet with representatives from the building industry to see if consensus could be reached on several issues, including the method and amount of an alternative payment in lieu of building for-sale high-rise MPDUs and affordability pricing. The PHED Committee received an update on these efforts on November 19, 2009. The Work Group met again in March 2010 and September 2010 and has continued to exchange information. In several areas, agreement has been reached through this dialogue. Because of other pressing issues before the previous PHED Committee, no further worksessions were held in 2010. The Council extended Bill 13/38-07 through the end of 2011. **The packet from the November 19, 2010 update is attached at ©106-148.**

B. Current Eligible Incomes for MPDUs

For the Committee's reference the following are the current income limits for participation in the MPDU program.

Household Size	RENTAL Maximum Income for Garden Apartment	RENTAL Maximum Income for High Rise Apartment	PURCHASE Maximum Income
1	$47,000	$50,500	$50,500
2	$54,000	$58,000	$58,000
3	$60,500	$65,000	$65,000
4	$67,500	$72,500	$72,500
5	$72,500	$78,000	$78,000

- Households renting through the MPDU program must have at least as many people in the household as the number of bedrooms in the apartment.

- Households renting through the program must have a good credit rating that is acceptable to the apartment management and be able to afford the monthly payment. The application process is handled directly by apartment management.

- Available rental units are listed on the Department of Housing and Community Affairs website. Currently, available units include 2-bedroom, 2-bath units in Germantown for $1,398 per month, studio apartment in North Bethesda for $1,055 per month, one bedroom in North Bethesda for $1,135 per month, and two-bedroom for $1,355 per month.

- Available for-sale units are listed on the DHCA website. Current listings include 3-bedroom duplex units in Olney for $164,937-$174,776 and 3-bedroom townhouses in Clarksburg for $164,937-$174,776. Households of any size may purchase any bedroom size home. Households are responsible for securing their own financing. Certification is handled through DHCA. Households must not have owned a home within the last 5-years.

C. Update on Outstanding Issues

The following summarizes the most recent comments/recommendations from representative from the building industry that participated in the Work Group, DHCA, and Council staff on several outstanding issues. There is agreement now on many items but still disagreement on the basis for the cost of an alternative payment, whether there should be an alternative payment allowed for rental and what that payment should be, and the proposed modifications to the policy statement.

Attached at ©6-67 is an October 4, 2010 memorandum from Ms. Vaias on behalf of the building industry representatives.

Attached at ©1-5 is a November 3, 2010 memo from DHCA Director Nelson responding to the October 4 memo.

1. Statement of Policy (©75; Lines 33-37 of Bill 13-38/07)

Based on prior PHED Committee discussions, Council staff recommended the following language to the PHED Committee which replaces the current "no loss or penalty" and "reasonable prospect of profits" with the broader goal of "financially viable mixed-income communities…" Provision #6 now reads that the public policy of the County is to: strive for, by the use where applicable of the MPDU density bonus allowed under Chapter 59 and, in certain zones, optional development standards and other flexible development practices, financially viable mixed-income communities that offer a broad range of housing opportunities throughout the County.

Comments from Building Industry Representatives	Comments from DHCA	Council Staff Comment
Retain previously approved language (Lines 23-32) that emphasizes that there will be no loss or penalty and that there is a reasonable prospect of a profit on such units. Tax incentives should be added to the language as a way to help realize such profit. Changing language take away the original intent	DHCA concurs with the amended language in the current draft of the bill and disagrees with building industry that they have been disproportionately burdened regarding the MPDU program noting funding provided through the HIF and PILOTs.	Approve language drafted for PHED Committee for Lines 23-32. Profitability and financial viability refer to the development or subdivision not individual unit.

and places undue burden for affordable housing in the building industry. Do not change provision (3) (Lines 12-14) to require MPDUs be dispersed within each subdivision as this removes flexibility.	 Proposes an alternative to current draft that would state, "dispersed within each individual subdivision consistent with sound planning practices."	 Concur with DHCA language. Staff believes it is important to have a statement regarding dispersing MPDUs as there has been confusion in the past over what was intended/required.

2. MPDU Percentage Requirement

Bill 13/38-07 proposes only one change to the requirement for the number of MPDUs included in a project. It is still required that the number of MPDUs must not be less than 12.5% of the total number of units in the subdivision but it now also requires, "If the number of market rate units is increased from the base density, the subdivision must include at least one additional MPDU." **The previous PHED Committee stated that would not consider recommending a change to the 12.5% MPDU requirement.**

In earlier meetings of the Work Group, the building industry representatives said that they would concur with the 12.5% requirement as long as the mandatory Workforce Housing requirement was repealed as the combination of both programs was too financially burdensome. The Council has repealed the mandatory Workforce Housing program, although Workforce Housing can be proposed in certain zones as way to receive additional density.

Comments from Building Industry Representatives	Comments from DHCA	Council Staff Comment
Keep 12.5% MPDU mandate but specify that the MPDUs are in addition to the base density. For example, if the base density allows 100 units then 113 units could be built (100 market rate + 13 MPDUs) instead of 87 market rate and 13 MPDUs as is currently calculated. Building industry also asked that MPDU rounding be consistent. If bonus density calculates 0.4 MPDUs or less, round down; if 0.5 MPDUs or more, round up.	Retain 12.5% MPDU requirement. Generally agree with comments about calculation of base density but Planning Board should be consulted. Rounding should always go up because law requires at least 12.5% MPDUs.	PHED Committee has agreed to retain 12.5% MPDU requirement. Approve requirement that use of density bonus must result in one more MPDU. **PHED Committee should discuss calculation of base density with Planning staff at next worksession.**

3. Alternative Location and Alternative Payment – Limit to High Rise Only

The current draft of Bill 13/38-07 allows alternative location and alternative payment agreements only for high-rise residential or mixed use buildings. High rise is defined as "any multiple-family residential or mixed use building that is higher than 4 stories."

Comments from Building Industry Representatives	Comments from DHCA	Council Staff Comment
Agree that alternative location and payment can be limited to high-rise only. Request that an exception be allowed if, "the Applicant can show extraordinary construction costs that warrant treatment as a high-rise building."	Executive originally opposed alternative payment for any type of building but will now support for high-rise only. Limit alternative locations to high-rise only. DHCA does not agree with the building industry proposed language for an exception.	Limit alternative location and payment agreements to high-rise buildings only as it is the cost of high-rise construction that has driven the discussion about the ability to provide MPDUs that are affordable to households at or below 70% of AMI. Building industry did have some specific examples where 4-story construction might be unusually costly (such as being on top of underground parking) or require steel construction and elevators. **Council staff suggests that DHCA be given authority to make an exception if specific criteria could be included in regulation.** Council staff does not agree that language should be as discretionary as proposed by the building industry.

4. Alternative Location – Percent Required/Density Bonus

The current draft of Bill 13/38-07 does not allow a project to obtain a MPDU density bonus when an alternative location agreement is used. The current draft also requires that the number of MPDUs provided at one or more alternative locations in the same planning area must be equal to at least 15% of the total approved units in the original building and must provide at least one more MPDU than would have been built if 12.5% of the units in the original building were MPDUs.

Comments from Building Industry Representatives	Comments from DHCA	Council Staff Comment
Bonus density should be available when an alternative agreement is used. An alternative location agreement should be on a one-for-one basis and not require additional units.	DHCA will now agree bonus density can be available when an alternative agreement is used. An alternative location agreement can be on a one-for-one basis and not require additional units.	**Agreement** that bonus density should be available when an alternative agreement is used. An alternative location agreement should be on a one-for-one basis and not require additional units.
Alternative locations should be allowed to be **outside** of the planning area.	Alternative locations must be in the **same** planning area.	Alternative locations must be in the **same** planning area.
When an alternative location is in another building within a development, MPDUs should be allowed to be up to 40% of one floor.	DHCA is willing to have up to 40% of units on one floor be MPDUs when there is more than one unit in a development.	Clarify that intent is building overall will have no more than 30% MPDUs. Agree with DHCA that 40% could be on one floor.
An Applicant's plan for off-site location must be confirmed prior to the issuance of a use-and-occupancy permit. Commitment on number of MPDUs would be signed earlier in the process.	MPDUs must be provided before or at same time as market units and thus an agreement cannot wait until use-and-occupancy permit.	Council staff agrees with DHCA that waiting to use-and-occupancy is too late in the process to specify where the MPDUs will be provided. If the builder cannot provide them on-site on at an alternative in the same planning area, then the alternative payment process should be used.

5. Alternative Payment – Density Bonus

The current draft of Bill 13/38-07 does not allow a project to obtain a MPDU density bonus when an alternative payment is made for the number of required MPDUs.

Comments from Development Representatives	Comments from DHCA	Council Staff Comment
Allow bonus density to be used with alternative payment agreements.	DHCA will support allowing bonus density with an alternative payment agreement if the payment is sufficient to allow DHCA to pursue other units in the same planning area. DHCA notes that builders will be gaining additional market rate units under this proposal.	Agree with DHCA that bonus density should be allowed if the alternative payment is sufficient to allow DHCA to find other units in the same planning area.

6. Alternative Payment – Calculation/Amount

In Council staff's opinion, the amount paid by a developer under an alternative payment agreement should accomplish three goals: (1) along with expected resources from an MPDU eligible household, it should be adequate to obtain another unit in the same planning area; (2) it should be evenly applied; and, (3) it should be clear to developers and the public how the payment was calculated. Council staff will not recommend to the PHED Committee any alternative payment method that requires meetings of the ARC and is based on confidential information. The alternative payment is a voluntary payment chosen by the developer in lieu of building MPDUs on site or providing them at an alternative location. The developer will determine which method is in their best interest.

Council staff is recommending that the voluntary alternative payment be 3% of the sales price of each market rate unit. It has several advantages: (1) it is clear and easy to calculate, (2) it responds to the market place both in adjusting for the value in different parts of the county and the ups and downs of market prices, (3) it can be paid as units are settled which would eliminate the need for an up front payment.

Council staff is basing this recommendation on an example that uses two 100 unit buildings, one in Bethesda and one in Silver Spring and **2009** median sales prices. Council staff is also assuming that a MPDU household seeking a 2 bedroom unit can bring $195,000 to the table based on the DHCA affordability guidelines.

Bethesda	Number of Units	2009 Median Sales Price	Total Value	3% alternative payment
Efficiency	0	Na	Na	Na
1 Bedroom	20	$596,000	$11,920,000	$357,600
2 Bedrooms	65	$1,184,000	$76,960,000	$2,308,000
3 bedrooms	15	$1,671,000	$25,065,000	$751,950
Total	100		$113,945,000	$3,418,350
Avg per unit - 13 forgone MPDUs				**$262,950**

Council staff is focusing on the average payment per forgone MPDU rather individual units. If the $262,950 average payment was combined with the $195,000 that a MPDU household could afford, then a unit costing up to $457,950 could be substituted. This is less than the median 2009 sales price for a new two bedroom unit in Bethesda but should be sufficient to allow DHCA to identify a resale unit in the Bethesda area.

Silver Spring	Number of Units	2009 Median Sales Price	Total Value	3% alternative payment
Efficiency	5	$248,000	$1,240,000	$37,200
1 Bedroom	55	$321,000	$17,655,000	$529,650
2 Bedrooms	40	$496,000	$19,840,000	$595,200
3 bedrooms	0	Na	Na	0
Total	100		$38,735,000	$1,162,050
Avg per unit - 13 forgone MPDUs				**$89,390**

In this case, if the average payment of $89,390 is combined with $195,000 the MPDU household can afford, there would be resources of $284,390 to use.

When an alternative payment is selected, the developer will be able to sell the square footage that would have been allocated to the MPDU at market rates. In the Bethesda model, the majority of new units sold were two bedroom units. Using the average cost of construction of $371,000 referenced by the building industry, the developer would have a cost of $633,950 for the two bedroom forgone MPDU ($371,000+$262,950). The median sales price for a two bedroom unit was $1.18 million. In Silver Spring, the average unit falls between 1 and 2 bedrooms. If average construction costs are $260,000, the developer cost would be $349,390 ($260,000 +$89,390) which would be slightly about the median price of a 1 bedroom unit but $150,000 below the median sales price of a two bedroom unit. Using a percent calculation, if sales prices decline, the payment will decline as well.

Comments from Building Industry Representatives	Comments from DHCA	Council Staff Comment
Agree with methodology that assesses a percent of actual sales price that would be paid to DHCA at the time of settlement.	Agree with methodology that assesses a percent of actual sales price that would be paid to DHCA at the time of settlement.	Agree with methodology that assesses a percent of actual sales price that would be paid to DHCA at the time of settlement.
Proposes that the payment should be 1% of sales price. Using the same example as Council staff, this would result in a payment of $87,650 per MPDU in the Bethesda scenario. Combined with $195,000 that would have been the buyer's price, this is an appropriate amount of money for DHCA to pursue other options or leverage other funds.	Agree with Council staff proposal for a 3% payment (this is lower than DHCA's previous position that the payment should be 4%.) DHCA notes that 1% will not provide a sufficient amount of funds to be able to purchase a replacement unit in the same planning area.	Payment should be 3% of actual sales price. This should allow sufficient funds to find appropriate alternative units.

Language in the legislation would require DHCA to set the voluntary alternative payment as a percentage of the sales price. The actual percentage would be set by a Method 2 regulation rather than in law.

Building industry representatives, DHCA, and Council staff agree that payment that goes to HIF for for-sale units could be used to increase affordable rental opportunities and does not have to be used to find an alternative resale unit.

7. Affordability Pricing

Representatives from the building industry have previously objected to the proposed change to an "affordability pricing" model because of the gap between the affordability price and construction costs and because the price remains uncertain and could change with interest rates or other variables. While industry representatives have voiced that the current pricing worksheets do not provide a price that covers the construction cost of the specific MPDU unit, there is a reliability to the current pricing worksheets that is preferable to affordability pricing.

The most "unaffordable" MPDUs have been in new high-end high-rise for-sale buildings and affordability pricing provides a model to ensure these units are affordable to households eligible for the MPDU program. However, if an alternative payment provides a reasonable way to provide an alternative unit, the move to affordability pricing is not necessary. Council staff recommends that if a

3% alternative payment calculation is adopted that the current MPDU pricing method be retained.

Comments from Building Industry Representatives	Comments from DHCA	Council Staff Comment
If there is agreement on a reasonable alterative payment, the Building Industry would be willing to support affordability pricing. If not, the process should continue to be based on the costs to developers.	DHCA continues to support affordability pricing and believes it is important to the integrity of the program. Affordability issues are a problem both with the initial sale and the resale of units. DHCA previous said that affordability price for high-rise will be based on 70% AMI (originally proposed 60% AMI).	Council staff expects that if affordability pricing is implemented along with a clear and certain alternative payment that few, if any, new MPDUs will be constructed in high-rise buildings. **Council staff believes the issue then becomes whether affordability pricing is important for garden apts. and single and town homes. The Committee should hear from the Building Industry and DHCA on this issue.**

8. Alternative Payment for Rental

The building industry has requested that alternative payment agreements also be available to developers of rental buildings. The previous PHED Committee agreed to this request and the current draft of Bill 13/38-07 allows alternative payments for rental developments (Line 295). However, the previous PHED Committee did not reach any conclusions on what an acceptable alternative payment would be.

Comments from Building Industry Representatives	Comments from DHCA	Council Staff Comment
Alternative payment agreements should be available for rental. The industry is having difficulties obtaining financing for high-rise buildings with MPDUs.	DHCA does not support alternative payment agreements for rental. There is no evidence that MPDUs make rental projects infeasible. Concerned that alternative	Council staff agrees with DHCA that there is a lack of evidence regarding inability to provide MPDUs in rental developments. However, the previous PHED Committee has

Proposes a 1% payment based on construction of the residential part of the building as set forth on the permitting application, plus 30% of the soft costs. Payment would be made 50% at 90% occupancy and 50% six months later.	payments for rental will reduce new MPDU rentals near Metro stations.	recommended including rental properties. Council staff is concerned that if an alternative payment is allowed there will be little or no new rental MPDUs in high-rises near transit. Therefore, it is important that the alternative payment be sufficient for DHCA to pursue other opportunities to secure rental units. Council staff will work to provide the PHED Committee with scenarios on how payments at the January 31 worksession.

9. Control Period

The building industry believes that the 99 year control period for rental developments impacts the quality of units and financing for these projects and recommends that the control period be changed to 20 years.

DHCA is not recommending any changes to the current MPDU control periods. The previous PHED Committee discussed the issue but did not indicate that they supported making any changes at this time.

10. Payment in Lieu of Taxes

The building industry is proposing that PILOTs for affordable units be automatically available for all rental developments to offset the cost of providing the MPDU. DHCA has used PILOTs for many projects with a variety of percentages of affordable units that are restricted to a variety of income levels, but does not agree that they are needed by every rental project in order to make the project financially viable.

Council staff is not recommending changes but **notes that separate legislation would be required.**

Comments from Development Representatives	Comments from DHCA	Council Staff Comment
Current standard that a PILOT is needed to make the project financially feasible is too onerous. PILOT should be available whenever full density cannot be achieved. PILOT should be approved by DHCA without Council action on cap.	DHCA does not recommend any changes to PILOT criteria/procedures. PILOT should be based on the amount needed to make the project financially feasible with MPDUs on site. Council should continue to set cap.	PILOTs are authorized in Chapter 52 of the County Code not Chapter 25A. Council staff believes current rules are appropriate. DHCA recommends to Finance which approves each PILOT.

11. Priority for Accessible Units

A key provision of Bill 13-07 was giving priority for accessible units to eligible disabled persons. At the November 2008 session, the PHED Committee agreed to the following language:

"For any MPDU that is accessible to persons with a mobility impairment, the regulation must require the MPDU to be offered to each eligible applicant whose household is appropriately sized for the MPDU and includes a person with a mobility impairment before the MPDU is offered to any other applicant."

The proposal is acceptable to the Building Industry as long as DHCA has the burden of finding the qualified applicants.

12. Exceeding Master Plan Height

Representatives from the building industry believe master plan density and height requirements should be exceeded when need to provide MPDUs. The building industry argues that master plans generally allow 65% of density allowed by zoning and that there is not a realistic expectation that density allowed under the MPDU program can be achieved.

DHCA agrees that master plan density and height limitation should be allowed to be exceeded in order to provide MPDUs but only when the MPDUs are provided on-site.

Council staff believes that the PHED Committee should have further discussions regarding this issue – particularly as it continues to hold work sessions on master plans and sector plans. The PHED Committee may also want to discuss this issue and how it might impact building in areas with recent plans such as Shady Grove and White Flint.

13. Flexibility to Modify Bedroom Requirements in Age-Restricted Single-Family Developments

At its September 2009 session, the previous PHED Committee approved the following amendment to provide flexibility in age-restricted single family developments.

"The Director must not approve an MPDU agreement that reduces the number of bedrooms required in this subsection in any MPDU, except that the Director may reduce the minimum required number of bedrooms in age-restricted single-family subdivisions in order to make the MPDUs compatible with the market rate units. The Director must not approve an MPDU agreement that does not meet minimum specifications for MPDUs established by regulation from time to time. The minimum specifications may include the overall basic size, the number of bedrooms and bathrooms, minimum room dimensions, and other minimum requirements for appliances, interior finishes, and architectural features."

Council staff has asked whether there might be reasons to allow for alternative payments for senior housing in order to make sure than resources are being invested in the type of affordable senior housing where there are currently shortages. DHCA supports this idea, noting that the demand for age-restricted for-sale MPDUs has been very low but that there is a need for affordable rental housing for seniors.

In addition, DHCA believe that changes are needed in the requirements for life-care facilities which are required to comply with MPDU laws and regulations. Since a person in a life care facilities is signing a contract to potentially move through different types of housing and care, it does not fit well with the MPDU model.

The Building Industry is looking at this issue and will provide further comment.

HOUSING & CA

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DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

Isiah Leggett
County Executive

059342

Richard Y. Nelson, Jr.
Director

MEMORANDUM

November 3, 2010

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MONTGOMERY COUNTY
COUNCIL
2010 NOV -3 PM 3:33

TO: Linda McMillan, Senior Legislative Analyst
Montgomery County Council

FROM: Richard Y. Nelson, Jr., Director
Department of Housing and Community Affairs

SUBJECT: DHCA Response to Building Industry Comments in its Memorandum dated October 4, 2010

DHCA has reviewed the October 4, 2010 memorandum from the Building Industry (BI) to you, in which the BI provided its response to your MPDU memorandum of March 15, 2010. DHCA has the following comments.

1. Statement of Policy

DHCA supports the language as proposed by Council staff in paragraph 25A-2(6) of the current amendment. In regards to the proposed amended language in 25A-2(3), DHCA believes that dispersal and integration of MPDUs within individual projects and subdivisions is a desirable public benefit in order to avoid the physical segregation and isolation of MPDUs from other units in the building or subdivision. However, DHCA would accept an amendment to the proposed language as follows in order to permit builders and developers to work with the Planning Board and DHCA to achieve this public good to the greatest extent feasible given individual site considerations:

> "(3) Assure that moderately priced housing is dispersed within the County consistent with the general plan and area master plans, <u>and dispersed within each individual subdivision consistent with sound planning practices</u>."

In addition, DHCA does not agree with the sentiment expressed in the BI memorandum that somehow the building industry is solely burdened with the responsibility for providing affordable housing in Montgomery County (through the MPDU program). While the MPDU program is one important component of the County's affordable housing efforts, the taxpayers of Montgomery County offer significant support to the public purpose of providing affordable housing, most significantly through the Housing Initiative Fund (HIF). According to CountyStat figures for 2008 through 2010, the number of affordable units produced or preserved in the County during this time period was 3,087 units. Of this total, new for sale and rental MPDU production accounted for 472 units (or 15% of the total).

2. MPDU Percentage Requirement

DHCA does not support a change in the minimum 12.5% MPDU requirement. Furthermore, a January 8, 2010 Memorandum from the BI to the MPDU Working Group included the following language:

> "2) MPDUs should remain with a minimum requirement of 12.5%. With the elimination of Workforce Housing, it is believed that the base requirement should remain with continued work on the other issues discussed below to help mitigate the financial burden to the struggling building community."

Since the mandatory Workforce Housing requirement has now been made voluntary, DHCA would expect the BI to accept the 12.5% minimum MPDU requirement without further conditions.

DHCA supports adding the required MPDUs to the base density, as proposed by the BI, but believes that the Planning Board should be consulted about this proposed change. However, DHCA does not agree that the methodology the Planning Department has used to calculate the number of MPDUs has been applied inconsistently. The Planning Department's standard practice is to round up because the language of Chapter 25A states that the calculated number of MPDUs "shall not be less than" 12.5%. Whenever this calculation results in a fraction of a unit, the resulting number of MPDUs has consistently been rounded up to the nearest whole number.

3. Alternative Location and Alternative Payment – Limit to High Rise Only

DHCA supports the proposed definition of high-rise building contained in the current version of the amendment; and disagrees with the need for the additional language proposed by the BI. Given the unique set of circumstances associated with a every development in the County, DHCA believes the term "extraordinary construction costs" would be difficult to define and quantify, and would result in too broad an application of the alternative location and alternative payment provisions of the MPDU law.

4. Alternative Location – Percentage Required/Density Bonus

DHCA supports providing bonus density with Alternative Location Agreements. However, in order to ensure that affordable housing is produced and available in all areas of the County, DHCA believes that MPDUs in alternative locations need to be within the same planning area as the project itself. DHCA recognizes that this will present challenges for developers wishing to develop in some higher cost planning areas. The alternative of permitting off-site MPDUs to be developed outside the planning area would lead in time to an overall loss of affordable housing in several large areas of the County due to re-development pressures, rising real estate costs, and conversions.

The BI states that it prefers that the decision on whether to place the MPDUs in the building, or to seek an Alternative Location or Alternative Payment Agreement, be made at the time the first unit in the project is sold. DHCA believes this is too late in the process for several reasons. First, DHCA believes that any alternative to providing MPDUs needs to be based on a firm and realistic alternative. Second, postponing this decision until the time the development is nearing completion would not permit DHCA to ensure compliance with the alternative agreement and ensure that the replacement units are provided or purchased. This is not to say that an amendment or change to the alternative agreement could not be pursued later in the development process if a previously unidentified alternative was found, only that the developer would need to work with DHCA throughout the process.

5. Alternative Payment – Density Bonus

DHCA supports the concept of providing a density bonus for projects that are seeking an Alternative Payment Agreement, but only in conjunction with a meaningful alternative payment that will permit the County to purchase a suitable replacement unit in the same Planning Area as the project. DHCA notes that its willingness to support a change in the way the MPDU requirement and bonus density is calculated (that is, calculated on, and added to, the base density) will also result in more market rate units than would be realized under the current calculation method.

6. Alternative Payment – Calculation/Amount

DHCA supports the Council staff's recommendation of a 3% flat fee in-lieu of providing MPDUs for high-rise for sale buildings (and for some age-restricted developments as is discussed below in item 13). DHCA's support for many of the proposed changes related to alternative locations, alternative payments, the revised method of calculating a project's MPDU requirement as additive to a project's base density, and the method of calculating bonus density (as discussed elsewhere in this memorandum) hinges on a meaningful alternative payment amount that will advance the creation and preservation of the affordable housing options that will be needed to compensate for the MPDUs not built.

As per the Council staff's analysis in the March 15, 2010 memorandum to the MPDU Development Work Group, DHCA supports the Council Staff position that any alternative payment needs to be based on the cost of replacing the foregone MPDU within the same planning area. In this analysis, Council Staff used a flat fee of 3% of the sales price of each market rate unit to calculate a total alternative payment of $3,418,350 for a hypothetical 100 unit high-rise for sale condominium in downtown Bethesda with the requirement to provide 13 MPDUs. This represents an average payment of $262,950 per MPDU.

The proposal put forth in the BI's October 4, 2010 memorandum proposes a flat buy-out amount of 1% of the sales price of the market rate units. Using the example presented in the March 10, 2010 working group memorandum, this would result in a total alternative payment of $87,650 per MPDU in a hypothetical 100 unit high-rise for sale development in downtown Bethesda (or a total payment of $1,139,450 for 13 MPDUs). DHCA maintains that the amount of funds generated by this proposal would be insufficient to purchase replacement affordable units, especially in high-cost planning areas such as Bethesda.

7. Affordability Pricing

DHCA agrees with the position of Council Staff as stated in the March 10, 2010 memorandum to the MPDU Development Workgroup:

> "Council staff believes that the most "unaffordable" MPDUs have been in new high-end high-rise for sale buildings and that affordability pricing provides a model to ensure that these units are affordable to households eligible for the MPDU program."

The issues surrounding for sale MPDUs in high rises must be addressed; these issues will only be exacerbated as future development in the County is channeled into higher density areas. Under the current income limits and MPDU pricing methodology, there is a growing inability of households in the MPDU program to purchase MPDUs in high rises. This problem is related to both the first purchase of the units, as well as to the subsequent resale of the units through the program. The problem is due to both the sales prices of the units (and the required mortgage payment), and the significantly higher condominium fees required in high rise building.

For this reason, DHCA supports affordability pricing for MPDUs in for sale, high rise buildings, especially since the developer will have the option of making an alternative payment for this type of project. Furthermore, in a memorandum dated October 4, 2010, the BI states:

> "If an alternative payment value can be agreed upon, the Industry is willing to support the pricing formula for the sale of MPDUs which is based on the buyer's ability to pay. However, if a reasonable alternative payment figure is not reached, then the pricing model needs to consider the costs to the developer and not the buyer's ability to pay."

8. Alternative Payment for Rental

DHCA does not support alternative payments for rental MPDUs in high rise buildings. Analysis of current and proposed projects does not support the contention that MPDUs make the project infeasible. FHA financing, mezzanine financing and judicious use of PILOTs accommodate the impact of MPDUs in high rise rental projects. Also, allowing these payments for rentals may result in no MPDUs in new buildings in redeveloping areas near Metro.

9. Control Period

DHCA does not support a change in the 99-year duration of the control period for rental MPDUs. DHCA believes that the 99-year control period has not been an impediment to financing otherwise economically viable rental projects. Since the 99-year rental control became effective on April 1, 2005, there have been seven high-rise rental projects developed that had MPDUs with 99-year control periods (these projects contain 269 MPDUs).

10. Payment in Lieu of Taxes (PILOT)

DHCA supports the current policy concerning PILOTs, particularly given current County fiscal realities. The reduction allowed by the PILOT should continue to be the amount needed to make the project financially feasible with the MPDUs onsite. Council should continue to set the cap. Only four of the seven high-rise projects with MPDUs offered since the inception of the 99-year control period in 2005 received a PILOT. Therefore, DHCA believes PILOTS should be granted on a case-by-case basis depending on the particular facts associated with each project.

11. Priority for Accessible Units

DHCA does not support the BI's position the DHCA should have the "burden of finding qualified occupants" for accessible units. The proposed bill does not place the responsibility on DHCA to sell or rent a developer's accessible, affordable units. The responsibility for such marketing and leasing/selling of these units legitimately rests with the developer.

12. Exceeding Master Plan Height

DHCA agrees with the BI that density and height limits in master plans should be allowed to be exceeded in order to provide MPDUs and to facilitate alternative location and payment agreements.

13. Flexibility to Modify Bedroom Requirements in Age-Restricted Single-Family Developments

In regards to this issue, Council Staff specifically asked the following question in the March 15, 2010 memorandum:

"Are there advantages to allowing an alternative payment for age-restricted units in mid-rise buildings as well high-rise buildings given the current supply of certain types of senior housing and the needs to increase senior housing that provides certain services?"

Based upon its experience managing the MPDU program, DHCA supports permitting alternative payment agreements in for sale, age-restricted developments. The demand for age-restricted MPDUs has historically been extremely limited; DHCA believes this may be due to the sales prices in relation to seniors' incomes, the 30-year control period on the units, and the inability of owners to leave the property to their children. It appears seniors are more amenable to affordable rental housing; therefore, an alternative payment would permit DHCA to assist in the development of this type of housing.

In a related area, DHCA believes that the affordable housing provisions related to certain types of projects developed under Section 59-G-2.35.1. "Life care (continuing care) facility" need to be examined to ensure that proper public policy goals are being furthered. These types of projects are specifically required to comply with the MPDU law under Section 59-G-2.35.1.(g)(2), but because the nature of these projects ties the provision of housing to lifetime care service contracts, the provision of affordable units in long term life-care facilities has proven to be extremely difficult using the MPDU model. Specifically, the housing is neither leased nor sold to residents of these facilities. Persons who purchase a contract for services move from one housing type to another as they age on site. Even if the housing component of the facility can be separated and the costs quantified, there is no provision to ensure that the residents can afford the additional extensive service package offered by such facilities.

14. Calculation Methodology and Rounding

DHCA believes the Planning Department's current methodology for calculating a development's MPDU requirement and bonus density on the total number of units in a development, including MPDUs is consistent with the language in Chapter 25A, Section 25A-5(c)(3) which states:

> "...the required number of moderately priced dwelling units is a variable percentage that is not less than 12.5 percent of the **total number of dwelling units** at that location." [emphasis added by DHCA]

However, as stated under Item 5 above, DHCA does support a meaningful density bonus that helps to offset the cost of providing affordable housing. One aspect of developing such a density bonus may involve changing the language in Chapter 25A to achieve what the BI is suggesting here (that is, calculating the MPDU requirement on the market rate units alone).

NAN LAM
CC

Housing

LINOWES AND BLOCHER LLP
ATTORNEYS AT LAW

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RECEIVED
MONTGOMERY COUNTY
COUNCIL

MEMORANDUM

TO: Linda McMillan
Senior Legislative Analyst, Montgomery County Council

FROM: Building Industry, MPDU Working Group
Emily J. Vaias, Esq.

DATE: October 4, 2010

RE: Building Industry Comments to MPDU Memorandum of March 15, 2010

We appreciate your comments and the discussion that we had as a full group on March 15,2010. Since that time, as we awaited the Council's completion of the budget and Summer recess, the Industry representatives have been meeting and further discussing the MPDU (moderately priced dwelling units) legislation, Bill No. 13/38-07. We continue to believe that changes are needed in order to transform this previously successful program, into one that can adapt to changing market and housing conditions in a way that continues to produce affordable housing in Montgomery County. Please remember that building creates jobs for the County, increases the tax base, and keeps housing costs down by providing additional supply. To the extent that the affordability program makes new projects infeasible or delays their construction, this adds costs to housing that is ultimately passed on to County residents. We look forward to meeting with you on September 2, 2010 to continue these discussions and have responded to your memo below.

1. Statement of Policy

We believe that the legality of the MPDU program has hinged on the ability to obtain bonus densities and on the intent of the legislation to assure "no loss or penalty as a result" of providing MPDUs. The general public policy to provide affordable housing is a burden that should be spread across the entire community and not bourne by one limited sector of the community that happens to build housing. If one sector is expected to be the main provider, than there must be sufficient bonuses or other credits such that the end result is not an unlawful penalty or tax. Simply providing that a development be financially viable does not adequately compensate for the loss caused by providing MPDUs.

Therefore we object to the proposed new paragraph 25A-2(6) and suggest that existing paragraphs (6) and (7) remain unchanged. Further, the proposed change in 25A-2(3) stating that MPDUs be "dispersed within each individual subdivision," should not be added as it takes away flexibility to provide units in a variety of developments.

2. MPDU Percentage Requirement

We are willing to accept the 12.5% standard requirement as long as the overall intent and policy of the program remains that there is to be "no loss or penalty." Further, and in keeping with the original and legal intent of the law, the MPDUs should be in addition to the base density such that there is truly no net loss. In this manner, a development of 100 dwelling units allowed by zoning, could produce 100 market-rate units and 13 MPDUs for a total of 113 units instead of only 87 market rate units and 13 MPDUs. In addition, there is no standard for the rounding of numbers and there should be a consistent way of doing this. For either determining bonus density or number of MPDUs, if it is a .4 or lower, round down; if .5 or higher, round up.

3. Alternative Location and Alternative Payment – Limit to High Rise Only

We are in agreement regarding the proposed definition of high-rise including a "multiple-family residential or mixed-use building that is higher than 4 stories." We would request that because the basis of this provision is the cost of high-rise construction, that an additional phrase be added to capture those construction circumstances where, "the Applicant can show extraordinary construction costs that warrant treatment as a high-rise building."

4. Alternative Location-Percentage Required/Density Bonus

Everyone seems in agreement that the bonus density should be available whether MPDUs are provided on-site or off-site at a one-for-one exchange rate. We believe that alternative locations should be "within the same or an adjacent Planning Area," such that there is an ability to find sites to locate units nearby. Generally, where high-rise structures are being built, these Planning Areas do not allow for many opportunities for low-rise or MPDU construction. Thus, inherently, there is already a problem in the area and the Planning Area. Accordingly, this is not a realistic option and will not help to encourage actual construction of MPDUs anywhere.

Further, there is agreement that within a project when there are different construction types (e.g., low-rise versus high-rise), the MPDUs can be built in the low-rise structure as long as no more than 40% of the units on a given floor are MPDUs, and no more than 40% of the units in the building can be MPDUs.

As to when the decision must be made as to the location of the MPDUs, we believe this decision can be pushed as far as the use and occupancy certificate in order to give the Applicant and DHCA time to pursue as many options as possible for finding alternative sites. With construction likely to take 2 years or so, there may be opportunities that arise during that time that would better serve the public interest and it seems there is no real reason to press for a decision so early in the process. The obligation to provide units can be finalized up-front, but the options for doing so can be deferred.

5. Alternative Payment – Density Bonus

As we have continually stated, if a payment is to be made, there must be a funding mechanism and this is, theoretically, the ability to recoup some of the costs of "providing" MPDUs by allowing additional market-rate units. The bonus density is key to making the program viable for builders. Without the bonus, the provision for an alternative payment is meaningless. (See also discussion #6 below)

6. Alternative Payment – Calculation/Amount

The Industry is willing to accept that the process and payment for alternative payments should be clear and understandable to everyone, even though this will necessarily involve huge compromises based on the fact that one size does not fit all when dealing with real property and development. Inherently, location matters and affects costs and it is difficult to determine a methodology that can work as well in downtown Bethesda as it can in Silver Spring or Shady Grove. However, we are willing to try.

But, the notion of there being a one-for-one exchange must be characterized in terms of the County's ability to leverage public monies, through collection of payments, bond financing, federal and state housing programs, partnerships with non-profits, etc., to find or create affordable housing units. That is, the price to be paid by the developer of a high-rise project per MPDU can not be expected to, on its own and coupled with the fixed amount being paid by an MPDU buyer, be enough to purchase a comparable unit in the same Planning Area. Again, this is just not logical and produces a number that is well above that of any nearby jurisdiction and more importantly, beyond what is a fair burden for a project to bear. Therefore, when looking at possible methodologies and calculations, one must consider that the alternative payment funds from one project, can and must be grouped with funds from numerous projects and then used strategically by DHCA to purchase units around the County as they become available and in numbers and locations that truly provide a more balanced and diverse housing stock throughout the County. It is true, this may not produce MPDUs simultaneously with market-rate units, but it will likely produce more units ultimately and in more neighborhoods than can be done by relying on the private market alone. Further, it will allow the County to take advantage of dips in the market by accumulating funds during busy times, and being able to spend them in slow times, when people will need housing the most.

With this concept in mind, we can agree to the proposed methodology of requiring a payment at the time of settlement on condominium units. This rate should be 1% of the sales price. A developer should have the option to make an alternative payment for the MPDUs by right without the need for any discretionary approval from the Planning Board, ARC or DHCA. Using the example in the March 15, 2010 Memo, for Bethesda, this would result in an approximate payment of $87,650 per MPDU. If you add the MPDU buyer's purchase price of $195,000 to that you get $282,650 available for purchase of a condominium unit, and this is before you add any other government programs and subsidies that would be available. Further, this money could be leveraged with other monies to allow additional savings and economies of scale in purchasing power. When allowed to go to adjacent planning areas to find units, it could allow for townhouse or even small single-family purchases, that might often be more desirable for an MPDU household than a high-rise condominium. Lastly, it is agreed that it may even be more beneficial for DHCA to use these funds to subsidize occupancies in rental units rather than try to buy for-sale units, as the long-term investment in an MPDU is questionable.

Similarly, for multi-family, high-rise rental projects a 1% payment would be assessed based on the construction costs of the residential portion of a building, as set forth on the building permit application, plus 30% soft costs. This payment would be made in two stages with the first 50% paid at 90% occupancy and the remaining 50% paid 6 months thereafter. For the long-term, solving the rental housing issue is just as important, if not more so, than the for-sale issue and the price inequities remain the same for the builders.

7. Affordability Pricing

If an alternative payment value can be agreed on, the Industry is willing to support the pricing formula for the sale of MPDUs which is based on the buyer's ability to pay. However, if a reasonable alternative payment figure is not reached, then the pricing model needs to consider the costs to the developer and not the buyer's ability to pay. (We have attached hereto FHA information)

8. Alternative Payment for Rental

We are experiencing problems with financing high-rise rental projects that have MPDUs. Partly based on the economy, but also based on the realities of construction costs, inability to get PILOTS, and length of the MPDU program (99 year drain on the property). As stated above, a 1% alternative payment on rental units, would provide funding for DHCA to find affordable units in better locations for MPDU households.

9. Control Period

The 99-year control period for rental units is simply an unlawful servitude upon the land of developers. It is essentially rent control, which is not a desirable program. This never allows a property owner to regain control and reinvest in the property in a reasonable manner. Further, it keeps MPDUs stagnant and does not allow flexibility for DHCA or households to find locations that are more desirable. A 20 year program would be comparable to federal housing programs and would allow for reinvestment within a reasonable time period. This change must be part of the legislative package.

10. Payment in Lieu of Taxes (PILOT)

We understand that DHCA has become more wiling to issue PILOTS in the last year or so than in the past. However, the regulations still require a showing that the project is financially infeasible with the MPDUs unless a PILOT is granted. This is a difficult burden to prove, and again, is not in-line with the legal intent of the original legislation, requiring no loss or penalty to the developer. PILOTS should be granted in order to make the MPDU financially feasible. PILOTS should be allowed for projects that provided 12.5% MPDUs, not just those that provide more and should be by-right especially if no alternative payment is requested. It is by use of PILOTS, in conjunction with alternative payments, that rental housing projects can get started and produce both market and affordable units. Further, the legislative cap on PILOTs should be removed, or the current cap increased.

11. Priority for Accessible Units

We understand this deals with making units accessible but not reasonably "adaptable," which is acceptable to the industry as long as DHCA has the burden of finding qualified occupants.

12. Exceeding Master Plan Height

We continue to believe that master plans should not stunt the production of housing, both market-rate and affordable units. Thus, using the master plans as a guide, which is how they are intended, an additional height of no more than 22% (the maximum bonus allowed for MPDUs) is consistent with the intent of the master plans (where allowed) and must be permitted under the Alternative Payment scenarios above so that the density bonus can be realized. However, we can appreciate that exceeding the 22% threshold or adding this to master plans that do not currently permit additional height, may be an issue for another time.

13. Flexibility to Modify Bedroom Requirements in Age-Restricted Single-Family Developments

We are working on getting feedback on this issue for you.

Additional Issue:

14. Calculation Methodology and Rounding

Another impediment to implementing the MPDU program has become the complexity of the calculations and disagreement as to what is appropriate and fair. The Industry believes that one way to help level the playing field is to assure that a true density bonus is granted when one is deserved. That is, if 15% MPDUs are provided, than a true 22% density bonus of market rate units should be awarded. Currently, the way DHCA calculates the density, a developer only obtains about an 18% density bonus because the MPDU calculation is based on the total number of units instead of just the base number. Consequently, in looking at simple ways to help fund MPDUs, one would be to truly allow 22% more market rate units as is promised by the legislation.

Please let us know the schedule for moving these issues forward.

Vaias, Emily J. - EJV

From: Terra Verde Communities LLC [tomttc@msn.com]
Sent: Thursday, September 16, 2010 1:15 PM
To: Raquel Montenegro ; Vaias, Emily J. - EJV
Subject: Fw: FHA Condo Update

image001.jpg 09-19ml ominium Approv 09-46aml porary Guidance 09-46bml lominium Approv FAQ's FHA Condominium.pdf

Here you go. Tom

Sent from my Verizon Wireless BlackBerry

-----Original Message-----
From: Tim Whittier <TWhittier@gofirsthome.com>
Date: Thu, 16 Sep 2010 17:13:00
To: <tomttc@msn.com>
Subject: FHA Condo Update

Tom,
I've attached all relevant letters regarding the changes in FHA condos. The FHA concentration for new projects will be reverting back to a maximum of 30% beginning with case numbers issued January 1, 2011. I have not heard any discussion about repealing this and would anticipate this in place the beginning of the year.

I've attached a few other documents for your records. These will give you the requirements for an initial project approvals and all of the information that the builder will need to supply for the project.

Lastly, I don't have anything in writing regarding this, however, we are also expecting FHA to lower the max. seller contributions from 6% to 3%. I don't know when, or if, this will get done but there has been a lot of discussion regarding it.

Sorry about the delay in getting this to you, feel free to call me anytime if I can help out.

Tim Whittier
Branch Manager

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June 12, 2009 **MORTGAGEE LETTER 2009-19**

TO: **ALL APPROVED MORTGAGEES**
ALL FHA ROSTER APPRAISERS

SUBJECT: Condominium Approval Process – Single Family Housing

In accordance with the passage of the Housing and Economic Recovery Act (HERA) of 2008, the Federal Housing Administration (FHA) is implementing a new approval process for Condominium Projects to insure mortgages on individual units under Section 203(b) of the National Housing Act. FHA will now allow lenders to determine project eligibility, review project documentation, and certify to compliance of Section 203(b) of the NHA and 24 CFR 203 of HUD's regulations. HUD will continue to maintain a list of Approved Condominium Projects. The requirements of this Mortgagee Letter are effective for all case numbers assigned on or after October 1, 2009 except as noted.

The purpose of this Mortgagee Letter is to provide guidelines and instructions on options available to lenders to receive mortgage insurance on condominium units which are located in a project. The lender will be required to retain all the project legal documents, contracts, conveyances, plats, plans, insurance coverage, presale and owner occupancy conditions and other documentation in connection with their review and approval of the condominium project. When requested, the lender must provide such documentation to HUD staff for verification of compliance with HUD's regulations.

I. Approval Processing Options

A. The lender will have two condominium project approval processing options. The applicable documentation requirements will be the same for each option:

1. HUD Review and Approval Process (HRAP).
2. Direct Endorsement Lender Review and Approval Process (DELRAP), outlined in this Mortgagee Letter. This option is only available to lenders who have unconditional Direct Endorsement authority and staff with knowledge and expertise in reviewing and approving condominium projects.

B. The processing options stated above will be applicable to condominium developments that are:

1. Proposed/Under Construction;
2. Existing Construction; or
3. Conversions.

II. Eligible Projects

The Condominium Project has been created and exists in full compliance with applicable

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State law requirements of the jurisdiction in which the Condominium Project is located, and with all other applicable laws and regulations.

III. Ineligible Projects

A. Condominium Hotel or "*Condotels*"
B. Timeshares or segmented ownership projects
C. Houseboat projects
D. Multi-dwelling unit condominiums [i.e. more than one dwelling per condominium unit]
E. All projects not deemed to be used primarily as residential

IV. General Requirements

A. Site Condominiums

Site Condominiums are single family detached dwellings encumbered by a declaration of condominium covenants or condominium form of ownership. Condominium Project approval is not required for Site Condominiums; however, the Condominium Rider (Attachment D) must be included in the FHA case binder submitted for insurance endorsement. Manufactured housing condominium projects (MHCPs) may not be processed as site condominiums; these projects will require approval under HRAP.

NOTE: Site Condominiums requirements are effective immediately with issuance of this Mortgage Letter.

B. "Spot Loan" Approval Process

The Spot Loan Approval process as defined in Mortgage Letter 1996-41 is eliminated with issuance of this guidance. The DELRAP and HRAP processes have been streamlined to allow for uncomplicated condominium project approvals eliminating the need to approve units on a "spot loan" basis.

C. FHA-to-FHA Transactions

Project Approval is not required for:

a. FHA-to-FHA streamline refinance transactions; or
b. FHA/HUD Real Estate Owned (REO) Division sales.

D. Environmental Review Requirements

If a lender elects to use the HRAP option, then environmental reviews will not be required for projects that, at the time that condominium project approval is requested, have progressed beyond that stage of construction where HUD has any influence over the remaining uncompleted construction. This occurs when:

- a condominium plat or similar development plan and any phases delineated therein have been reviewed and approved by the local jurisdiction and, if applicable, recorded in the land records, **and**
- the construction of the project's infrastructure (streets, stormwater management, water and sewage systems, utilities, facilities (e.g., parking lots, community building, swimming pools, golf course, playground, etc.) and buildings containing the condominium units has proceeded to a point that precludes any major changes.

Environmental reviews will not be required for condominium projects approved using the DELRAP option. If the appraiser identifies an environmental condition or the lender is aware of an existing environmental condition through remarks provided on the Builder's Certification, form HUD-92541, the appraisal or other known documentation, the lender must avoid or mitigate the following conditions before completing its review process:

1. The project is located in a Special Flood Hazard Area designated on a Federal Emergency Management Agency flood map.

2. Potential noise issues, where the property is located within 1000 feet of a highway, freeway, or heavily traveled road, within 3000 feet of a railroad, or within one mile of an airport or five miles of a military airfield.

3. The property has an unobstructed view, or is located within 2000 feet, of any facility handling or storing explosive or fire-prone materials.

4. The property is located within 3000 feet of a dump or landfill, or of a site on an EPA Superfund (NPL) list or equivalent state list, or a Phase I Environmental Site Assessment indicates the presence of a Recognized Environmental Condition or recommends further (Phase II) assessment for the presence of contaminants that could affect the site.

5. The property has any hazards or adverse conditions listed in Section 1.f. of the Builder's Certification, including, but not limited to, high ground water levels, unstable soils, or earth fill.

6. The project is located in a wetland designated on National Wetlands Inventory maps or designated by State or local authorities.

7. The project is on the National Register of Historic Places or is within a historic district listed on the Register.

8. The appraiser or DE lender is aware of any other condition that could adversely affect the health or safety of the residents of the project.

V. Project Eligibility Requirements

A. The following requirements apply to all Condominium Project approvals:

- Projects consist of two units or more.
- Projects must be covered by hazard and liability insurance and, when applicable, flood insurance.
- Right of first refusal is permitted unless it violates discriminatory conduct under the Fair Housing Act regulation in 24 CFR 100.
- No more than 25 percent of the property's total floor area in a project can be used for commercial purposes. The commercial portion of the project must be of a nature that is homogenous with residential use, which is free of adverse conditions to the occupants of the individual condominium units.
- No more than 10 percent of the units may be owned by one investor. This will apply to developers/builders that subsequently rent vacant and unsold units. For two and three unit condominium projects, no single entity may own more than one unit within the project; all units, common elements, and facilities within the project must be 100 percent complete; and only one unit can be conveyed to non-owner occupants.
- No more than 15 percent of the total units can be in arrears (more than 30 days past due) of their condominium association fee payment.
- At least 50 percent of the total units must be sold prior to endorsement of any mortgage on a unit. Valid presales include an executed sales agreement and evidence that a lender is willing to make the loan.[1]
- At least 50 percent of the units of a project must be owner-occupied or sold to owners who intend to occupy the units.[2] For proposed, under construction or projects still in their initial marketing phase, FHA will allow a minimum owner occupancy amount equal to 50 percent of the number of presold units (the minimum presales requirement of 50 percent still applies).
- Legal Phasing is permitted for condominium processing. It is recommended that developers submit all known phases for initial project approval. For purposes of calculating the owner-occupancy percentage:

    a. On multi-phased projects the owner-occupancy percentage is calculated on the first declared phase and cumulatively on subsequent phases if the ownership of the condominium project remains the same;

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[1] Secondary residences can only be included if it meets the requirements of 24 CFR 203.18(f)(2).

[2] If the owner-occupancy ratio includes presales, FHA requires an executed sales agreement and corresponding evidence that a lender is willing to make the loan and the buyer intends to occupy the unit. A separate owner-occupancy certification is also required in the FHA case binder for loans where the Individual Condominium Unit Appraisal Report, Fannie Mae Form 1073, does not contain the required data or the condominium project is proposed or under construction.

b. If multi-phasing includes separate ownership per phase, each phase is calculated individually; or
c. Single-phase condominium project approval requests must meet the owner-occupancy percentage requirement.

- FHA Concentration

a. Projects consisting of three or less units will have no more than one unit encumbered with FHA insurance.
b. Projects consisting of four or more units will have no more than 30 percent of the total units encumbered with FHA insurance.

- Reserve Study - a current reserve study must be performed to assure that adequate funds are available for the funding of capital expenditures and maintenance. A current reserve study must be no more than 12 months old – if recent events or market conditions have affected the finished condition of the property that information must be included. When reviewing the reserve study, consideration must be given to items that have been replaced after the time that the reserve study was completed.

VI. Manufactured Housing Condominium Projects

Pursuant to HERA, manufactured housing condominium projects are now eligible for FHA mortgage insurance. Accordingly, all outstanding and current FHA Manufactured Housing individual unit requirements remain applicable for both Home Equity Conversion Mortgages (HECM) and forward mortgages, including elevations in flood zones and foundation requirements. MHCPs must be submitted to the applicable Homeownership Center for review and approval – these projects are ineligible for DELRAP processing. MHCPs may not be processed as site condominiums; these projects will require approval under HRAP.

1. Appraisal reporting requirements for condominium manufactured homes:

a. Appraisal must be reported on the Manufactured Home Appraisal Report (Fannie Mae Form 1004C).
b. Subject condominium project must be inspected and the Project Information section of the Individual Condominium Unit Appraisal Report (Fannie Mae Form 1073) must be completed and included as an addendum to the appraisal report.
c. Comparable sales must be condominium manufactured homes. Detailed explanations must be provided when search parameters are expanded due to the lack of comparable sales in subject market area.

VII. Condominium Conversions

Conversion to condominiums occurs in those projects which involve changing the title of an existing structure generally under one title, to property that is separated into units so that the title to most units can be held separately. Changes to condominium conversion requirements are defined below:

1. The one-year waiting period requirement for conversions is eliminated;
2. In the event that FHA is insuring a mortgage on a unit and an undivided interest in the common elements on a project undergoing remodeling or rehabilitation, the entire condominium project, including the common facilities, must be 100 percent completely built before any mortgage may be endorsed. Escrow provisions will be permitted for weather related delays for common areas only.

VIII. FHA Connection (FHAC)

System modifications will be made to capture additional information, remove obsolete fields, and identify points of contacts. Major planned system modifications are:

1. Establishment of a Condominium Project Approval screen in FHAC that will be used by DE lenders and HUD staff to enter approval, rejection and recertification data.
2. System generated condominium project identification numbers based on the HOC of jurisdiction.

NOTE: While major system modifications have been identified, other modifications will be made and released as necessary to ensure collection of all valid information.

IX. Condominium New Construction Pre-approval and Inspection Requirements

Mortgagee Letter 2001-27 prohibited condominium processing under those guidelines. This Mortgagee Letter now permits condominium processing under the policy as established below.

In cases where a building permit and a certificate of occupancy (or its equivalent) are issued by a local jurisdiction that performs a minimum of three inspections (typically the footing, framing and final) neither an Early Start Letter nor a HUD approved ten-year warranty plan is required. For those jurisdictions that do not issue a building permit (or its equivalent) prior to construction and a Certificate of Occupancy (or its equivalent) upon completion of construction, a condominium unit that is one year old or less must have either an Early Start Letter (with a minimum of three inspections by an FHA Roster Inspector) or be covered by a HUD-approved ten-year warranty plan (with a final inspection by a FHA Roster Inspector) to be eligible for high-ratio mortgage insurance. All condominium types are eligible to follow this process (e.g. Multi-family). Projects are still required to be on the FHA-approved condominium list.

FHA will require the completion and retention of the following documents when processing new construction condominium project approvals:

- Builder's Certification of Plans, Specifications and Site, form HUD-92541
- Builder's Warranty, form HUD-92544
- Building Permit (or its equivalent)
- Final Certificate of Occupancy (or its equivalent)

FHA will not accept a temporary Certificate of Occupancy; all units within the building (where the specific unit that is security for the insured financing is located) must be complete.

X. General Processing Steps for DELRAP or HRAP

A. Determine acceptability of the site and location of the project. Refer to Attachment A, *Condominium Project Approval Matrix*.

B. Review the project's financial and legal documents; if acceptable, authorized personnel will sign and date the Lender Certification of Condominium Requirements (Attachment B).

C. Place the Lender Certification of Condominium Requirements and other required certifications in the FHA case binder.

D. Retain and maintain all documents used to review and approve the project for a period of three years from the date of project approval.

E. Mixed condominium review and processing is not permitted. If a lender opts to participate in the DELRAP process, all future processing submissions must be processed, accordingly, in that sole and particular manner with the exception of manufactured housing condominium project approvals (these must be submitted to the applicable Homeownership Center for review and approval).

F. If a project is listed as Rejected or Withdrawn on the FHA-approved condominiums list, the only approval process accepted is HRAP.

G. Second and subsequent lenders that submit a unit for insurance in a project that is listed on the FHA-approved condominium list are not required to complete any further approval process. At the lender's discretion, they may seek any additional information to satisfy their own requirements and/or perform their own due diligence. FHA will require the lender to certify it has no knowledge of circumstances or conditions that might have an adverse effect on the project or cause a mortgage secured by a unit in the project to become delinquent.

H. Subsequent phases being approved by a different lender must follow the general procedures listed here in Section X. The original lender must also follow these general procedures but will have already satisfied some of the steps listed.

I. All required certifications, as applicable, must be included in the FHA case binder submitted for insurance endorsement.

J. For both new construction and conversions if the developer intends to market five or more units within the next 12 months with FHA mortgage insurance, an Affirmative Fair Housing Marketing Plan (AFHMP) or a Voluntary Affirmative Marketing Agreement (VAMA) must be in place. Form HUD-935.2C, Affirmative Fair Housing Marketing Plan – Condominium or Cooperatives, is to be used for condominium projects. This completed form must be submitted to the Director of the Processing and Underwriting Division in the jurisdictional HOC for approval. If "a, b, c, or d" is checked on response to Question 2 in the Applicability section, the developer is not required to complete an AFHMP. The developer should complete block 11 on form HUD-92541, Builder's Certification of Plans, Specification and Site.

K. Environmental reviews will be required for proposed and under construction project approvals submitted under the HRAP option consistent with the Environmental Review Requirements listed in Section IV. D. Environmental review is not required under DELRAP, but the lender **must** take necessary actions to avoid or mitigate identified environmental conditions prior to completing its project review.

L. Transfer of control of the Homeowners Association shall pass to the owners of units within the project no later than the earlier of the following:

  1. 120 days after the date by which 75 percent of the units have been conveyed to the unit purchasers, or

  2. One year after completion of the project evidence by the first conveyance to a unit purchaser.

XI. Certification for Initial Approval

Lenders must provide certifications on company letterhead signed by a company authorized representative (signature stamps or electronic signatures are not authorized) that:

1. The eligible condominium project complies with applicable FHA requirements addressed within this Mortgagee Letter;
2. All condominium legal documents meet HUD regulations, state and local condominium laws; and
3. Pre-sale and owner occupancy ratios per loan are met.

NOTE: FHA will not require an attorney's certification; however, lenders may obtain this as part of their due diligence process. Lenders are reminded that this document will not replace other condominium certifications required from the lender.

XII. Certification of Projects Previously Approved

If a project has been previously approved, lenders must certify that they are not aware of any change in circumstances since initial approval of the project that would result in the project no longer complying with FHA requirements.

XIII. Recertification of Project Approvals

Condominium Project approvals will expire two years from the date it has been placed on the list of approved condominiums. This will also apply to all projects currently on the list of approved condominiums. Further participation in the program after this two-year period has expired will require recertification to determine that the project is still in compliance with HUD's owner-occupancy requirement and that no conditions currently exist which would present an unacceptable risk to FHA. Items that should be given consideration are:

1. Pending special assessments,
2. Pending legal action against the condominium association, or its officers or directors,
3. Hazard, liability insurance and when applicable flood insurance.

XIV. Quality Assurance

Monitoring the condominium approval process is critical to the success of the program. Lenders who approve condominium projects utilizing the DELRAP option will be required to submit a copy of the complete condominium project approval package to the applicable Homeownership Center within five business days of approval. Lenders are required to submit the first **five** DELRAP approvals for review. Further, to manage FHA's risk, and ensure compliance with all condominium project policy requirements, additional condominium project approvals will be selected for review. The criteria for selection of the additional approvals will be determined and lenders will be notified in future guidance.

XV. False Certifications

Title 18 U.S.C. 1014, provides in part that whoever knowingly and willfully makes or uses a document containing any false, fictitious, or fraudulent statement or entry, in any matter in the jurisdiction of any department or agency of the United States, shall be fined not more than $1,000,000 or imprisoned for not more than 30 years or both. In addition, violation of this or others may result in debarment and civil liability for damages suffered by the Department.

XVI. Insurance of Individual Units

All applicable, outstanding and any additional FHA insurance requirements not defined in this guidance must be met for individual units.

If you have questions regarding this Mortgagee Letter, please call the FHA's Resource Center at 1-800-CALL-FHA (1-800-225-5342). Persons with hearing or speech impairments may access this number via TDD/TTY by calling 1-877-TDD-2HUD (1-877-833-2483).

Sincerely,

Brian D. Montgomery
Assistant Secretary for Housing-
Federal Housing Commissioner

Attachments

Attachment A

	Condominium Project Approval Matrix	Proposed/UC	Existing	Conversion
1	All Condominium Legal Documents	X	X	X
a	Recorded Plat Map indicating Legal Description	X	X	X
b	Recorded Covenants, Conditions and Restrictions (CC&R's)	X	X	X
c	Signed and Adopted Bylaws	X	X	X
d	Articles of Incorporation filed with the State	X	X	X
e	Recorded Condominium Site Plans	X	X	X
2	Plan or Evidence of Transfer of Control	X	X	X
3	Proposed or Actual Budget	X	X	X
4	Reserve Study	X	X	X
5	Management Agreement, if applicable	X	X	X
6	Equal Employment Opportunity Certificate (Form HUD 92010)	X		
7	Affirmative Fair Housing Marketing Plan or Voluntary Affirmative Marketing Agreement (VAMA)	X		X
8	FEMA Flood Map	X	X	X
9	Estimated Construction Completion Date	X		X
10	Outstanding or Pending Litigation Analysis		X	X
11	Pending Special Assessment Analysis		X	

Attachment B

LENDER CERTIFICATION TO CONDOMINIUM REQUIREMENTS

The undersigned hereby certifies that (1) the Lender has reviewed the project and it meets all requirements of Section 203(b) of the National Housing Act, 24 CFR 203, State and local condominium laws and any Mortgage Letters thereto applicable to the review of condominiums; (2) to the best of his or her knowledge and belief, the information and statements contained in this application are true and correct, and (3) the Lender has no knowledge of circumstances or conditions that might have an adverse effect on the project or cause a mortgage secured by a unit in the project to become delinquent (including but not limited to: defects in construction; substantial disputes or dissatisfaction among unit owners about the operation of the project or the owner's association; and disputes concerning unit owners; rights privileges, and obligations). The undersigned understands and agrees that the Lender is under a continuing obligation to inform HUD if any material information compiled for the review and acceptance of this project is no longer true and correct.

____ ____________

Authorized Lender Representative (Signature and Title) — Date

Title 18 U.S.C. 1014, provides in part that whoever knowingly and willfully makes or uses a document containing any false, fictitious, or fraudulent statement or entry, in any matter in the jurisdiction of any department or agency of the United States, shall be fined not more than $1,000,000 or imprisoned for not more than 30 years or both. In addition, violation of this or others may result in debarment and civil liability for damages suffered by the Department.

Attachment C

LENDER CERTIFICATION TO CONDOMINIUM REQUIREMENTS FOR APPROVED PROJECTS

The undersigned hereby certifies that (1) the Lender has verified the condominium unit in connection with this loan file has been verified to be in a project that appears on FHA's list of approved condominium projects; (2) to the best of his or her knowledge and belief, the information and statements contained in this application are true and correct, and (3) the Lender has no knowledge of circumstances or conditions that might have an adverse effect on the project or cause a mortgage secured by a unit in the project to become delinquent (including but not limited to: defects in construction; substantial disputes or dissatisfaction among unit owners about the operation of the project or the owner's association; and disputes concerning unit owners; rights privileges, and obligations). The undersigned understands and agrees that the Lender is under a continuing obligation to inform HUD if any material information compiled for the review and acceptance of this project is no longer true and correct.

______________________________________ ____________

Authorized Lender Representative (Signature and Title) Date

Title 18 U.S.C. 1014, provides in part that whoever knowingly and willfully makes or uses a document containing any false, fictitious, or fraudulent statement or entry, in any matter in the jurisdiction of any department or agency of the United States, shall be fined not more than $1,000,000 or imprisoned for not more than 30 years or both. In addition, violation of this or others may result in debarment and civil liability for damages suffered by the Department.

Attachment D

CONDOMINIUM RIDER

THIS CONDOMINIUM RIDER is made this _____________ day of ____________, 20__, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust or Security Deed ("Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Note ("Note") to ____________________________ ("Lender") of the same date and covering the Property described in the Security Instrument and located at:

[Property Address]

The Property includes a unit in, together with an undivided interest in the common elements of, a condominium project known as:

[Name of Condominium Project]

("Condominium Project"). If the owners association or other entity which acts for the Condominium Project ("Owners Association") holds title to property for the benefit or use of its members or shareholders, the Property also includes Borrower's interest in the Owners Association and the uses, proceeds and benefits of Borrower's interest.

CONDOMINIUM COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring all property subject to the condominium documents, including all improvements now existing or hereafter erected on the Property, and such policy is satisfactory to Lender and provides insurance coverage in the amounts, for the periods, and against the hazards lender requires, including fire and other hazards included within the term "extended coverage," and loss by flood, to the extent required by the Secretary, then: (i) Lender waives the provision in the Security Instrument for the monthly payment to Lender of one-twelfth of the yearly premium installments for hazard insurance on the Property, and (ii) Borrower's obligation under the Security Instrument to maintain hazard insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy. Borrower shall give Lender prompt notice of any lapse in required hazard insurance coverage and of any loss occurring from a hazard. In the event of a distribution of hazard insurance proceeds in lieu of restoration or repair following a loss to the Property, whether to the condominium unit or to the common elements, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender for application to the sums secured by this Security Instrument, with any excess paid to the entity legally entitled thereto.

Borrower promises to pay all dues and assessments imposed pursuant to the legal instruments creating and governing the Condominium Project.

If Borrower does not pay condominium dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and provisions contained in this Condominium Rider.

______________________ (SEAL)
Borrower

______________________ (SEAL)
Borrower

[ADD ANY NECESSARY ACKNOWLEDGEMENT PROVISIONS.]

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING-
FEDERAL HOUSING COMMISSIONER

November 6, 2009

MORTGAGEE LETTER 2009-46 A

TO: ALL APPROVED MORTGAGEES

SUBJECT: Temporary Guidance for Condominium Policy

In Mortgagee Letter 2009-46 B, the Federal Housing Administration (FHA) announced the permanent baseline guidance for condominium project eligibility. This Mortgagee Letter (ML) waives five provisions of that guidance and serves as a temporary directive to address current housing market conditions. This temporary guidance is effective for all FHA case numbers assigned on or after December 7, 2009 through December 31, 2010, except as noted for the "Spot Loan" Approval Process. FHA reserves the right to modify, suspend or terminate the guidance contained in this document if analysis of condominium mortgage performance indicates that the insurance fund is at risk.

I. "Spot Loan" Approval Process

Mortgagee Letter 2009-46B eliminated the Spot Loan Approval Process as defined in Mortgagee Letter 1996-41 for all FHA case number assignments effective on or after December 7, 2009. However, to address concerns involving the volatility in the condominium market, the new effective date for the elimination of this practice is for all FHA case number assignments on or after February 1, 2010. FHA may perform additional monitoring to ensure compliance with the "Spot Loan" Approval Process.

II. FHA Concentration Requirements

The FHA concentration requirement defined in ML 2009-46 B will be increased temporarily to 50 percent.

Exceptions to 50 percent Concentration Level. The FHA concentration may be increased up to 100 percent if the project meets all of the basic condominium standards plus the additional items stated below:

- The project is 100 percent complete and construction has been completed for at least one year, as evidenced by issuance of the final or temporary/conditional certificate of occupancy for last unit conveyed;

- 100 percent of the units have been sold and no entity owns more than 10 percent of the units in the project (for projects with fewer than 10 units, single entity may own no more than 1 unit);
- The project's budget provides for the funding of replacement reserves for capital expenditures and deferred maintenance in an account representing at least 10% of the budget;
- Control of the Homeowners Association has transferred to the owners; *and*
- The owner-occupancy ratio is at least 50 percent.

Note: New construction and conversions are not eligible for this exception.

III. Owner-Occupancy Requirements

At least 50 percent of the units in a project must be owner-occupied or sold to owners who intend to occupy the units. For proposed, under construction, or projects still in their initial marketing period, FHA will allow a minimum owner occupancy amount equal to 50 percent of the number of presold units.

Vacant or tenant-occupied real estate owned (REOs), including properties that are bank owned, may be excluded from the calculation of the required owner-occupancy percentage (should be removed from both the numerator and denominator).

IV. Pre-Sale Requirements

In the case of new construction, the pre-sale requirement defined in ML 2009-46 B will be reduced temporarily to 30 percent. Per ML 2009-46 B, the pre-sale percentage must be documented as follows:

- Copies of sales agreements and evidence that a mortgagee is willing to make the loan;
- Evidence that units have closed and are occupied; **OR**
- Information from a developer/builder that lists all of the units already sold, under contract, or closed (e.g. a spreadsheet, chart, or listing used for the company's own tracking purposes) that is accompanied by a signed certification from the developer (Attachment F of ML 2009-46 B).

V. Florida Condominium Project Approval

All requests for approval of condominium projects located in Florida will require submission to the Atlanta Homeownership Center for review, under the HUD Review and Approval Process (HRAP). These projects are not eligible for approval using the Direct Endorsement Lender Review and Approval Process (DELRAP), defined in ML 2009-46 B.

If you have questions regarding this Mortgagee Letter, please call the FHA's Resource Center at 1-800-CALLFHA (1-800-225-5342). Persons with hearing or speech impairments may access this number via TDD/TTY by calling 1-877-TDD-2HUD (1-877-833-2483).

Sincerely,

David H. Stevens
Assistant Secretary for Housing-
Federal Housing Commissioner

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

ASSISTANT SECRETARY FOR HOUSING-
FEDERAL HOUSING COMMISSIONER

November 6, 2009 **MORTGAGEE LETTER 2009-46 B**

TO: **ALL APPROVED MORTGAGEES**
ALL FHA ROSTER APPRAISERS

SUBJECT: Condominium Approval Process for Single Family Housing

In accordance with the passage of the Housing and Economic Recovery Act of 2008 (HERA), the Federal Housing Administration (FHA) is implementing a new approval process for condominium projects and insurance requirements for mortgages on individual units, as authorized under Section 203(b) of the National Housing Act. The requirements of this Mortgagee Letter are effective for all case numbers assigned on or after December 7, 2009, except as noted. This Mortgagee Letter revises and consolidates existing guidance, and therefore replaces Mortgagee Letter 2009-19.

FHA will now allow lenders to determine project eligibility, review project documentation, and certify to compliance with Section 203(b) of the NHA and 24 CFR 203 of FHA's regulations. FHA will continue to maintain a list of approved condominium projects. Lenders will be required to retain all the project legal documents, contracts, conveyances, plats, plans, insurance coverage, presale and owner occupancy conditions and other documentation in connection with their review and approval of the condominium project.

PROJECT APPROVAL

I. Approval Processing Options

A. Lenders will have two condominium project approval processing options. The applicable documentation requirements will be the same for each option:

1. HUD Review and Approval Process (HRAP).
2. Direct Endorsement Lender Review and Approval Process (DELRAP), outlined in this Mortgagee Letter. This option is only available to lenders who have unconditional Direct Endorsement authority and staff with knowledge and expertise in reviewing and approving condominium projects.

   Under DELRAP, lenders must provide the condominium approval or denial documents to FHA within five (5) business days of final disposition. These documents must be uploaded using *pdf* format through FHA Connection.

B. The processing options stated above will be applicable to condominium developments that are:

1. Proposed or Under Construction;
2. Existing Construction; or
3. Conversions.

C. Lenders who are eligible to and do process condominium approvals under DELRAP may exercise the option,a t their discretion, to submit a condominium project for approval under the HRAP.

II. <u>Eligible Projects</u>

The Condominium Project has been declared and exists in full compliance with applicable State law requirements of the jurisdiction in which the condominium project is located, and with all other applicable laws and regulations.

III. <u>Ineligible Projects</u>

A. Condominium Hotel or "*Condotels*"
B. Timeshares or segmented ownership projects
C. Houseboat projects
D. Multi-dwelling unit condominiums [*i.e.* more than one dwelling per condominium unit]
E. All projects not deemed to be used primarily as residential

IV. <u>General Requirements</u>

A. Site Condominiums (effective June 12, 2009)

Condominium project approval is **<u>not</u>** required for Site Condominiums. Site Condominiums are defined as single family totally detached dwellings (no shared garages or any other attached buildings) encumbered by a declaration of condominium covenants or condominium form of ownership. Site Condominiums that do not meet this definition will require project approval. See Loan Approval section for processing and documentation requirements for unit financing of Site Condominiums.

- Manufactured Housing Condominium Projects (MHCPs) may **<u>not</u>** be treated as Site Condominiums; these projects require approval under HRAP.
- Modular homes are processed as single family homes for insurance purposes and are eligible to be treated as Site Condominiums as long as they meet the stated definition for site condominiums.

B. Environmental Review Requirements

If a lender elects to use the HRAP option, then environmental reviews will not be required for projects that, at the time that condominium project approval is requested, have progressed beyond a stage of construction where HUD has any influence over the remaining uncompleted construction. This occurs when:

- a condominium plat or similar development plan and any phases delineated therein have been reviewed and approved by the local jurisdiction and, if applicable, recorded in the land records, **and**
- the construction of the project's infrastructure (streets, stormwater management, water and sewage systems,uti lities), and facilities (e.g., parking lots, community building, swimming pools, golf course, playground, etc.) and buildings containing the condominium units has proceeded to a point that precludes any major changes.

Environmental reviews will not be required for condominium projects approved using the DELRAP option. If the appraiser identifies an environmental condition or the lender is aware of an existing environmental condition through remarks provided on the Builder's Certification, Form HUD-92541, the appraisal or other known documentation, the lender must avoid or determine that there are mitigants to address the following conditions before completing its review process:

1. The project is located in a Special Flood Hazard Area designated on a Federal Emergency Management Agency flood map.

2. Potential noise issues, where the property is located within 1000 feet of a highway, freeway, or heavily traveled road, within 3000 feet of a railroad, or within one mile of an airport or five miles of a military airfield.

3. The property has an unobstructed view, or is located within 2000 feet, of any facility handling or storing explosive or fire-prone materials.

4. The property is located within 3000 feet of a dump or landfill, or of a site on an EPA Superfund (NPL) list or equivalent state list, or a Phase I Environmental Site Assessment indicates the presence of a Recognized Environmental Condition or recommends further (Phase II) assessment for the presence of contaminants that could affect the site.

5. The property has any hazards or adverse conditions listed in Section 1.f. of the Builder's Certification, including, but not limited to, high ground water levels, unstable soils, or earth fill.

6. The project is located in a wetland designated on National Wetlands Inventory maps or designated by State or local authorities.

7. The project is on the National Register of Historic Places or is within a historic district listed on the Register.

8. The appraiser or DE lender is aware of any other condition that could adversely affect the health or safety of the residents of the project.

V. Project Eligibility Requirements

The following requirements apply to all Condominium Project approvals:

1. **Minimum number of units**: Projects must consist of two or more units.

2. **Insurance Coverage**: Projects must be covered by hazard and liability insurance and, when applicable, flood and fidelity insurance (See Section VI, Insurance Requirements).

3. **Right of First Refusal**: Right of first refusal is permitted unless it violates discriminatory conduct under the Fair Housing Act regulation at 24 CFR part100.

4. **Commercial Space**: No more than 25 percent of the property's total floor area in a project can be used for commercial purposes. The commercial portion of the project must be of a nature that is homogenous with residential use, which is free of adverse conditions to the occupants of the individual condominium units.

5. **Investor Ownership**: No more than 10 percent of the units may be owned by one investor. This limitation also applies to developers/builders that subsequently rent vacant and unsold units. For condominium projects with ten or fewer units, no single entity may own more than one unit within the project; all units, common elements, and facilities within the project must be 100 percent complete.

6. **Delinquent Home Owners Association (HOA) Dues**: No more than 15 percent of the total units can be in arrears (more than 30 days past due) of their condominium association fee payments.

7. **Pre-sales**: At least 50 percent of the total units must be sold prior to endorsement of a mortgage on any unit. Valid presales include:

   - Copies of sales agreements and evidence that a mortgagee is willing to make the loan[1];
   - Evidence that units have closed and are occupied; **OR**
   - Information from a developer/builder that lists all of the units already sold, under contract, or closed (e.g. a spreadsheet, chart, or listing used for the company's own tracking purposes) that is accompanied by a signed certification from the developer (Attachment F).

[1] Secondary residences can only be included if it meets the requirements of 24 CFR 203.18(f)(2).

8. **Owner-occupancy Ratios**: At least 50 percent of the units of a project must be owner-occupied or sold to owners who intend to occupy the units.[2] For proposed, under construction or projects still in their initial marketing phase, FHA will allow a minimum owner occupancy amount equal to 50 percent of the number of presold units (the minimum presales requirement of 50 percent still applies).

9. **Legal Phasing**: Legal phasing is permitted for condominium processing. It is recommended that developers submit all known phases for initial project approval. FHA will not accept market phasing in lieu of legal phasing.

   For vertical buildings, legal phasing is acceptable if:

   a. The floors are legally phased in groupings of no less than five floors;
   b. At least a temporary certificate of occupancy has been obtained and **all** common areas and amenities have been completed; **AND**
   c. A third party completion bond has been obtained.

   For purposes of calculating the owner-occupancy percentage and FHA concentration:

   a. On multi-phased projects the owner-occupancy percentage is calculated on the first declared phase and cumulatively on subsequent phases if the ownership of the condominium project remains the same.
   b. If multi-phasing includes separate ownership per phase, each phase is calculated individually.
   c. In single-phase condominium project approval requests, all units are used in the denominator when calculating the 50 percent owner-occupancy percentage.

10. **FHA Concentration**: FHA will display the concentration information for each approved condominium development on the approved condominium listing, which can be found on both FHA Connection and on the public website at www.hud.gov. The concentration level will be based on case numbers assigned on units in a project; FHA will not issue new case numbers once the 30 percent concentration level (plus a small tolerance to accommodate for some fall-out) has been reached in any particular development.

    a. Projects consisting of three or fewer units will have no more than one unit encumbered with FHA insurance.
    b. Projects consisting of four or more units will have no more than 30 percent of the total units encumbered with FHA insurance.
    c. Calculation of the level of FHA concentration in a project declared with legal phases will follow the same methodology as owner-occupancy, described above.

11. **Budget Review**: Mortgagees must review the homeowners' association budget (the actual budget for established projects or the projected budget for new projects) for all projects. This review must determine that the budget is adequate and:

[2] Units sold to owners who intend to occupy the units must follow the requirements of a valid presale.

- Includes allocations/line items to ensure sufficient funds are available to maintain and preserve all amenities and features unique to the condominium project;
- Provides for the funding of replacement reserves for capital expenditures and deferred maintenance in an account representing at least 10% of the budget; and
- Provides adequate funding for insurance coverage and deductibles (see Section VI, Insurance Requirements).

In cases where the budget documents do not meet these standards, the mortgagee may request a reserve study to assess the financial stability of the project. The reserve study cannot be more than 12 months old. When reviewing the reserve study, consideration must be given to items that have been replaced after the time that the reserve study was completed.

In lieu of the actual budget documents, mortgagees may request and rely on Fannie Mae form 1073a, Analysis of Annual Income and Expenses – Operating Budget, executed by an authorized representative of the seller/servicer, owners association, or management agent.

VI. <u>Insurance Requirements</u>

A. The condominium project must be covered by hazard, flood, liability and other insurance required by state or local condominium laws or acceptable to FHA as defined below:

- Hazard Insurance: The homeowners association (HOA) is required to maintain adequate "master or blanket" property insurance in an amount equal to 100% of current replacement cost of the condominium exclusive of land, foundation, excavation and other items normally excluded from coverage. If the HOA does not maintain 100% coverage, the unit owner may not obtain "gap" coverage to meet this requirement.
- HO-6 Coverage: In cases where the master policy does not include interior unit coverage, including replacement of interior improvements and betterment coverage to insure improvements that the borrower may have made to the unit, the borrower must obtain a "walls-in" coverage policy (HO-6 policy).
- Liability Insurance: The HOA is required to maintain comprehensive general liability insurance covering all of the common elements, commercial space owned and leased by the owner's association, and public ways of the condominium project.
- Fidelity Bond/Fidelity Insurance: Fidelity Bond/Fidelity Insurance is required for new and established condominium projects with 20 or more units. The HOA must maintain this insurance for all officers, directors, and employees of the association and all other persons handling or responsible for funds administered by the association. The coverage must be no less than a sum equal to three months aggregate assessments on all units plus reserve funds.

- Flood Insurance: Insurance coverage equal to the replacement cost of the project less land costs or up to the National Flood Insurance Program (NFIP) standard of $250,000 per unit, whichever is less. In the insuring of a residential condominium building in a regular program community, the maximum limit of building coverage is $250,000 times the number of units in the building (not to exceed the building's replacement cost). The HOA, not the borrower or individual unit owner, is responsible for obtaining and maintaining adequate flood insurance under the NFIP on buildings located in a Special Flood Hazard Area (SFHA). The flood insurance coverage must protect the interest of borrowers who hold title to an individual unit as well as the common areas of the condominium project. If the FHA Roster Appraiser reports that buildings in a condominium project are located in a SFHA the lender is responsible for ensuring that the HOA obtains and maintains adequate flood insurance on buildings located within the SFHA, per Mortgagee Letter 2009-37.

B. Determining Need for Flood Insurance

Mortgagees must determine whether the property improvements (dwelling and related structures/equipment essential to the value of the property and subject to flood damage) are located in a 100-year flood plain. If the property is in a 100-year flood plain, flood insurance is required, per Mortgagee Letter 2009-37. To demonstrate and document that the property is not located in a 100-year flood plain and not subject to flood insurance requirements, the mortgagee must obtain:

- A final Letter of Map Amendment (LOMA) or
- A final Letter of Map Revision (LOMR)

VII. Manufactured Housing Condominium Projects (MHCP) (effective June 12, 2009)

Pursuant to HERA, manufactured housing condominium projects are now eligible for FHA mortgage insurance. All outstanding and current FHA Manufactured Housing individual unit requirements remain applicable for both Home Equity Conversion Mortgages (HECM) and forward mortgages, including elevations in flood zones and foundation requirements. MHCPs must be submitted to the applicable Homeownership Center (HOC) for review and approval (HRAP). MHCPs are ineligible for DELRAP processing and may **not** be processed as site condominiums.

See Loan Approval section for appraisal reporting requirements.

VIII. Condominium Conversions

Conversion to condominiums occurs in those projects which involve changing the title of an existing structure generally under one title, to property that is separated into units so that the title to most units can be held separately. Changes to condominium conversion requirements are defined below:

1. The one-year waiting period requirement for conversions is eliminated;
2. In the event that FHA is insuring a mortgage on a unit and an undivided interest in the common elements on a project undergoing remodeling or rehabilitation, the entire condominium project, including the common facilities, must be 100 percent completely built before any mortgage may be endorsed. Escrow provisions will be permitted for weather related delays for common areas only.
3. Conversions of properties from non-residential or from rental, whether tenant-occupied or vacant, will be treated as new construction.

IX. Condominium New Construction Pre-approval and Inspection Requirements

This Mortgagee Letter now permits condominium processing consistent with guidance described in Mortgagee Letter 2001-27.

A. In cases where a building permit and a certificate of occupancy (or its equivalent) are issued by a local jurisdiction that performs a minimum of three inspections (typically the footing, framing and final) neither an Early Start Letter nor a HUD approved ten-year warranty plan is required. For those jurisdictions that do not issue a building permit (or its equivalent) prior to construction and a Certificate of Occupancy (or its equivalent) upon completion of construction, a condominium unit that is one year old or less must have either an Early Start Letter (with a minimum of three inspections by an FHA Roster Inspector) or be covered by a HUD-approved ten-year warranty plan (with a final inspection by a FHA Roster Inspector) to be eligible for high-ratio mortgage insurance. Projects are still required to be on the FHA-approved condominium list.

B. FHA will require the completion and retention of the following documents when processing new construction condominium project approvals:

- Builder's Certification of Plans, Specifications and Site, form HUD-92541
- Builder's Warranty, form HUD-92544
- Building Permit (or its equivalent)
- Final Certificate of Occupancy (or its equivalent)

C. FHA will accept a temporary/conditional Certificate of Occupancy for new construction and conversions that require substantial rehabilitation under the following circumstances:

- All common areas and amenities for the project must be completed.
- The temporary/conditional Certificate of Occupancy that was issued clearly indicates that the unit is habitable and eligible for immediate occupancy.

- The jurisdiction that is issuing the temporary/conditional Certificates of Occupancy has in place a standard protocol whereby permanent certificates are issued and maintained.

X. General Processing Steps for DELRAP or HRAP

A. Determine acceptability of the site and location of the project. Refer to Attachment A, *Condominium Project Approval Matrix* for the list of documents that the project review package must contain.

B. Review the project's financial and legal documents; if acceptable, authorized personnel will sign and date the Lender Certification of Condominium Requirements (Attachment B).

- While FHA expects lenders to submit recorded documents with the condominium project approval package, unrecorded properly executed documents are acceptable in the initial request for project approval.
- If unrecorded documents are utilized, no loan can be *insured* in the project until the recorded documents have been received and the applicable approval data updated.
- Unrecorded documents for conversions will be acceptable if the conversion was a non-occupied rental building (i.e., warehouse or vacant building converted to a condominium regime) that meets all applicable requirements.
- Whenever unrecorded documents are submitted, the lender (for HRAP), DELRAP lender or builder/developer must provide a certification with the final recorded documents and description of any changes from original unrecorded documents.

C. Determine the project's budget is adequate or meets the alternative standards in Project Approval Section, V, 11.

D. Retain and maintain all documents used to review and approve the project for a period of three years from the date of project approval.

E. If a project is listed as Rejected or Withdrawn on the FHA-approved condominium list, the project will not be eligible for reconsideration unless the request meets the following:

- Project was rejected or withdrawn $\leq$ 12 months: new/additional information may be submitted to HUD for reconsideration only under HRAP processing based on the rejection or withdrawal date;
- Project was rejected or withdrawn > 12 months: new/additional information may be submitted to HUD for processing under HRAP or may be considered by the lender (and ultimately transmitted to HUD) in the case of projects undergoing DELRAP review.

NOTE: If a project is no longer approved or does not meet approval criteria, then only a FHA-to-FHA streamline refinance without an appraisal is allowed.

F. Second and subsequent lenders that submit a unit for insurance in a project that is listed on the FHA-approved condominium list are not required to complete any further approval process. However, as part of loan-level review, FHA will require the lender to certify (Attachment C) it has no knowledge of circumstances or conditions that might have an adverse effect on the project or cause a mortgage secured by a unit in the project to become delinquent. FHA will also require the lender to certify (Attachment C) that it has reviewed and verified the condominium project's continued compliance with the initial approval requirements regarding investor ownership, percentage of owners in arrears for condominium association fees, owner-occupancy rate and FHA loan concentration rate, and the lender certifies (Attachment C) that the condominium project continues to comply with FHA requirements.

G. Subsequent phases being approved by a different lender must follow the general procedures listed under this Section of the ML. The original lender must also follow these general procedures but will have already satisfied some of the steps listed.

H. All required certifications, as applicable, must be included in the FHA case binder submitted for insurance endorsement.

I. For both new construction and conversions the developer should complete form HUD-92541, Builder's Certification of Plans, Specification and Site. If the developer/builder intends to market five or more units within the next 12 months with FHA mortgage insurance and block 11"a, b, c, or d" is not checked, the developer/builder is required to complete Form HUD-935.2C, Affirmative Fair Housing Marketing Plan – Condominium or Cooperatives. This completed form must be submitted to the Director of the Processing and Underwriting Division in the jurisdictional HOC for approval (prior to project approval).

J. Environmental reviews will be required only for proposed and under construction project approvals submitted under the HRAP option consistent with the Environmental Review Requirements listed in Project Approval section, numeral IV, B. Environmental review is not required under DELRAP, but the lender **must** take necessary actions to avoid or determine that there are mitigants to addressing identified environmental conditions prior to completing its project review.

K. Transfer of control of the Homeowners Association shall pass to the unit owners within the project no later than the latest of the following:

1. 120 days after the date by which 75 percent of the units have been conveyed to the unit purchasers;

2. Three years after completion of the project evidenced by the first conveyance to a unit purchaser; OR

3. The time frame established under state or local condominium laws if specific provisions regarding transfer of control exist.

XI. Certification for Initial Project Approval

A. Lender Certification

Lenders must provide certifications on company letterhead signed by a company authorized representative (signature stamps or electronic signatures are not authorized) that:

1. The eligible condominium project complies with applicable FHA requirements addressed within this ML;
2. All condominium legal documents meet HUD regulations, state and local condominium laws; and
3. Pre-sale, owner occupancy and FHA concentration ratios are met.

B. Developer Certification

The developer/builder must provide a certification (Attachment E) on company letterhead signed and dated by an authorized representative of the developer/builder (signature stamps or electronic signatures are not authorized) which states that:

1. The eligible condominium project complies with all applicable FHA requirements addressed in this ML; and
2. All condominium documents meet all HUD requirements, and state and local requirements.

NOTE: FHA will not require an attorney's certification. However, lenders and developers/builders may obtain this as part of their own due diligence process. Lenders as well as developers/builders are reminded that this document will not replace other required condominium certifications they are required to execute (*e.g.*, Applicable Appendices B, C, E and F of this Mortgagee Letter).

XII. Recertification of Project Approvals

Condominium Project approvals will expire two years from the date of placement on the list of approved condominiums. Further participation in the program after this two-year period has expired will require recertification to determine that the project is still in compliance with HUD's owner-occupancy requirement and that no conditions currently exist which would present an unacceptable risk to FHA. Items that must be given consideration are:

1. Pending special assessments,
2. Pending legal action against the condominium association, or its officers or directors, and
3. Adequate hazard, liability insurance, and when applicable, flood insurance coverage.

LOAN APPROVAL

I. Mortgage Insurance for Individual Unit Financing

All applicable, outstanding and any additional FHA mortgage insurance requirements not defined in this ML must be satisfied for individual units.

II. Recordation of Documents

If unrecorded documents were submitted along with other required documentation for initial project approval, no loan can be *insured* in the project until the recorded documents are received and the applicable approval data updated.

III. Insurance Requirements

A. Hazard Insurance

For forward mortgages, in cases where the master policy *does not* include interior unit coverage, including replacement of interior improvements and betterment coverage to insure improvements that the borrower may have made to the unit, the borrower must obtain a "walls-in" coverage policy (HO-6 policy).

For Home Equity Conversion Mortgages (reverse mortgages), the borrower must obtain and maintain hazard insurance equal to the value of insurable property improvements, per Handbook 4235, REV 1, Chapter 6.

B. Flood Insurance

For both forward and reverse mortgages, lenders must ensure that the Homeowners Association (HOA), not the individual owner, obtains and maintains adequate flood insurance under the National Flood Insurance Program on buildings located within a Special Flood Hazard Area. The insurance coverage must protect the interest of borrowers who hold title to an individual unit as well as the common areas. See Section VI, Insurance Requirements.

IV. Certifications

If a project has been previously approved, the lender must certify that it has reviewed and verified the condominium project's continued compliance with the initial approval requirements regarding investor ownership, percentage of owners in arrears for condominium association fees, owner-occupancy rate and FHA loan concentration rate, and the Lender certifies that the condominium project continues to comply with FHA requirements.

V. FHA-to-FHA Transactions

Project Approval is not required for:

a. FHA-to-FHA streamline refinance transactions or
b. FHA/HUD Real Estate Owned (REO).

VI. Site Condominiums

Although processed as Section 203(b) loans, the applicable ADP codes for Site Condominiums are 731 (Adjustable Rate Mortgages) and 734.

Appraisal data is collected and reported on Fannie Mae form 1004, in accordance with the Valuation Protocols, Appendix D of HUD Handbook 4150.2.

The Condominium Rider (Attachment D) must be included in the FHA case binder submitted for insurance endorsement.

VII. Manufactured Housing Condominium

The appraisal reporting requirements for condominium manufactured homes are:

1. Appraisal must be reported on the Manufactured Home Appraisal Report (Fannie Mae Form 1004C).
2. Subject condominium project must be inspected and the Project Information section of the Individual Condominium Unit Appraisal Report (Fannie Mae Form 1073) must be completed and included as an addendum to the appraisal report.
3. Comparable sales must be condominium manufactured homes. Detailed explanations must be provided when search parameters are expanded due to the lack of comparable sales in subject market area.

VIII. "Spot Loan" Approval Process

The Spot Loan Approval Process as defined in Mortgage Letter 1996-41 is eliminated. The DELRAP and HRAP have been streamlined to allow for uncomplicated condominium project approvals eliminating the need to approve units on a "spot loan" basis.

LIABILITIES AND MONITORING

I. Mortgagee Liability

Mortgagees who issue condominium project approvals using the DELRAP process are responsible for material deficiencies associated with the project approval and any loan they originate and/or underwrite using the applicable project approval.

Mortgagees who rely upon a condominium project approval issued by another mortgagee are responsible for the loan level certification (Attachment C). With this certification, the lender is confirming that the company has no knowledge of circumstances or conditions that might have an adverse effect on the project or cause a mortgage secured by a unit in the project to become delinquent. The lender is also certifying that it has reviewed and verified the condominium project's continued compliance with the initial approval requirements regarding investor ownership, percentage of owners in arrears for condominium association fees, owner-occupancy rate and FHA loan concentration rate, and it certifies that the condominium project continues to comply with FHA requirements.

II. Quality Assurance

Monitoring the condominium approval process is critical to the success of the program. Lenders who approve condominium projects utilizing the DELRAP option will be required to submit a copy of the complete condominium project approval package to the applicable Homeownership Center within five (5) business days of approval. Lenders are required to submit the first **five** DELRAP approvals for review. Further, to manage FHA's risk, and ensure compliance with all condominium project policy requirements, additional condominium project approvals will be selected for review. The criteria for selection of the additional approvals will be determined and lenders will be notified in future guidance.

III. False Certifications

Title 18 U.S.C. 1014, provides in part that whoever knowingly and willfully makes or uses a document containing any false, fictitious, or fraudulent statement or entry, in any matter in the jurisdiction of any department or agency of the United States, shall be fined not more than $1,000,000 or imprisoned for not more than 30 years or both. In addition, violation of this or others may result in debarment and civil liability for damages suffered by the Department.

TRANSITION STRATEGY

FHA will move all currently approved condominium projects to the new approval list and FHA Connection database. The following requirements are applicable based on the date of the initial project approval. Additional guidance on new data entry requirements will be issued in a separate ML.

- Projects that received approval prior to October 1, 2008, will require recertification on or before December 7, 2010.

- Projects that received approval between October 1, 2008 through December 7, 2009, will follow the recertification requirements defined in the Project Approval Section, XIII.

Recertification of approved condominium projects may be processed by HUD using HRAP or by a mortgagee under DELRAP. The DELRAP option is only available to lenders who have unconditional Direct Endorsement authority and staff with knowledge and expertise in reviewing and approving condominium projects.

If you have questions regarding this Mortgagee Letter, please call the FHA's Resource Center at 1-800-CALL-FHA (1-800-225-5342). Persons with hearing or speech impairments may access this number via TDD/TTY by calling 1-877-TDD-2HUD (1-877-833-2483).

Sincerely,

David H. Stevens
Assistant Secretary for Housing-
Federal Housing Commissioner

Attachments

Attachment A

	Condominium Project Approval Matrix	Proposed/UC	Existing	Conversion
1	All Condominium Legal Documents	X	X	X
a	Recorded Plat Map indicating Legal Description	X	X	X
b	Recorded Covenants, Conditions and Restrictions (CC&R's)	X	X	X
c	Signed and Adopted Bylaws	X	X	X
d	Articles of Incorporation filed with the State	X	X	X
e	Recorded Condominium Site Plans	X	X	X
2	Plan or Evidence of Transfer of Control	X	X	X
3	Proposed or Actual Budget	X	X	X
4	Management Agreement, if applicable	X	X	X
5	Equal Employment Opportunity Certificate (Form HUD 92010)	X		
6	Builder's Certification of Plans, Specifications and Site, Form HUD-92541	X		X
7	FEMA Flood Map	X	X	X
8	Estimated Construction Completion Date	X		X
9	Outstanding or Pending Litigation Analysis		X	X
10	Pending Special Assessment Analysis		X	

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Attachment B

LENDER CERTIFICATION TO CONDOMINIUM REQUIREMENTS

The undersigned hereby certifies that (1) the Lender has reviewed the project and it meets all requirements of Section 203(b) of the National Housing Act, 24 CFR part 203, State and local condominium laws and any Mortgage Letters thereto applicable to the review of condominiums; (2) to the best of his or her knowledge and belief, the information and statements contained in this application are true and correct, and (3) the Lender has no knowledge of circumstances or conditions that might have an adverse effect on the project or cause a mortgage secured by a unit in the project to become delinquent (including but not limited to: defects in construction; substantial disputes or dissatisfaction among unit owners about the operation of the project or the owner's association; and disputes concerning unit owners; rights privileges, and obligations). The undersigned understands and agrees that the Lender is under a continuing obligation to inform HUD if any material information compiled for the review and acceptance of this project is no longer true and correct.

Authorized Lender Representative
(Signature and Title)

Date

Title 18 U.S.C. 1014, provides in part that whoever knowingly and willfully makes or uses a document containing any false, fictitious, or fraudulent statement or entry, in any matter in the jurisdiction of any department or agency of the United States, shall be fined not more than $1,000,000 or imprisoned for not more than 30 years or both. In addition, violation of this or others may result in debarment and civil liability for damages suffered by the Department.

Attachment C

LENDER CERTIFICATION FOR INDIVIDUAL UNIT FINANCING

The undersigned hereby certifies that (1) the Lender has verified the condominium unit in connection with this loan file has been verified to be in a project that appears on FHA's list of approved condominium projects; (2) to the best of his or her knowledge and belief, the information and statements contained in this application are true and correct; (3) the Lender has no knowledge of circumstances or conditions that might have an adverse effect on the project or cause a mortgage secured by a unit in the project to become delinquent (including but not limited to: defects in construction; substantial disputes or dissatisfaction among unit owners about the operation of the project or the owner's association; and disputes concerning unit owners; rights privileges, and obligations); and (4) the Lender has reviewed and verified the condominium project's continued compliance with the initial approval requirements regarding investor ownership, percentage of owners in arrears for condominium association fees, pre-sale ratio, owner-occupancy ratio, FHA loan concentration ratio, and the Lender certifies that the condominium project continues to comply with FHA requirements.

______________________________________ ____________

Authorized Lender Representative (Signature and Title) Date

Title 18 U.S.C. 1014, provides in part that whoever knowingly and willfully makes or uses a document containing any false, fictitious, or fraudulent statement or entry, in any matter in the jurisdiction of any department or agency of the United States, shall be fined not more than $1,000,000 or imprisoned for not more than 30 years or both. In addition, violation of this or others may result in debarment and civil liability for damages suffered by the Department.

Attachment D

CONDOMINIUM RIDER

THIS CONDOMINIUM RIDER is made this _____________ day of ___________, 20__, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust or Security Deed ("Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Note ("Note") to _________________________ ("Lender") of the same date and covering the Property described in the Security Instrument and located at:

[Property Address]

The Property includes a unit in, together with an undivided interest in the common elements of, a condominium project known as:

[Name of Condominium Project]

("Condominium Project"). If the owners association or other entity which acts for the Condominium Project ("Owners Association") holds title to property for the benefit or use of its members or shareholders, the Property also includes Borrower's interest in the Owners Association and the uses, proceeds and benefits of Borrower's interest.

CONDOMINIUM COVENANTS. In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

So long as the Owners Association maintains, with a generally accepted insurance carrier, a "master" or "blanket" policy insuring all property subject to the condominium documents, including all improvements now existing or hereafter erected on the Property, and such policy is satisfactory to Lender and provides insurance coverage in the amounts, for the periods, and against the hazards lender requires, including fire and other hazards included within the term "extended coverage," and loss by flood, to the extent required by the Secretary, then: (i) Lender waives the provision in the Security Instrument for the monthly payment to Lender of one-twelfth of the yearly premium installments for hazard insurance on the Property, and (ii) Borrower's obligation under the Security Instrument to maintain hazard insurance coverage on the Property is deemed satisfied to the extent that the required coverage is provided by the Owners Association policy. Borrower shall give Lender prompt notice of any lapse in required hazard insurance coverage and of any loss occurring from a hazard. In the event of a distribution of hazard insurance proceeds in lieu of restoration or repair following a loss to the Property, whether to the condominium unit or to the common elements, any proceeds payable to Borrower are hereby assigned and shall be paid to Lender for application to the sums secured by this Security Instrument, with any excess paid to the entity legally entitled thereto.

Borrower promises to pay all dues and assessments imposed pursuant to the legal instruments creating and governing the Condominium Project.

If Borrower does not pay condominium dues and assessments when due, then Lender may pay them. Any amounts disbursed by Lender under this paragraph shall become additional debt of Borrower secured by the Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and provisions contained in this Condominium Rider.

_________________________ (SEAL)
Borrower

_________________________ (SEAL)
Borrower

[ADD ANY NECESSARY ACKNOWLEDGEMENT PROVISIONS.]

Attachment E

DEVELOPER/BUILDER CERTIFICATION TO CONDOMINIUM REQUIREMENTS

The undersigned hereby certifies that (1) the Developer/Builder has reviewed the project and it meets all requirements of Section 203(b) of the National Housing Act, 24 CFR 203, State and local condominium laws and any Mortgage Letters thereto applicable to the review of condominiums; (2) to the best of his or her knowledge and belief, the information and statements contained in this application are true and correct, and (3) the Developer/Builder has no knowledge of circumstances or conditions that might have an adverse effect on the project or cause a mortgage secured by a unit in the project to become delinquent (including but not limited to: defects in construction; substantial disputes or dissatisfaction among unit owners about the operation of the project or the owner's association; and disputes concerning unit owners; rights privileges, and obligations). The undersigned understands and agrees that the Developer/Builder is under a continuing obligation to inform HUD if any material information compiled for the review and acceptance of this project is no longer true and correct.

_______________________________________ _______________

Authorized Representative (Signature and Title) Date

Title 18 U.S.C. 1014, provides in part that whoever knowingly and willfully makes or uses a document containing any false, fictitious, or fraudulent statement or entry, in any matter in the jurisdiction of any department or agency of the United States, shall be fined not more than $1,000,000 or imprisoned for not more than 30 years or both. In addition, violation of this or others may result in debarment and civil liability for damages suffered by the Department.

Attachment F

DEVELOPER/BUILDER PRESALES CERTIFICATION

The undersigned hereby certifies that in lieu of providing (1) Copies of sales agreements and evidence that a mortgagee has issued approval; **or** (2) Evidence that units have closed and are occupied; the Developer/Builder has attached to the signed and dated certification, a list documenting all units sold, under contract or closed (i.e., and excel spreadsheet). This information will be used to document the required minimum presale requirement of 50 percent.

____ ________________

Authorized Representative (Signature and Title) Date

Title 18 U.S.C. 1014, provides in part that whoever knowingly and willfully makes or uses a document containing any false, fictitious, or fraudulent statement or entry, in any matter in the jurisdiction of any department or agency of the United States, shall be fined not more than $1,000,000 or imprisoned for not more than 30 years or both. In addition, violation of this or others may result in debarment and civil liability for damages suffered by the Department.

MORTGAGEE LETTER 2009-46 A & 2009-46 B

FREQUENTLY ASKED QUESTIONS

1. **Are all lenders able to process Condominium Project Approval Requests?**

   Only lenders who have unconditional Direct Endorsement authority and staff with knowledge and expertise in reviewing and approving projects are authorized to process condominium projects using DELRAP.

2. **Can a lender choose to process condo projects both through DELRAP "and" HRAP processes?**

   Lenders who are eligible and process condominium approvals under DELRAP may exercise the option, at their discretion, to submit a condominium project for approval under the HRAP.

3. **Lender "A" processes a condominium project approval request and lender "B" closes a loan in that project. What is lender "B"s responsibility and would they be held accountable if the project was not processed in accordance with FHA requirements?**

   Mortgagees who rely upon a condominium project approval issued by another mortgagee are responsible for the loan level certification as outlined in ML 2009-46-B (Liabilities and Monitoring) (I).

4. **When submitting projects for review during the test case phase, is it necessary for a lender to submit five test cases to each HOC or will the approval be granted on a national basis?**

   This is not a "test" case process but rather a post review of condominium projects that have been approved by the DELRAP Lender. The projects can be submitted to one or more HOC's to meet the five post review requirement.

5. **From a Loan Correspondent's position, how is an acceptable level of expertise/knowledge determined? Does approving projects on a spot loan basis be considered acceptable to meet expertise/knowledge requirement?**

   Loan Correspondent's cannot process, review or approve condominium projects.

6. **How will the 30% concentration requirement affect first time homebuyers?**

   With the publication of Mortgagee Letter 2009-46 A, the FHA concentration will be increased temporarily to 50 percent. Mortgagee Letters 2009- 46 A and 2009-46 B applies to all projects, existing, proposed and new construction without distinction of homebuyers.

7. **Can a lender close a loan prior to completing the five condo test cases and receiving HUD's approval?**

   Yes, this is not a test case process but a post review of projects that have been approved.

8. **For small lenders that do not have a condominium approval department can their investor(s) process the project using the DELRAP or HRAP process?**

   The lender would have several options:

   - The project can be submitted directly to the HOC for the project to processed using HRAP or

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- The investor can process the project providing they meet all the FHA requirements.

9. **When the 2-year recertification is required, can any lender re-certify that a project meets all FHA requirements without the submission of five test cases, if that project had been previously approved by another DE lender?**

   This is not a test case process but rather a post review of projects that have been approved by an authorized DELRAP Lender. Only lenders with DELRAP authority can re-certify a previously approved project.

10. **If a lender uses the DELRAP process and the project is placed on the FHA approved list does that lender have approval proprietary?**

    No, any lender can process a loan in a condo project that is listed as a FHA approved project.

11. **What checks and balances are in place that prevent more than one Lender and HUD from all reviewing the same condo project simultaneously (for different borrowers) and arriving at different decisions?**

    When processing a condo project DELRAP or HRAP, the processor should:

    - Check FHA Connection to determine if the project is listed and
    - Contact the developer and ask if the project has been submitted for FHA project approval.

12. **Can lenders recertify to a project if the original approval was completed by another lender or by the HOC and will additional documentation be required from the re-certifying lender?**

    Any DE Lender with DELRAP authority can recertify that a project continues to meet FHA requirements. Further participation in the program will require that the project is still in compliance with FHA requirements including but not limited to;

    - Owner-occupancy
    - FHA Concentration

13. **If using the HRAP process, once a Loan Officer, Broker or Project Consultant has gathered all the required exhibits' are they required to send the package to the Lender for the Lender to submit to the appropriate HOC?**

    The lender or their authorized representative can submit the project to the appropriate HOC.

14. **If a Lender elects the HRAP approval process and discovers that the project would result in a non-approval decision, would the package be forwarded to the HOC anyway?**

    If the Lender is authorized to process condominium projects using DELRAP the lender would update the condominium maintenance screen to reflect the rejection and reason for the decision. If the Lender is not authorized to process project approval request using the DELRAP option the project would be forwarded to the applicable Homeownership Center for review.

15. **If a lender's process is currently delegated to do spot loan reviews does that mean they are automatically delegated/approved to do DELRAP?**

    No

16. **Who is considered companies "authorized representative"?**

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An individual designated by the company as authorized to financially bind the company.

17. Does the "authorized representative" need to be DE certified if they are only approving the project?

Not necessarily, however;

- They should have the skill set and experience in project approval **and**
- FHA Connection must be updated to reflect the individual has condo approval authority.

18. Can a lender's subsidiary companies process their project approvals?

Yes, if the subsidiary company has DELRAP approval authority.

19. How will Lenders who utilize the DELRAP option enter the information on the FHAC once a review has been completed?

Separate guidance that addresses inputting information into FHA Connection will be issued in the near future.

20. If a project is rejected via the DELRAP process by Lender A and Lender B questions the validity of that result can Lender B appeal the decision?

- If a project has been rejected or withdrawn ≤12 months: new/additional information may be submitted to HUD for reconsideration under HRAP processing based on the rejection or withdrawal date;
- If a project was rejected or withdrawn >12 months: new/additional information may be submitted to HUD for processing under HRAP or to an eligible DELRAP mortgagee for processing under DELRAP requirements based on the rejection or withdrawal date.

21. What is the procedure to become a participating DELRAP Lender?

To process condominium projects using DELRAP lenders must;

- Have unconditional Direct Endorsement authority and
- The first five project approvals must be submitted to the applicable HOC for a post-review and be determined acceptable.

PROJECT/DOCUMENTATION REQUIREMENTS

1. At what point in time will it be required that the Homeowner Association be turned over to the homeowners?

Transfer of control of the Homeowners Association shall pass to the owners of units within the project no later than the latest of the following;

- 120 days after the date by which 75 percent of the units have been conveyed to the unit purchasers;
- Three years after completion of the project evidence by the first conveyance to a unit purchaser; or
- The time frame established under state or local condominium laws if specific provisions regarding transfer of control exist.

2. How is the concentration percentage determined, is it based on the entire project or individual phases?

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For purposes of calculating FHA concentration percentages:

- On multi-phased projects the concentration percentage is calculated on the first declared phase and cumulatively on subsequent phases if the ownership of the condominium project remains the same;
- If multi-phasing includes separate ownership per phase, each phase is calculated individually; or
- Single-phase condominium project approval requests must meet the concentration percentage requirement or

  a. Projects consisting of three or less units will have no more than one unit encumbered with FHA Insurance.
  b. Projects consisting of four or more units will have no more than 30 percent of the total units encumbered with FHA Insurance.

3. **Can the Right of First Refusal be eliminated before December 7, 2009?**

   No

4. **When processing a condo approval request under the DELRAP how does the processing lender obtain information regarding presales (i.e. executed sales contracts)?**

   It is industry practice to obtain pre-sale data from the builder/developer if not properly disclosed on the appraisal. Documentation would include;

   - Copies of sales agreements and evidence that a mortgagee has issued approval or
   - Evidence that units have closed and are occupied.

   In lieu of providing this documentation the developer/builder will provide a list documenting all units sold, under contract or closed (i.e., an excel spreadsheet) signed and dated certification attached to this list. (ML 2009-46 B, Attachment F).

5. **What will happen if a project that has been recently approved and the concentration is greater than 30%? Will those projects be withdrawn?**

   The FHA concentration requirement defined in ML 2009-46 B will be increased temporarily to 50 percent. The FHA concentration may be further increased up to 100 percent if the project meets all basic condominium standards plus the additional items as stated in ML 2009-46 A.

6. **How can a lender obtain the information relative to FHA 30% concentration within a project?**

   FHA will display the concentration information for each approved condominium development on the approved condominium listing, which can be found on both FHA Connection the Condominium Project Maintenance Screen and on the public website http://www.hud.gov/lenders/.

7. **What will be the minimum amount of liability coverage required for a project, for example $1,000,000 for a building of 30 units or more?**

   The Homeowners Association is required to maintain comprehensive general liability insurance covering all of the common elements, commercial space owned and leased by the owner's association, and public ways of the condominium project.

8. **Under the Project Eligibility Review Service (PERS) system of condo approval a new construction condo project in its marketing stage would be eligible for approval subject o the terms and conditions of the PERS approval process, is the same true under the DELRAP?**

PERS is the Fannie Mae (FNMA) condo project approval process and not acceptable for FHA processing.

9. **Will PERS be terminated in December with the transition into DELRAP?**

   PERS is FNMA condo project approval process therefore is not affected by the December 7, 2009 implementation date.

10. **If an approval under PERS is obtained prior to December 7, 2009 will it carry over to DELRAP?**

    PERS is applicable to FNMA only.

11. **The Mortgagee Letter states that projects will need to be recertified every 2 years. If a project approval has expired or will expire in the near future does the case numbers have to be issued by the time of expiration, the loan approval or actually closed?**

    FHA will move all currently approved condominium projects to the new Project Approval Condominium List in the FHA Connection database. Recertification of these projects is required based on;

    - Projects that received approval prior to October 1, 2008, will require recertification by December 7, 2010.
    - Projects that received approval between October 1, 2008 and December 7, 2009, will follow the recertification requirements defined in the Project Approval Section, XIII.

12. **What constitutes a violation when considering a "Right of First Refusal"?**

    A Right of First Refusal that is contained in the Condominium Legal Documents may not discriminate as set forth in the Fair Housing Regulations.

    Reference; 24 CFR 100, Subpart B, Sec. 100.50, Real estate practices prohibited. (http//www.gpoaccessgov/cfr/index.html)

    Further guidance can be obtained by accessing HUD's website at www.hud.gov/offices/Fheo/index.cfm.

13. **Will condo projects that were approved between 10/01/2008 and 12/7/2009 remain on the approval list?**

    Yes, all projects approved between 10/01/2008 and 12/7/2009 will remain on the approval list however, re-certification will be required based on the project approval date.

14. **Will Mortgagee Letter 2009-46 A and 2009-46 B apply to Reverse Mortgages**

    Both mortgagee letters will apply to all condominium property types insured by FHA.

15. **How is the 30% (50% temporary increase) FHA concentration determined in an existing project on resales?**

    There is no difference between existing and new construction for determining the 30% (50% temporary) FHA concentration.

16. **Does the lender have to sign off on Attachment C (Lender Certification for Individual Unit Financing) of ML 2009-46 B on every approved condo project starting with case number assignments on or after December 7, 2009?**

Yes, this must be included in the case binder for each loan.

17. **If a project is on HUD's approved condo list what documentation or checklist would a lender use before signing the certification?**

    FHA will not provide a checklist. Lenders must certify that they are not aware of any change in circumstances since initial approval of the project that would result in the project no longer complying with FHA requirements, i.e. FHA concentration and owner-occupancy requirements.

18. **If a project is submitted to the HOC (HRAP) will an Attorney's Certification be required?**

    FHA will not require an attorney's certification. Lenders and/or developers/builders may obtain this as part of their due diligence process.

19. **Can an Attorney's Certification be used in place of Attachment B, Attachment C or other certifications that may be required from the lender?**

    No, an Attorney's Certification can not replace any of the required applicable Appendices B, C, E and F of ML 2009-46 B.

20. **If a project was FHA approved within the 10/08 to 12/09 timetable under the existing guidelines is the project exempt from the 30%(50% temporary increase) concentration requirement?**

    On December 7, 2009 all projects must meet FHA guidelines however ML 2009-46 A addresses the Temporary Guidance for Condominium Policy.

21. **Can a Spot Loan be processed in a project that is not approved or was that eliminated with the publication of ML 2009-46 B?**

    To address concerns involving the volatility in the condominium market, the new effective date for the elimination of the spot loan process is for all FHA case number assignments on or after February 1, 2010.

22. **Who submits the documents to the HOC for projects being processed under HRAP?**

    If a Condo Project Approval request is processed using HRAP the Lender, Developer, or their authorized representative can submit the request to the appropriate HOC.

23. **Who is qualified to do a reserve study?**

    FHA does not provide the names of companies that can perform this service. It is the lender's responsibility to determine who has the expertise and capability to provide the necessary data.

24. **Two and four unit condominium projects typically do not have a Homeowners Association. Would FHA accept a legal arbitration agreement executed by all unit owners**

    No, this would not be acceptable.

25. **If a transaction consists of a HUD REO, and the buyer has been issued a case number however the condo project is not on the approved list can a lender still process the loan and expect to obtain FHA Insurance.**

    Project Approval is not required for:

    - FHA/HUD Real Estate Owned (REO) or
    - FHA-to-FHA streamline refinance transactions.

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26. **When the new system goes into effect will there *be* a list maintained for projects that are either denied or withdrawn?**

    This information will be captured in FHA Connection on the Condominium Project Approval Maintenance Screen in the project status section.

27. **If form 1004 (Single Family Appraisal) can be used in completing site condo appraisals is it necessary to include the condo rider in the case binder?**

    Yes, the Condominium Rider, Attachment D of ML 2009-46 B is required and must be included in the FHA case binder submitted for insurance endorsement.

28. **What is the Owner Occupancy Requirement?**

    At least 50 percent of the units of a project must be owner-occupied or sold to owners who intend to occupy the units.

29. **Will FHA allow a HECM loan in a 2 unit condo?**

    Yes

30. **At the present time both VA and FNMA accept FHA Approved Condo Projects will the new policy have an effect on their acceptance of FHA projects?**

    VA and FNMA will determine if FHA's new process and policies will continue to be accepted for their loan programs.

31. **Will FHA have a reciprocity agreement with VA and FNMA?**

    No.

32. Can a project be submitted with the Right of First Refusal prior to the implementation of the new ML?

    No.

33. **What evidence is needed from a lender that is willing to make a loan to a buyer if the loan is through a different lender?**

    Examples of acceptable documentation would be a copy of a loan commitment or a letter from the buyer's lender.

34. **Is the 30 % (50% temporary increase) concentration requirement applicable to all condos or just "spot" condos?**

    The requirement of FHA 30% (50% temporary increase) concentration within a project goes into effect for all FHA projects effective December 7, 2009. The Spot Loan Approval Process will be eliminated beginning February 1, 2010.

35. **How will FHA Concentration be monitored?**

    FHA is currently updating and enhancing FHA Connection to provide reports relative to this data.

36. **How will one lender know if another lender has FHA loans within a specific project?**

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To obtain the FHA concentration percentage within a project the lender will access the Condominium Project Maintenance Screen; the percentage of FHA loans will be able to be viewed on this screen.

37. In the Reserve Study, what is considered adequate funds? 10%, 5%?

A reserve study is not automatically required. The Mortgagee must first review the homeowners' association budget to determine that the budget is adequate as stated in ML-2009-46 B. This includes providing for funding of at least 10% of the budget for replacement reserves for capital expenditures and deferred maintenance. If it has been determined that the budget is not adequate the mortgagee may request a reserve study to assess the financial stability of the project.

38. Why is a temporary C.O. not acceptable? Does this mean that even though the municipality is stating that a unit can be occupied, FHA will not allow the loan to close until the project is 100% complete?

Temporary certificates may be allowed under the circumstances as set forth in ML 2009-46 B, Section IX(C).

39. Can DELRAP be used for recertification?

Yes.

40. Should a lender review the HOA's budget at time of recertification?

Further participation in the program after the two-year period has expired from the time of approval will require recertification to determine that the project is still in compliance with HUD- requirements and that no conditions currently exist which would present an unacceptable risk to FHA. Mortgagee Letter 2009-46 B, Section XII.

41. After the initial approval and the project is due for recertification does a full review need to be redone or a simplified certification?

Re-certification of a project will require the DELRAP Lender to certify that the project is still in compliance with HUD's owner-occupancy requirement, FHA concentration and that no conditions exist which would present an unacceptable risk to FHA.

42. There are HOA's that do not have a Reserve Study completed or they may have them completed every 24 months and in some cases will not release them. What is the guidance in these situations?

In lieu of the actual budget documents, mortgagees may request and rely on a properly executed Fannie Mae for 1073a, Analysis of Annual Income and Expenses-Operating Budget. The document may be executed by the sell/servicer, owners association, or management agent.

43. If a condo project was FHA approved between 10/01/08 and 10/01/09 under a MAR would those case numbers be grandfathered when considering the 30% (50% temporary increase) concentration?

No

44. Can a case number be assigned prior to a project receiving FHA approval?

No

45. Are Reserve Studies required for all existing as well as new construction condominiums?

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Reserve Studies are not automatically required. Mortgagees must review the homeowners' association budget (the actual budget for established projects or the projected budget for new projects) for all projects. If the budget is determined by the mortgagee not to be adequate as stated in ML 2009-46 B, they may request a reserve study to assess the financial stability of the project.

46. **If the builder is providing a 10 year warranty, does the condo unit have to be started prior to the case number being ordered?**

    No, however a case number will not be assigned unless the project has received approval either through DELRAP or HRAP.

47. **If a Lender cannot determine the owner occupancy rate or number of FHA loans within a project can they continue to state "UNKNOWN" as in the past on spot loans?**

    No, however FHA will display the concentration information for each approved condominium development on the approved condominium listing, which can be found on both FHA Connection and on the public website at http://www.hud.gov/lenders/.

48. **Will the Working Capital Clause as stated in HB 4265.1, Appendix 24 still be required to be in the legal documents?**

    HUD does not require that the legal documents contain a Working Capital Clause.

49. **Are HOA Fidelity Bond Requirements still in place as before?**

    Yes, for projects that consists of 20 units or more. The coverage must be no less than a sum equal to three months aggregate assessments on all units plus reserve funds.

50. **Will all HOC's follow the same standards and checklist(s) for project approvals?**

    Yes

51. **Can qualified application preparers submit application packages to the HOC's under HRAP Procedures?**

    Yes, with all the required documentation and applicable appendixes.

52. **Are any of the requirements grandfathered in for projects that are currently approved?**

    No, beginning December 7, 2009 all projects will be required to comply with FHA Condominium Guidelines as stated in ML 2009-46 A and ML 2009-46 B.

53. **If a project's first phase was approved prior to October 1, 1008 with additional phasing after December 7, 2009, will DELRAP be allow at this point or will the project need to be processed under HRAP?**

    Additional phasing can be processed with either DELRAP or HRAP. The processing DELRAP Lender will be required to certify that the project continues to meet all FHA requirements.

54. **Will the project remain on the system if the initial phase approved prior to October, 2008 with ongoing subsequent phase submissions?**

    Yes.

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55. **Other then stated in the Declaration, will additional documentation be required to confirm the requirements of the Transfer of Control?**

No

56. **FNMA has re-instated their project approval process; will HUD accept their current approval in lieu of an FHA Attorney Opinion Letter?**

FHA does not have a reciprocity agreement with Fannie Mae. Mortgagees requesting FHA project approval must submit the request through either DELRAP or HRAP.

57. **On a conversion that is undergoing remodeling or rehabilitation, must the entire building be converted to condos before HUD will insure a loan?**

Yes, conversion to condominiums occurs in those projects which involve changing the title of an existing structure generally under one title, to property that is separated into units so that the title to most units can be held separately. In the event that FHA is insuring a mortgage on a unit and an undivided interest in the common elements on a project undergoing remodeling or rehabilitation, the entire condominium project, including the common facilities must be 100 percent completely built before any mortgage may be endorsed. Escrow provisions will be permitted for weather related delays for common areas only.

58. **Attachments B and C, do these need to be signed by a DE underwriter?**

- Attachment B must be completed by the DELRAP Lender certifying that the project meets all FHA Condominium Requirements and must be placed in the project file.
- Attachment C will be completed by the loan processing lender certifying that the unit in connection with the loan file has been verified to be in a project that to the best of their knowledge continues to meet all FHA Condominium Requirements. This certification will be placed in the case binder.

59. **If the condo project is not on the FHA list, but is on the VA approved list, is the condo project acceptable?**

No, FHA does not have a reciprocity agreement with VA; the project must be processed through either DELRAP or HRAP.

60. **In those circumstances where the FHA guidelines and state statute are in conflict, must the documents comply with FHA guidelines or the state statute?**

The DELRAP Lender must provide certification that;

- The project meets all requirements of Section 203b of the National Housing Act, 24 CFR 203;
- State and local condominium laws **and**;
- Any Mortgagee Letters thereto applicable to the review of condominiums.

61. **For existing condo communities that are approved and will transition to the new database, what will be the protocol for the 30% absorption going forward? Will only the new phases be affected or will the total absorption from the initiation of the condo approval limit FHA financing based on the history of the entire project?**

On new construction multi-phased projects the owner-occupancy and 30% (50% temporary increase) concentration are calculated on the first declared phase and cumulatively on subsequent phases if the ownership of the condominium project remains the same. Existing projects are considered to be complete and therefore the concentration would be based on the total number of units within the project.

62. **If the FHA approved project that falls within the transition period has a greater than 30% (50% temporary increase) concentration of FHA loans at the time of the transition, will it still be transitioned and grandfathered in or will its approval be withdrawn?**

    Case numbers assigned prior to the transition date will be honored however case numbers will not be issued in projects that do not meet FHA requirements with the implementation of the new policy on December 7, 2009.

63. **If a case number is received prior to December 7, 2009 under the existing policy, a conditional commitment is issued however the original applicant is denied. Can the conditional commitment be transferred to the new applicant and the old condo guidelines after December 7, 2009 when the new guidelines go into effect?**

    No.

64. **If a new construction condo project that has been approved FHA phase by phase and is already over 30 % (50% temporary increase) FHA concentration will a case number be issued?**

    Case numbers will not be issued in projects that do not meet FHA requirements as stated in ML 2009-46 B however the FHA concentration may be increased up to 100 percent concentration providing the project meets all of the basic condominium standards plus the additional items as stated in ML 2009-46 A.

65. **Does a lender have to have a borrower to obtain a FHA Case Number?**

    Yes.

CONDOMINIUM PROJECT APPROVAL

FAQ's (SITE/APPRAISAL REQUIREMENTS)

1. **What is the definition of "site" condo?**

   FHA definition: A site condominium is defined as a single family totally detached dwelling (no shared garages or any other attached buildings) encumbered by a declaration of condominium covenants or condominium form of ownership.

2. **What appraisal form will be used in completing an appraisal for site condos, FNMA 1073 or 1004?**

   Appraisal data is collected and reported on Fannie Mae form 1004 in accordance with the Valuation Protocols, Appendix D of HUD Handbook 4150.2.

3. **If a project was previously approved more than 2 years ago however was recently rebuilt due to a fire, is the project still approved?**

   FHA will move all currently approved condominium projects to the new approval list and FHA Connection database. Recertification will be based on the date of the initial project approval as stated in ML 2009-46 B.

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4. **Will 2 unit condominiums be added on HUD's approved condo list once they are approved through either the DELRAP or HUDRAP process?**

   Yes

5. **When is it necessary for an Environmental Site Review to be performed?**

   An Environmental Site Review is required if the project is processed using the HRAP option and where the project does not meet the following conditions;

   - A condominium plat or similar development plan and any phases delineated therein have been reviewed and approved by the local jurisdiction and, of applicable, recorded in the land records **and**
   - The construction of the project's infrastructure and buildings containing the condominium units has proceeded to a point that precludes any major changes.

6. **Will a PHASE I Environmental required to be updated if the report is over 6 months old?**

   It is not a FHA requirement to update a PHASE I.

7. **Is any training planned or will be planned on how lenders processing Condominium Projects using DELRAP might mitigate environmental risk?**

   None is planned at this time. The guidance outlines the requirements on items that the lender must avoid or mitigate before completing its review process.

8. **When completing an appraisal for a site condo what comps will be used, site condo's or single family.**

   Site condo comparables should be used in completing the appraisal report. If the appraiser uses comparables other than site condos they must provide an explanation on the appraisal report.

9. **When does the acceptance of a Building Permit and Certificate of Occupancy go into effect?**

   - For Site Condominiums the effective date was June 12, 2009.
   - All other project types the effective date is December 7, 2009.

10. **In reviewing and analyzing pending special assessments what should be considered?**

    Some items to be considered;

    - Is the assessment required to be pre-paid or is spread out over a period of time.
    - What is the purpose of the assessment?
    - Does the assessment affect the present market value?
    - What impact will the assessment have on the future value and marketability of the property?

11. **In reviewing and analyzing pending legal action against the condominium association or its officers or directors what should be considered?**

    Some items to be considered;

    - How does the legal action impact the future solvency of the HOA?
    - The ability for homeowners to transfer title.
    - Does the action impact the homeowner's rights?

12. **Does the requirement of "no more than 10% of the units may be owned by one investor," apply to apartment conversions where the developer owns all of the units with a large portion rented?**

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All condominium projects must meet the eligibility requirements set forth in ML 2009-46 B regardless of project classification.

13. **What does separate ownership per phase mean in a multi-phased project?**

    Separate ownership occurs when the original developer transfers their interest of the project to another party on either one or multiple phases.

14. **Can un-sold units be substantially complete and still allow a 100% completed unit to close? If not why not?**

    Yes, units can be sold and receive FHA Insurance providing;

    - The unit is located in an approved FHA project;
    - All common areas and amenities are completed; and
    - The unit has received a Certificate of Occupancy (CO) or Temporary/Conditional Certificate as outlined in ML 2009-46 B.

15. **Can secondary residences be rented out at all during the course of the year and still be considered as secondary residences as noted in 2009-46 B?**

    Yes, FHA does not prohibit renting of secondary residences.

16. **Can second homes (secondary residences) be included in the calculation of owner-occupancy or presale percentages?**

    For the purpose of calculating presale and owner-occupancy percentage only, second homes can be included as long as they are:

    - not investment properties;
    - occupied by the owner for some portion of the year; and
    - meet the requirements of a valid presale as stated in ML 2009-46 B.

17. **For the HRAP option, what will be the process for completing the Environmental Reviews, who will complete the reviews and what will be the time period for completion?**

    - Environmental issues/conditions that may require mitigation;
    - Site reviews will be performed by individuals designated by HUD;
    - Time periods are determined by complexity of the review and site conditions..

18. **Since environmental reviews are not required for the DELRAP option what alternative documents or partial review does the lender have to provide in lieu of a full review to avoid or mitigate environmental conditions that they become aware of?**

    If an environmental condition is identified by either the appraiser or if the lender is aware of an existing environmental condition through remarks provided on the Builder's Certification, form HUD-92541, the appraisal or other known documentation, the lender <u>must</u> avoid or mitigate those conditions before completing the review process.

19. **ML 2009-46 B states the only documentation acceptable to determine the need for Flood Insurance is either a LOMA or LOMR and does not mention the acceptability of an Elevation Certificate. ML 2009-37 dated October 1, 2009 (Condominiums) states that the HOA is responsible for obtaining and maintaining adequate flood insurance making it appear that the Elevation Certificate is acceptable. If a LOMA or LOMR is obtained flood insurance is not required however, insurance is required with an Elevation Certificate. Will FHA accept an Elevation Certificate?**

If the condominium unit (structure) is subject to the Single Family MPS (Minimum Property Standards) requirements, that unit (structure) to the same extent as a dwelling that is held in traditional fee simple ownership, an Elevation Certificate would be acceptable. (Site Condo's)

If the condominium project **contains nonresidential community structures** (i.e. clubhouse etc.) those would not be subject to the single family MPSs and therefore only a LOMA or LOMR would be acceptable for that project.

20. Some local building jurisdictions issue conditional certificates of occupancy on projects where common areas have not been entirely completed. On phased projects conditional C/O's are common. How is this issue going to be handled?

Temporary certificates may be allowed under the following circumstances for new construction and conversions:

- All common area and amenities must be completed;
- The temporary certificate that was issued clearly indicates that the unit is habitable and eligible for immediate occupancy;
- The jurisdiction that is issuing the temporary certificate has in place a standard protocol whereby permanent certificates are issued and maintained.

21. The new condo letter does not address high rise buildings; will FHA allow vertical buildings to be phased floor by floor?

Yes, FHA will recognize <u>legal</u> phasing in vertical buildings if;

- The floors are legally phased in groupings of no less than five floors;
- At least a temporary certificate of occupancy has been obtained and **all** common areas and amenities have been completed; **and**
- A third party completion bond has been obtained.

22. How will live/work units be handled and what will the eligibility requirements consist of?

Live/work projects are for all purposes normal looking condominiums that have been zoned by the local jurisdiction to allow individual units mixed use percentages of professional work and residential usage. The purpose is to attract professional workers to live in specific areas and work out of their units (Artist, Attorneys, Real Estate and Insurance agents). For the most part, they include conditions that don't meet FHA's condominium requirements. Mainly, local jurisdictions require approximately 66 percent of the unit be used for professional work. This exceeds FHA's requirement that a project have no more than 25% of a projects total floor area be used for commercial purposes.

23. Why are Manufactured Housing Condo Projects not treated like site condos, when the M/H condominium units are basically very similar in character to site?

Due to the complexity of manufactured housing requirements and to protect the interest of the Department, FHA has made the determination that a condo in a Manufactured Housing Project will <u>**NOT**</u> be processed as a site condo and must be submitted to the appropriate HOC for completion.

24. What is the current checklist to be used to process MHCP's?

Manufactured Housing Condo Projects are to use the condominium project approval matrix (Attachment A in ML2009-46B). In addition, these projects must meet the individual Manufactured Housing eligibility and general requirements as set forth in ML 2009-16.

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25. Will the certifications that are contained in Handbook 4150.1, Chapter 11, Appendix A & C OR Appendix B & D continue to be required when the new policy takes effect on December 7, 2009?

Effective December 7, 2009 those Appendixes's will not be required for projects processed under the guidelines of ML 2009-46 B.

If a project is located in a jurisdiction that does not issue a building permit (or its equivalent) prior to construction and a Certificate of Occupancy (or its equivalent) upon completion of construction, a condominium unit/project that is one year old or less must have either an Early Start Letter (with a minimum of three inspections by an FHA Roster Inspector) or be covered by a 10 year warranty to be eligible for a high-ratio mortgage insurance.

26. If a builder checks either box a, b, c or d on item 11 of HUD Form 92541, Builder Certification will this satisfy the requirement of an acceptable AFHMP, Affirmative Fair Housing Marketing Plan?

Form HUD-935.2C, Affirmative Fair Housing Marketing Plan-Condominium or Cooperatives, is to be used for condominium projects. If "a, b, c, or d" is checked on response to Question 2 in the Applicability section, the developer is not required to complete an AFHMP. The developer should complete block 11 on form HUD-92541, Builder's Certification of Plans, Specification and Site.

27. Is DELRAP allowed for new construction condo projects?

Yes.

X

PHED Item 1
September 14, 2009
Worksession 6

MEMORANDUM

TO: Planning, Housing and Economic Development Committee

FROM: Michael Faden, Senior Legislative Attorney
Linda McMillan, Senior Legislative Analyst

SUBJECT: **Worksession 6:** Bill 38-07, Moderately Priced Housing - Amendments
Bill 13-07, Moderately Priced Housing - Amendments

Bill 13-07, Moderately Priced Dwelling Units (MPDU) - Amendments, sponsored by Councilmembers Leventhal, Andrews and Trachtenberg, was introduced on June 26, 2007. A public hearing was held on July 19, 2007, and a Committee worksession on Bill 13-07 was held on July 23, 2007.

Bill 13-07 would allow the Director of the Department of Housing and Community Affairs (DHCA) to set aside certain specially equipped moderately priced dwelling units (MPDUs) for eligible disabled persons. Bill 13-07 also would repeal the Director's authority to approve "buyouts" or alternative payment agreements, in which a developer pays a certain amount into the County Housing Initiative Fund (HIF) instead of building some or all of the required MPDU's.

Bill 38-07, Moderately Priced Housing - Amendments, sponsored by the Council President at the request of the County Executive, was introduced on December 11, 2007. A public hearing was held on February 5, 2008. Committee worksessions were held on September 25, October 13, November 24, and December 1, 2008, and February 23, 2009.

Bill 38-07 would revise the standards for setting sales prices for moderately priced dwelling units. The bill would also repeal the Director's authority to approve "buyouts". In addition, the bill would revise the control periods for the sale or rent of MPDUs, the standards for building certain MPDUs in alternative locations, and various other standards, procedures, and terminology in the MPDU law.

The Office of Legislative Oversight released its Study of Moderately Priced Dwelling Unit Program Implementation (OLO Report 2007-9) on July 19, 2007. This Committee held worksessions on that report on November 5, 2007, and March 13, 2008. Many of the issues presented in Bill 38-07 were raised and discussed in the OLO report.

Combined redraft

The attached redraft combines the 2 pending bills, which differed in only one significant respect (the amendment in Bill 13-07 to give priority for certain accessible units to eligible households with disabled persons), and incorporates all amendments that the Committee has approved, including technical amendments submitted by DHCA staff.

In the order they appear in this combined redraft, this Bill includes the following substantive amendments (and other technical, conforming, and stylistic amendments) to the MPDU law, County Code Chapter 25A:

§25A-2 Statement of policy

Lines 13-14 adds policy that MPDU's should be dispersed in each subdivision as well as the County generally. This is guidance to DHCA and the Planning Board but does not require any specific formula or distance.

Lines 23-37 replaces current non-binding "no loss or penalty" and "reasonable prospects of profit" policy language with broader "financially viable mixed-income communities" goal.

§25A-4 Income and eligibility standards

Lines 134-137 gives Executive discretion whether to use different income eligibility standards for buyers and renters (current law requires it). Removes Executive's discretion to set different income standards for higher-cost housing.

Lines 140-145 directs DHCA to draft regulations to give priority to eligible households with disabled persons for units that federal law requires to be accessible to mobility-impaired persons.

Lines 146-149 deletes Executive's authority to base eligibility standards on the units' sale price or rent (later provisions turn this around and base the unit's price on the eligible household's income).

§25A-5 Requirement to build MPDU's

Lines 168-175 clarifies that regulations can set minimum specifications for MPDU's, such as unit size, number of bedrooms and bathrooms, and other minimum requirements.

Lines 193-195 requires that, if the number of market-rate units in a subdivision is increased from the base density, the subdivision must include at least one additional MPDU.

§25A-5A Alternative payment agreement

Lines 291-312 continues DHCA's "buyout" authority with significant changes:

- buyouts are limited to high-rise buildings (defined in lines 94-95 as buildings higher than 4 stories);

- the Alternative Review Committee (ARC) no longer must issue findings before DHCA can approve a buyout – in fact, the ARC has no further role in the buyout approval process;
- the former policy-based standards for approving buyouts, such as high condominium fees or site-specific environmental constraints (see lines 262-274), are deleted, effectively making the buyout an entitlement for any high-rise developer who wants to pay the price;
- the buyout payment is a percentage, set by regulation approved by the Council, of the difference between the sales prices for the market price units and the MPDU's;
- buyout funds received should be used to buy or build MPDU's in the same planning area as the original development, but DHCA could use them elsewhere.

§25A-5B Alternative location agreement

Lines 322-345 modifies DHCA's alternative site approval authority in several ways:

- deletes the former policy-based standards for approving alternative sites (see lines 322-327);
- requires the alternative site to include at least 15% MPDU's (15% of the units in the original building), instead of "at least the same number" of MPDU's;
- allows the alternative MPDU's to be located at more than one location;
- caps the number of MPDU's at the alternative locations at 1/3 of the total number of units there;
- requires the MPDU's at the alternative sites to have at least as many bedrooms as would have been required at the original site.

§25A-6 Optional zoning provisions; waiver of requirements.

Lines 367-368 deletes requirement that the Department of Permitting Services or the Planning Board consult DHCA before waiving the number of MPDU's to be built because of zoning constraints (this kind of waiver has rarely if ever been issued).

§25A-7 Maximum prices and rents.

Lines 381-391 removes specific production cost-based criteria for setting MPDU maximum sale prices (see lines 392-436), and replaces them with a general standard of affordability to households of moderate income, with details to be filled in by regulation. The new maximum price standards would not apply to any MPDU for which DHCA approved an offering agreement before this Bill takes effect (see lines 761-765).

Line 438 excludes tenant-paid parking from maximum MPDU rents set by DHCA.

Lines 444-448 deletes DHCA authority to set different rents for high-rise MPDU's.

Lines 449-465 deletes specific criteria for setting MPDU maximum rents.

§25A-8 Sale or rental of units.

Lines 552-553 lets DHCA waive the preference for MPDU-eligible buyers in age-restricted developments for good cause.

Lines 578-581 requires each MPDU bought or leased by a government agency or non-profit organization to be occupied by an eligible household.

Issues

1) New DHCA amendments

In a recent email to Council staff, DHCA recommended two additional amendments to the combined bill.

a) Calculation of Alternative Payments

The Committee recommended an alternative payment option ("buyout") for high-rise condominium and rental buildings. DHCA is concerned that the language on ©13, lines 297-304 as applied to rental MPDUs may be ambiguous and could imply that the alternative payment for a rental MPDU could never exceed 100% of the difference between the MPDU rent and the market rate rent (for example, under this interpretation, if the market rent is $2,500 and the MPDU rent would be $1,500, the amount of the alternative payment for that unit could not exceed $1,000). Calculating the alternative payment amount for rental MPDUs could be complicated because the affordability of the rental MPDU is "bought out" for 99 years. DHCA suggested that the actual methodology for rental units as well as the specific percentage be set in the regulations. To do this, Council staff recommends the following italicized language be added after ©13, line 304, as shown below:

> (b) Any payment to the Housing Initiative Fund under this Section must be based, for each unbuilt MPDU, on a percentage, which must not exceed 100%, of the difference between the actual sale price or annual rental charged for each market price unit and the price or rent that would be charged for the same unit if it were an MPDU. The Executive by regulation must further specify the methodology to compute this payment, including the percentage of the price or rent difference which applies, when this payment must be made, *and, for rental units, any modification to the methodology which is needed to account for the longer control period and other differences from sale units.*
>
> or percentage

b) Bedroom Requirement in Age-Restricted Single-Family Developments

Current §25A-5(b)(2) requires that each MPDU in a single-family dwelling unit subdivision must have 3 or more bedrooms and provides that: "The Director must not approve an MPDU agreement that reduces the number of bedrooms required by this subsection." DHCA is concerned about age-restricted single family developments where the developer might only offer

2-bedroom market rate units. In that case, the current law would still require each MPDU to have 3 bedrooms even though many MPDU applicants may not want this size unit. DHCA would let the Director reduce the required number of bedrooms in an age-restricted single-family development so the MPDU's are comparable with the market rate units. This can be done by inserting the italicized language on ©8, line 171, as follows:

> [[(4)]] The Director must not approve an MPDU agreement that reduces the number of bedrooms required by this subsection in any MPDU, or that does not meet minimum specifications for MPDUs established by regulation from time to time. *However, the agreement may allow the applicant to reduce the number of bedrooms required in an age-restricted single-family subdivision when necessary to make the MPDUs comparable with the market rate units.* The minimum specifications may include the overall basic unit size, the number of bedrooms and bathrooms, minimum room dimensions, and other minimum requirements for appliances, interior finishes, and exterior architectural features.

2) Use of Temporary Regulation to Implement New Pricing Model and Buyout Standards

Council staff recommends that the Executive be prohibited from using a Temporary Regulation to implement new standards for pricing MPDUs and calculating alternative payments. This prohibition should be included in an uncodified provision and should only apply to the initial replacement of the currently applicable regulation. Council staff does not recommend a permanent prohibition on the use of Temporary Regulations, but believes the Council review for this crucial initial change cannot be omitted. If the Committee approves this amendment in concept, Council staff will draft and circulate appropriate language.

3) Maximum sale price standards and effective date (grandfathering)

We expect the Maryland-National Capital Building Industry Association (BIA) to offer further objections and alternatives to the Bill's maximum sale price provisions (see ©16, lines 386-391) and the timing of their implementation (see ©30, lines 761-765). Attorneys Kaufman and Brown, representing the developers of Clarksburg Town Center, also objected to the timing (see letter, ©31-33) and asked for a specific exemption or grandfather clause. Council staff does not recommend a specific Clarksburg amendment because DHCA will need to sort out how much of the previous MPDU agreement still applies, given the comprehensive changes in this development since it was first approved.

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Bill No. 13/38-07
Concerning: Moderately Priced Housing - Amendments
Revised: 9-11-09 Draft No. 5
Introduced: June 26, 2007/December 11, 2007
Expires: June 11, 2009
Enacted:
Executive:
Effective:
Sunset Date: None
Ch. _____, Laws of Mont. Co. ________

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Leventhal, Andrews, and Trachtenberg/
Council President at the Request of the County Executive

AN ACT to:

(1) [[allow]] require the Director of the Department of Housing and Community Affairs to set aside certain specially equipped moderately priced dwelling units for eligible disabled persons;

[[(1)]] (2) revise the standards for setting sales prices for moderately priced dwelling units (MPDUs);

[[(2)]] (3) [[repeal]] modify the authority of the Director of the Department of Housing and Community Affairs to allow an applicant to pay into the Housing Initiative Fund instead of building MPDUs in a proposed subdivision;

[[(3)]] (4) revise the control periods for the sale or rent of MPDUs;

[[(4)]] (5) revise the standards for building certain MPDUs in alternative locations; and

[[(5)]] (6) revise other standards and procedures for, and generally amend County law governing, the moderately priced dwelling unit program.

By amending
Montgomery County Code
Chapter 25A, Housing, Moderately Priced
Sections 25A-2, 25A-3, 25A-4, 25A-5, 25A-5A, 25A-5B, 25A-6, 25A-7, 25A-8, 25A-9, 25A-10, and 25A-12

[[By repealing
Section 25A-5A]]

Boldface	*Heading or defined term.*
Underlining	*Added to existing law by original bill.*
[Single boldface brackets]	*Deleted from existing law by original bill.*
Double underlining	*Added by amendment.*
[[Double boldface brackets]]	*Deleted from existing law or the bill by amendment.*
* * *	*Existing law unaffected by bill.*

The County Council for Montgomery County, Maryland approves the following Act:

Sec. 1. Sections 25A-2, 25A-3, 25A-4, 25A-5, 25A-5A, 25A-5B, 25A-6, 25A-7, 25A-8, 25A-9, 25A-10, and 25A-12 are amended[[, and Section 25A-5A is repealed,]] as follows:

25A-2. Declaration of Public Policy.

The County Council hereby declares [[it to be]] that the public policy of the County is to:

(1) Implement the [Montgomery] County housing policy and the general plan goal of providing for a full range of housing choices, conveniently located in a suitable living environment, for all incomes, ages and [family] household sizes;

* * *

(3) Assure that moderately priced housing is dispersed within the County consistent with the general plan and area master plans, and dispersed within each individual subdivision;

(4) Encourage the construction of moderately priced housing by allowing optional increases in density in order to reduce land costs and the costs of optional features that may be built into [such] moderately priced housing; [[and]]

(5) Require that all subdivisions of [35] 20 or more dwelling units include a minimum number of moderately priced units of varying sizes with regard to [family] household needs, and encourage subdivisions with fewer than [35] 20 units to do the same[;] [[.]] and

[(6) Ensure that private developers constructing moderately priced dwelling-units under this Chapter incur no loss or penalty as a result thereof, and have reasonable prospects of realizing a profit on such units by virtue of the MPDU density bonus provision of Chapter 59 and, in certain zones, the optional development standards;

(7) Allow developers of residential units in qualified projects more flexibility to meet the broad objective of building housing that low- and moderate-income households can afford by letting a developer, under specified circumstances, comply with this Chapter by contributing to a County Housing Initiative Fund.]

(6) strive for, by the use where applicable of the MPDU density bonus allowed under Chapter 59 and, in certain zones, optional development standards and other flexible development practices, financially viable mixed-income communities that offer a broad range of housing opportunities throughout the County.

25A-3. Definitions.

* * *

(g) Control period means the time an MPDU is subject to either resale price controls and owner occupancy requirements or maximum rental limits, as provided in Section 25A-9. [The control period is 30 years for sale units and 99 years for rental units, and begins on the date of initial sale or rental. If a sale MPDU is sold to an eligible person within 30 years after its initial sale, and if (in the case of a sale MPDU that is not bought and resold by a government agency) the unit was originally offered for sale after March 1, 2002, the unit must be treated as a new sale MPDU and a new control period must begin on the date of the sale.]

(1) For an MPDU originally offered for sale or rent before March 1, 2002:

(A) the control period for each sale MPDU is 10 years after the date of the original purchase; and

(B) the control period for each rental MPDU is 20 years after the date of original rental.

[[(2) For an MPDU originally offered for sale or rent in a Growth Policy area before March 1, 2002:

(A) the control period for each sale MPDU is 15 years after the date of the original purchase; and

(B) the control period for each rental MPDU is 15 years after the date of original rental.]]

[[(3)]] (2) For an MPDU originally offered for sale or rent between March 1, 2002 and March 31, 2005:

(A) the control period for each sale MPDU is 10 years after the original settlement date and 10 years after the settlement date of each later sale if that sale occurs during the existing control period; and

(B) the control period for each rental MPDU is 20 years after the date of original rental.

[[(4)]] (3) For an MPDU originally offered for sale or rent on or after April 1, 2005:

(A) the control period for each sale MPDU is 30 years after the date of the original purchase and 30 years after the settlement date of each later sale if that sale occurs during the existing control period; and

(B) the control period for each rental unit is 99 years after the date of original rental.

(h) Date of original [sale] purchase means the date of settlement [for purchase of a moderately priced dwelling unit].

(i) Date of original rental means the date [[the first lease agreement for a moderately priced dwelling unit takes effect]] that covenants binding the MPDU rental units were recorded in the County land records.

* * *

(l) Dwelling unit means a building or part of a building that provides complete living facilities for one [family] household, including at a minimum facilities for cooking, sanitation, and sleeping.

(m) Eligible [person] buyer means a [person or] household whose income qualifies the [person or] household to [participate] buy a sale unit in the MPDU program, and who holds a valid certificate of eligibility from the Department which entitles the [person or] household to buy [or rent] an MPDU during the priority marketing period.

(n) Eligible renter means a household whose income qualifies the household to rent a unit in the MPDU program.

(o) High rise building means any multiple-family residential or mixed-use building that is higher than 4 stories.

[(n)] (p) Housing Initiative Fund means a fund established by the County Executive to achieve the purposes of Section 25B-9.

[(o)] (q) Low income means levels of income within the income range for "very-low income families" established from time to time by the U.S. Department of Housing and Urban Development for the Washington metropolitan area, under federal law, or as defined by [executive regulations] regulation.

[(p)] (r) Moderate income means those levels of income, established [in executive regulations] by regulation, which prohibit or severely limit the financial ability of persons to buy or rent housing in [Montgomery] the County.

[(q)](s) Moderately priced dwelling unit or MPDU means a dwelling unit which is:

(1) offered for sale or rent to eligible [persons] buyers or renters through the Department, and sold or rented under this Chapter; or

(2) sold or rented under a government program designed to assist the construction or occupancy of housing for [families] households of low or moderate income, and designated by the Director as an MPDU.

[(r)](t) Optional density bonus provision means any increase in density under Chapter 59, in a zoning classification that allows residential development, above the amount permitted in the base or standard method of development density, whether by exercise of the optional provisions of Chapter 59 or by any special exception.

[(s)](u) Planning Board means the Montgomery County Planning Board.

(v) Planning Area means a geographic area of the County defined in the County's Growth Policy or otherwise defined by the Planning Board.

(w) Policy Area means a geographic area of the County defined in the County's Growth Policy.

[(t)] (x) Priority marketing period is the period an MPDU must be offered exclusively for sale or rent to eligible [persons] buyers or renters, as provided in Section 25A-8.

25A-4. Income and eligibility standards.

(a) The County Executive must set and annually revise standards of eligibility for the MPDU program by regulation. These standards must specify moderate-income levels for varying sizes of households which will qualify a [person or] household to buy or rent an MPDU.

The Executive [must] may set different income eligibility standards for buyers and renters and for age-restricted housing. [The Executive may set different income eligibility standards for buyers and renters of higher-cost or age-restricted housing, as defined by regulation.] [[The regulations may also allow the Director to set aside certain units for eligible persons with disabilities if the units are specially equipped for occupancy by disabled persons.]] For any MPDU that is required by federal law to be accessible to persons with a mobility impairment, the regulation must require the MPDU to be offered to each eligible applicant whose household is appropriately sized for the MPDU and includes a person with a mobility impairment before the MPDU is offered to any other applicant.

(b) In establishing standards of eligibility and moderate-income levels, the Executive must consider:

[(1) the price established for the sale or rental of MPDUs under this Chapter,]

[(2)] (1) the term and interest rate that applies to the financing of MPDUs,

[(3)] (2) the estimated levels of income necessary to carry a mortgage on an MPDU, and

[(4) family] (3) household size and number of dependents.

* * *

25A-5. Requirement to build MPDU's; agreements.

* * *

(b) Any applicant, in order to obtain a building permit, must submit to the Department of Permitting Services, with the application for a permit, a written MPDU agreement approved by the Director and the County Attorney. Each agreement must require that:

*   *   *

(3) in [multi-family] multiple-family dwelling unit subdivisions, the number of efficiency and one-bedroom MPDUs each must not exceed the ratio that market-rate efficiency and one-bedroom units respectively bear to the total number of market-rate units in the subdivision.

[[(4)]] The Director must not approve an MPDU agreement that reduces the number of bedrooms required by this subsection in any MPDU, or that does not meet minimum specifications for MPDUs established by regulation from time to time. The minimum specifications may include the overall basic unit size, the number of bedrooms and bathrooms, minimum room dimensions, and other minimum requirements for appliances, interior finishes, and exterior architectural features.

(c) When the development at one location is in a zone where a density bonus is allowed; and

(1) is covered by a plan of subdivision,

(2) is covered by a plan of development or a site plan, or

(3) requires a building permit to be issued for construction,

the required number of moderately priced dwelling units is a variable percentage that is not less than 12.5 percent of the total number of dwelling units at that location, not counting any workforce housing units required under Chapter 25B. The required number of MPDUs must vary according to the amount by which the approved development exceeds the normal or standard density for the zone in which it is located. Chapter 59 permits bonus densities over the presumed base density where MPDUs are provided. If the use of the optional MPDU development standards does not result in an increase over the base density, the Director must conclude that the base density could not be achieved under conventional development standards, in which case the required number of MPDUs must not be less than 12.5 percent of the total number of units in the subdivision. If the number of market rate units is increased from the base density, the subdivision must include at least one additional MPDU. The amount of density bonus achieved in the approved development determines the percentage of total units that must be MPDUs, as follows:

* * *

(e) The Director may approve an MPDU agreement that[:]:

[(1) allows an applicant to reduce the number of MPDUs in a subdivision only if the agreement meets all requirements of Section 25A-5A; or]

(1) allows an applicant to reduce the number of MPDUs in a subdivision only if the agreement meets all requirements of Section 25A-5A; or

[(2)] (2) allows an applicant to build the MPDUs at another location only if the agreement meets all requirements of Section [25A-5B] [[25A-5A]] 25A-5B.

[[* * *]]

(f) * * *

(3) Notwithstanding any other provisions of [the] this subsection, the County may reject an election by an applicant to transfer land to the County in whole or in part whenever the public

interest would best be served thereby. [Any rejection and the reasons for the rejection may be considered by the] The Planning Board or the Director of Permitting Services may consider any rejection and the reasons for it in deciding whether to grant [the applicant] a waiver [of this Chapter] under Section [25A-7(b)] 25A-6(b).

(4) Any transfer of land to the County [hereunder] under this subsection is not subject to [Section 11B-33] Chapter 11B, and any land so transferred is not property subject to [Section 11B-31A] Chapter 11B regulating the disposal of surplus land. The Director may dispose of the [lots] land in a manner that furthers the objectives of this Chapter.

* * *

(k) The applicant must execute and [record] cause to be recorded covenants assuring that:

* * *

(l) (1) In any purchase and sale agreement and any deed or instrument conveying title to an MPDU, the grantor must clearly and conspicuously state, and the grantee must clearly and conspicuously acknowledge, that:

(A) the conveyed property is [a] an MPDU and is subject to the restrictions contained in the covenants required under this Chapter during the control period until the restrictions are released; and

* * *

(3) When a deed or other instrument conveying title to an MPDU is recorded in the land records, the grantor must cause to be filed

in the land records a notice of sale for the benefit of the County in the form provided by [state] State law.

(m) Nothing in this Chapter prohibits an applicant from voluntarily building MPDUs, as calculated under subsection (c), in a development with fewer than 20 dwelling units at one location, and in so doing from qualifying for an optional method of development under Chapter 59. A development with fewer than 20 dwelling units where an applicant voluntarily builds MPDUs must comply with any procedures and development standards that apply to a larger development under this Chapter and Chapter 59. Sections 25A-5A[, 25A-5B,], 25A-5B, and 25A-6(b) do not apply to an applicant who voluntarily builds MPDU[']s under this subsection and in so doing qualifies for an optional method of development.

[25A-5A. Alternative payment agreement.

(a) The Director may approve an MPDU agreement that allows an applicant, instead of building some or all of the required number of MPDUs in the proposed subdivision, to pay to the Housing Initiative Fund an amount computed under subsection (b), only if an Alternative Review Committee composed of the Director, the Commission's Executive Director, and the Director of Park and Planning, or their respective designees, by majority vote finds that:

(1) either:

(A) an indivisible package of services and facilities available to all residents of the proposed subdivision would cost MPDU buyers so much that it is likely to make the MPDUs effectively unaffordable by eligible buyers; or

(B) environmental constraints at a particular site would render the building of all required MPDUs at that site economically infeasible; and

(2) the public benefit of additional affordable housing outweighs the value of locating MPDUs in each subdivision throughout the County, and accepting the payment will further the objective of providing a broad range of housing opportunities throughout the County.

(b) Any payment to the Housing Initiative Fund under this Section must equal or exceed 125% of the imputed cost of land for each unbuilt MPDU. Except as further defined by Executive regulation, the imputed land cost must be calculated as 10% (for high-rise units) or up to 30% (for all other housing units) of the actual sale price charged for each substituted unit. If the substituted unit will be a rental unit, the Director must calculate an imputed sale price under applicable regulations, based on the rent actually charged.

(c) Any payment to the Housing Initiative Fund under this Section may be used only to buy or build more MPDUs in the same planning policy area (as defined in the County Growth Policy) as the development for which the payment was made, and must not be used to reduce the annual County payment to the Fund.

(d) Any subdivision for which a payment is made under this Section is not eligible for any density bonus for which it would otherwise be eligible under Chapter 59.]

<u>25A-5A.</u> <u>Alternative payment agreement.</u>

<u>(a)</u> <u>The Director may approve an MPDU agreement that allows an applicant for development of a high-rise residential or mixed-use</u>

building, instead of building some or all of the required number of MPDUs for sale or rent in the proposed subdivision, to pay to the Housing Initiative Fund an amount computed under subsection (b).

(b) Any payment to the Housing Initiative Fund under this Section must be based, for each unbuilt MPDU, on a percentage, which must not exceed 100%, of the difference between the actual sale price or annual rental charged for each market price unit and the price or rent that would be charged for the same unit if it were an MPDU. The Executive by regulation must further specify the methodology to compute this payment, including the percentage of the price difference which applies, and when this payment must be made.

(c) Any payment to the Housing Initiative Fund under this Section should be used to buy or build the same number or more MPDUs in the same planning area as the development for which the payment was made, and must not be used to reduce the annual County payment to the Fund.

(d) Any subdivision for which a payment is made under this Section is not eligible for any density bonus for which it would otherwise be eligible under Chapter 59.

[25A-5B.] [[25A-5A.]] 25A-5B. Alternative location agreement.

(a) The Director may approve an MPDU agreement that allows an applicant for development of a high-rise residential or mixed-use building (the "original building,") instead of [[building]] locating some or all of the required number of MPDUs [on-site,] [[within the boundaries of the project plan, preliminary plan, or site plan for the development,]] in the original building, to provide [at least the same number of] MPDUs at [[another location]] one or more other locations in the same planning [[or policy]] area, only if the Director finds that:

[(1) the public benefit of locating MPDUs at the proposed alternative location outweighs the value of locating MPDUs in each subdivision throughout the County; and

(2) building the MPDUs at the proposed alternative location will further the objective of providing a broad range of housing opportunities throughout the County.]

(1) the applicant has agreed to provide at one or more proposed alternative locations:

(A) a number of MPDUs equal to at least [[20]] 15 percent of the total approved units in the [[high-rise]] original building, and

(B) at least one more MPDU than would have been built if 12.5% of the units in the original building were MPDU's;

(2) no more than [[30 percent]] one-third of the total number of units at the proposed alternative location or locations will be MPDUs; and

(3) the MPDUs at the proposed alternative location or locations have at least as many bedrooms as would have been required under Section 25A-5(b)(3) if all MPDUs had been located on the site of the [[high-rise]] original building.

(b) To satisfy the requirements of this Section, an applicant may:

(1) build, or convert from non-residential use, the required number of new MPDUs at [[a site]] one or more sites approved by the Director;

(2) buy, encumber, or transfer, and rehabilitate as necessary, existing market rate housing units that meet all standards for use as MPDUs; or

(3) return to MPDU use, and rehabilitate as necessary, existing MPDUs for which price or rent controls have expired.

(c) Any subdivision for which an alternative location agreement is approved under this Section is not eligible for any density bonus for which it would otherwise be eligible under this Chapter or Chapter 59.

[[(c)]] (d) Each agreement under this Section must include a schedule, binding on the applicant, for timely completion or acquisition of the required number of MPDUs, in accordance with Section 25A-5(i).

[[* * *]]

25A-6. Optional zoning provisions; waiver of requirements.

* * *

(b) *Waiver of requirements.* Any applicant who presents sufficient evidence to the Director of Permitting Services in applying for a building permit, or to the Planning Board in submitting a preliminary plan of subdivision for approval or requesting approval of a site or other development plan, may be granted a waiver from part or all of Section 25A-5. The waiver must relate only to the number of MPDUs to be built, and may be granted only if the Director of Permitting Services or the Board[, after consulting with the Department of Housing and Community Development Affairs,] finds that the applicant cannot attain the full density of the zone because of any requirements of [the zoning ordinance] Chapter 59 or the administration of other laws or regulations. When any part of the land that dwelling units cannot be built on for physical reasons is used to compute permitted density, the applicant's inability to use the optional density bonus provisions is not in itself grounds [for waiving the] to waive any MPDU [requirements] requirement. Any waiver must be strictly construed and limited.

25A-7. Maximum prices and rents.

Moderately priced dwelling units must not be sold or rented at prices or rents that exceed the maximum prices or rents established under this Section.

(a) *Sales.*

[(1)] The sale price of any MPDU, [including closing costs and brokerage fees,] including any closing costs paid by the builder, must not exceed an applicable maximum sale price [[established]] which the Director must set from time to time [by the County Executive in regulations adopted under method (1)] in accordance with Executive regulations. The applicable regulation must identify the methodology which the Director must use to set maximum sales prices so that the resulting prices are affordable to households of moderate incomes, considering those households' ability to buy and finance housing.

[(2) The County Executive in issuing MPDU sale price regulations must seek appropriate information, such as current general market and economic conditions and the current minimum sale prices of private market housing in the County, and must consult with the building industry, employers, and professional and citizen groups to obtain statistical information which may assist in setting a current maximum sale price. The County Executive must, from time to time, consider changes in the income levels of persons of low and moderate income and their ability to buy housing. The County Executive must also consider the extent to which, consistent with code requirements, the cost of housing can be reduced by the elimination of amenities, the use of cost-reducing building techniques and materials, and the partial finishing of certain parts of the units.

(3) The County Executive must issue maximum sale prices for MPDUs which continue in effect until changed by later regulation. The maximum sale prices must be based on the necessary and reasonable costs required to build and market the various kinds of MPDUs by private industry. The sale prices for any succeeding year must be based on a new finding of cost by the County Executive, or on the prior year's maximum MPDU price adjusted by the percentage change in the relevant cost elements indicated in the Consumer Price Index.

(4) The County Executive may make interim adjustments in maximum MPDU sale prices when sufficient changes in costs justify an adjustment. Any interim adjustment must be based on the maximum MPDU sale prices previously established, adjusted by the percentage change in the relevant cost elements indicated in the Consumer Price Index.

(5) If the Director finds that other conditions of the design, construction, pricing, or amenity package of an MPDU project will lessen the ability of eligible persons to afford the MPDUs, the Director, under executive regulations, may restrict those conditions that will impose excessive mandatory homeowner or condominium fees or other costs that reduce the affordability of

the MPDUs.

(6) The Director may let an applicant increase the sale price of a MPDU when the Director, under executive regulations, finds in exceptional cases that a price increase is justified to cover the cost of modifying the external design of the MPDUs when a modification is necessary to reduce excessive marketing impact of the MPDUs on the market rate units in the subdivision. The Director must approve the amount of any increase for this purpose, which must not exceed 10 percent of the allowable base price of the unit.]

(b) *Rents.*

[(1)] The rent, [including parking but] excluding utilities and parking when they are paid by the tenant, for any MPDU must not exceed a maximum rent for the dwelling unit set [by] by the Director in accordance with Executive regulations. Different rents must be set for units when utility costs are paid by the owner and included in the rent. Different rents may be set for age-restricted units. [Different rents also may be set for high-rise rental units, but those rents must not apply unless the Director finds that no other reasonable means is available to finance the building of all required MPDUs at a specific development.]

[(2) The County Executive, in setting the maximum rent, must consider the current cost of building MPDUs, available interest rates and debt service for permanent financing, current market rates of return or investments in residential rental properties, operating costs, vacancy rates of comparable properties, the value of the MPDU at the end of the control period, and any other relevant information. The County Executive must consult with the rental industry, employers and professional and citizen groups to obtain statistical information and current general market and economic conditions which may assist in setting a current maximum rent. The County Executive must consider the extent to which, consistent with County codes and housing standards, the cost of rental housing can be reduced by the elimination of amenities. The County Executive must also consider from time to time changes in the income levels of persons of low and moderate income and their ability to rent housing.]

25A-8. Sale or rental of units.

(a) *Sale or rental to general public.*

(1) [Every] During the priority marketing period, every moderately priced dwelling unit required under this Chapter must be offered to [the general public for sale or rental to a good-faith purchaser] an eligible buyer or renter to be used for his or her own residence, except units offered for sale or rent with the assistance of, and subject to the conditions of, a subsidy under a federal, state or local government program, identified in regulations, [adopted by the County Executive under method (1)] whose purpose is to provide housing for persons of low or moderate income.

(2) Before offering any moderately priced dwelling units, the applicant must notify the Department of the proposed offering and the date on which the applicant will be ready to begin the

marketing to eligible [persons] buyers or renters. The notice must [set forth] specify the number of units offered, the bedroom mix, the floor area for each unit type, [a description of] the amenities offered in each unit, and [a statement of] the availability of each unit for sale or rent, including information regarding any mortgage financing available to buyers of the designated unit. The applicant must also give the Department a vicinity map of the offering, a copy of the approved development, subdivision or site plan, as appropriate, and such other information or documents as the Director finds necessary. The Department must maintain a list of eligible [persons] buyers of moderate income and, in accordance with procedures established by the County Executive, must [notify eligible persons] post a notice of the offering for eligible buyers and renters.

(3) After receiving the offering notice, the Department must notify the Commission of the offering. If the Department finds that the offering notice is complete, it must decide whether the offering of the units to eligible [persons] buyers or renters will be administered by [lottery] random selection drawing or by another method that will assure eligible [persons] buyers or renters an equitable opportunity to buy or rent [a] an MPDU. The Department must notify the applicant of the method and when the 90-day priority marketing period for the MPDUs may begin.

(4) The Executive may by regulation establish a buyer [and renter] selection system which considers household size, County

residency, employment in the County, and length of time since the [[person]] household was certified for the MPDU program. Each eligible [person] buyer must be [notified of the availability of any MPDU which would meet that [[person's]] household's housing needs, and be] given an opportunity to buy [or rent] an MPDU during the priority marketing period in the order of that person's selection priority ranking.

(5) The priority marketing period for new units ends 90 days after the initial offering date approved by the Department. The priority marketing period for resold or rerented units ends 60 days after the Department notifies the seller of the approved resale price or vacancy of the rental unit. The Department may extend a priority marketing period when eligible [persons] buyers or renters are interested in buying or renting a unit.

(6) [Moderately priced dwelling units] MPDUs, except those built, sold, or rented under a federal, state, or local program designated by regulation, must not be offered for rent by an applicant during the priority marketing period, except in proportion to the market rate rental units in that subdivision as follows:

(A) In a subdivision containing only single-family dwellings, the proportion of rental MPDUs to all MPDUs must not exceed the proportion of market rate rental units to all market rate units.

* * *

[[(D)]] [Applicants] Each applicant must make a good-faith effort to enter into contracts with eligible [persons] buyers or renters during the priority marketing period and for an additional period necessary to negotiate with eligible [persons] buyers or renters who indicate a desire to buy or rent an MPDU during that period.

(7) Every buyer or renter of an MPDU must occupy the unit as his or her primary residence during the control period. Each buyer and renter must certify before taking occupancy that he or she will occupy the unit as his or her primary residence during the control period. The Director may require an owner who does not occupy the unit as his or her primary residence to offer the unit for resale to an eligible [person] buyer under [the resale provisions of Section 25A-9] Section 25A-10.

* * *

(10) [An] During the priority marketing period, an applicant must not sell [or lease] any unit without first obtaining a certificate of eligibility from the buyer [or lessee]. A copy of each certificate must be furnished to the Department and maintained on file by the Department. The Director may waive this requirement in an age-restricted development for good cause. Before the sale by an applicant or by the Commission or a designated housing agency or nonprofit corporation to any buyer of any MPDU who does not possess a certificate of eligibility, the applicant, the Commission, or the agency or corporation must ask the Department whether the certificates on file show that the proposed buyer had previously bought another MPDU. A person who previously bought and owned an MPDU must not buy a second MPDU unless no first-time buyer is qualified to

buy that unit. The Director may waive this restriction for good cause.

(11) If an MPDU owner dies, at least one heir, legatee, or other person taking title by will or by operation of law must occupy the MPDU during the control period under this Section, or the owner of record must sell the MPDU as provided in Section 25A-9. After the control period expires, the owner of record must comply with Section 25A-9(c).

(b) *Sale or rental to government agencies or nonprofit corporations.*

(1) In view of the critical, long-term public need for housing for [families] households of low and moderate income, the Department, the Commission, or any other housing development agency or nonprofit corporation designated by the County Executive may buy or lease, for its own programs or programs administered by it, up to 40 percent of all MPDUs which are not sold or rented under any other federal, state, or local program. Each MPDU bought or leased by the Department, the Commission, or a designated housing agency or nonprofit corporation must be occupied by an eligible household. The Department or Commission may buy or lease up to [[33]] 33.3 percent of the MPDUs not sold or rented under any other federal, state, or local program. Any other designated agency or corporation may buy or lease:

(A) any MPDU in the first [[33]] 33.3 percent that HOC has not bought or leased, and

(B) the remainder of the 40 percent.

This option may be assigned to persons of low or moderate income who are eligible for assistance under any federal, state, or local program identified in regulations [adopted by the Executive]. The Executive must, by regulation, adopt standards and priorities for designating nonprofit corporations under this subsection. These standards must require [[the]] each corporation to demonstrate its ability to operate and maintain MPDUs satisfactorily on a long-term basis.

* * *

25A-9. Control of rents and resale prices; foreclosures.

(a) *Resale price and terms.* Except for foreclosure proceedings, any MPDU constructed or offered for sale or rent under this Chapter must not be resold or refinanced during the control period for a price greater than the original [selling] purchase price plus:

(1) A percentage of the unit's original [selling] purchase price equal to the increase in the cost of living since the unit was first sold, as determined by the Consumer Price Index;

(2) The [fair market value] documented cost of improvements made to the unit between the date of original [sale] purchase and the date of resale;

(3) An allowance for closing costs which were not paid by the initial seller, but which will be paid by the initial buyer for the benefit of the later buyer; and

(4) A reasonable sales commission if [the unit is not sold during the priority marketing period to an eligible person from the Department's eligibility list] a third-party licensed real estate agent is used.

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The resale price of an MPDU may be reduced if the physical condition of the unit reflects abnormal wear and tear because of neglect, abuse, or insufficient maintenance. Any personal property transferred in connection with the resale of an MPDU must be sold at its fair market value. In calculating the allowable resale price of an MPDU which was originally offered for rent, the Department must [estimate the price for which the unit would have been sold if the unit had been offered for sale when it was first rented] <u>calculate the current affordable sales price as defined under Section 25A-7(a)</u>.

(b) *Resale requirements during the control period.*

(1) Any MPDU offered for resale during the control period must first be offered exclusively for <u>up to</u> 60 days to the Department and the Commission, in that order. The Department or the Commission may buy a unit when funds are available. The Department may buy a unit when the Director finds that the Department's or a designated agency or corporation's buying and reselling the unit will increase opportunities for eligible [persons] <u>buyers</u> to buy the unit. If the Department or the Commission does not buy the unit, the Department must [notify eligible persons of the availability of a resale MPDU] <u>post a notice for eligible buyers of the availability of a resale MPDU</u>. The unit may be sold through either of the following methods:

(A) The Department may by [lottery] <u>random selection drawing</u> establish a priority order under which eligible [persons] <u>buyers</u> who express interest in buying the unit may buy it at the approved resale price.

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(B) The Department may notify the MPDU owner that the owner may sell the unit directly to any eligible [person] <u>buyer</u> under the resale provisions of this Chapter.

(2) A resale MPDU may be offered for sale to the general public only after:

* * *

(B) all eligible [persons] <u>buyers</u> who express an interest in buying it have been given an opportunity to do so.

(3) The Executive by regulation may adopt requirements for reselling MPDUs. The regulations may require a seller to submit to the Department for approval:

* * *

(B) a signed copy of the settlement sheet; [and]

(C) an affidavit signed by the seller and buyer attesting to the accuracy of all documents and conditions of the sale[.]<u>;</u> <u>and</u>

<u>(D)</u> <u>an affidavit signed by the buyer agreeing to comply with all requirements of this Chapter.</u>

* * *

(c) *First sale after control period ends.*

(1) If an MPDU originally offered for sale or rent after March 21, 1989, is sold or resold after its control period ends, upon the first sale of the unit the seller must pay to the Housing Initiative Fund one-half of the excess of the total [resale] <u>fair market sales</u> price over the sum of the following:

(A) The original [selling] <u>purchase</u> price;

(B) A percentage of the unit's original [selling] purchase price equal to the increase in the cost of living since the unit was first sold, as determined by the Consumer Price Index; [[and]]

(C) The [fair market value] documented cost of capital improvements made to the unit between the date of original [sale] purchase and the date of resale; and

(D) A reasonable sales commission if a third-party licensed real estate agent was used.

(2) The Director must adjust the amount paid into the fund in each case so that the seller retains at least $10,000 of the excess of the resale price over the sum of the items in subsection (c)(1)(A)-(D).

[(2)] (3) The Director must find that the price and terms of a sale covered by subsection (c)(1) are bona fide and accurately reflect the entire transaction between the parties so that the full amount required under subsection (c)(1) is paid to the fund. When the Director finds that the amount due the fund is accurate and the Department of Finance receives the amount due, the Department must terminate the MPDU controls and execute a release of the restrictive covenants.

[(3)] (4) The Department and the Commission, in that order, may buy an MPDU at any time during the control period, and may resell the unit to an eligible [person] buyer. A resale by the Department or Commission starts a new control period.

[(4)] (5) The Commission and any partnership in which the Commission is a general partner need not pay into the Housing

Initiative Fund any portion of the resale price of any MPDU that it sells.

(d) *Initial and later rent controls.* Unless previously sold under subsection (c)(1), [MPDUs] any MPDU built or offered for rent under this Chapter must not be rented for 99 years after the original rental at a rent greater than that established by [Executive regulations] regulation. Any MPDU (other than those built, sold, or rented under any federal, state, or local program offered by the Commission) offered for rent during the control period must be offered exclusively for 60 days to one or more eligible [persons] renters, as determined by the Department, for use as that [[person's]] household's residence, and to the Commission. The Commission may assign its right to rent such units to persons of low or moderate income who are eligible for assistance under any federal, state, or local program identified [in Executive regulations] by regulation.

(e) *Foreclosure or other court-ordered sales.* If an MPDU is sold through a foreclosure or other court-ordered sale, a payment must be made to the Housing Initiative Fund as follows:

* * *

(5) If the foreclosing lienholder either sells the MPDU to the MPDU owner at the foreclosure sale or sells it to the MPDU owner after the foreclosure sale has been ratified, the covenants recorded against the MPDU must not be released and must remain in effect for the remaining term of the covenants. A payment to the Housing Initiative Fund must be required when the first sale occurs after the control period ends, under

subsection (c) and the MPDU covenants or, if a later foreclosure sale occurs, under this subsection.

[[All MPDU covenants]] Subject to paragraph (5), each MPDU covenant must be released after the [[required]] payment required under this Section is made [[into]] to the Housing Initiative Fund.

[[* * *]]

(f) *Waivers*. The Director may waive the restrictions on the resale and re-rental prices for MPDUs if the Director finds that the restrictions conflict with regulations of federal or state housing programs and thus prevent eligible [persons] buyers or renters from buying or renting units under the MPDU program.

(g) *Bulk transfers*. This section does not prohibit the bulk transfer or sale of all or some of the sale or rental MPDUs in a subdivision within 30 years after the original rental or offering for sale if the buyer is bound by all covenants and controls on the MPDUs.

* * *

25A-10. [Executive regulations] Regulations; enforcement.

(a) The Department must maintain a list of all moderately priced dwelling units constructed, sold or rented under this Chapter. [; and the] The County Executive may, from time to time, adopt regulations under method [(1) necessary] (2) to administer this Chapter.

* * *

(e) In addition to or instead of any other available remedy, the Director may take legal action to:

* * *

(2) require an owner to sell an MPDU owned or occupied in violation of this Chapter to the County, the Commission, or an eligible [person] buyer.

25A-12. Annual report.

Each year by [[March 15]] October 1 the Director must report to the Executive and Council, for the previous [[calendar]] fiscal year:

(a) the number of MPDUs approved and built; and

(b) each [alternative payment agreement approved under Section 25A-5A or] alternative payment agreement approved under Section 25A-5A or alternative location agreement approved under [Section 25A-5B,] [[Section 25A-5A]] Section 25A-5B, and the location and number of MPDUs that were involved in each agreement[;].

[(c) each approval of a different rent for a high-rise rental unit under Section 25A-7(b)(1); and

(d) the use of all funds in the Housing Initiative Fund that were received as a payment under Section 25A-5A.]

Sec. 2. Effective Date. Any regulation which implements County Code Section 25A-7(a), as amended by Section 1 of this Act, must not apply to those moderately priced dwelling units for which the Department of Housing and Community Affairs approved an MPDU offering agreement before this Act took effect.

Approved:

Philip M. Andrews, President, County Council | Date

Approved:

Isiah Leggett, County Executive | Date

LINOWES AND BLOCHER LLP
ATTORNEYS AT LAW

February 20, 2009

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By Hand Delivery

Hon. Michael Knapp, Chair
and Members of the Planning, Housing and
Economic Development Committee
Montgomery County Council
100 Maryland Avenue, 6th Floor
Rockville, Maryland 20850

Re: Bill No. 13/38-07 Moderately Priced Housing Amendments

Dear Mr. Knapp and Members of the PHED Committee:

On behalf of the developer of the Clarksburg Town Center project, this letter requests the addition of language to proposed Bill No. 13/38-07 to grandfather expressly the Town Center project from the effect of the legislation.

As the Council is aware, the initial Town Center project approvals were granted many years ago, beginning with the original project plan approval in 1995. The project has been partially completed and contains 72 MPDUs. At its meeting on December 11, 2008, the Montgomery County Planning Board approved amendments to the project plan and preliminary plan, and also approved a new overall site plan for the project. These approvals were granted to implement the Program of Compliance for the Town Center approved in 2006. The new approvals require construction of an additional approximate 81 MPDUs.

The project is subject to an Interim Agreement to Build MPDUs dated November 29, 2006. The Interim Agreement provides that the parties will enter into a Final Amended and Restated Agreement for the entirety of the Town Center once the Planning Board grants the final project approvals. As indicated above, the Planning Board approved the overall Town Center plan amendments and site plan at its meeting on December 11, 2008. The approved final plans contain an extensive redesign of the Town Center and significant amenity enhancements for the community.

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The developer of the Town Center has two major concerns with Bill 13/38-07. First, it would be inequitable to impose new MPDU maximum sales pricing requirements on this project considering its approved status and its unique and troubled history. Furthermore, when the developer entered into the mediated settlement agreement with community representatives in 2006, it considered MPDU lot values in its financial planning. These lot values have already been reduced significantly below their fair market value to accommodate the MPDU program. Failing to consider builder costs when calculating MPDU maximum sales prices as contemplated by the Bill could further negatively impact the value of the MPDU lots, developer and builder financial modeling, and, most importantly, the ability to implement the approved plans. After all that has occurred concerning this project, respectfully, it would be unjust to impose additional regulatory changes having the anticipated economic impact of Bill 13/38-07. This is particularly evident considering the substantial development costs resulting from the redesign effort and its associated nearly 4-year delay and the additional costs already being incurred to implement the revised design.

Second, as noted above, the project is subject to an approved MPDU Agreement. The Agreement served first as a stop-gap measure to allow development of the project to continue while revised plans were being prepared and reviewed and also as a place-holder for the final agreement. Now that the Planning Board has approved the final plans for the Town Center, the parties can enter into the final MPDU agreement as contemplated. However, imposing new maximum sales pricing requirements on the project would unquestionably constitute another obstacle to completing the Town Center. In this regard, the developer has advised us that the prospective sale of market and up to 22 MPDU lots has already been impacted by the mere *potential* maximum sales pricing change proposed by Bill 13/38-07.

Based on the foregoing, we request that the legislation and any regulation implementing the maximum sales price provisions of Bill 13/38-07 not apply to projects having a preliminary subdivision plan approved prior to the effective date of the legislation and that MPDU maximum sales prices for such projects continue to be based on builder cost calculations.

Thank you for your consideration.

Very truly yours,

LINOWES AND BLOCHER LLP

Stephen Z. Kaufman

Todd D. Brown

cc: Montgomery County Councilmembers
Mr. Douglas Delano
Mr. Robert Ditthardt
Mr. Jeffrey Zyontz

PHED COMMITTEE #1
November 19, 2009

MEMORANDUM

November 18, 2009

TO: Planning, Housing, and Economic Development Committee

FROM: Linda McMillan, Senior Legislative Analyst LaMc

SUBJECT: **Discussion:** Bill 13/38-07, Moderately Priced Dwelling Units (MPDU) – Amendments – Follow-up from Work Group Requested at September 14 PHED Committee session

The PHED Committee held a worksession on this bill on September 14th. At that session, the Committee continued to discuss the major issues in the proposed legislation including, affordability pricing (for-sale units), alternative payment agreements for high-rise buildings (for-sale and rental), and alternative location agreements for high-rise buildings (for-sale and rental). The Committee heard from representatives from the building industry regarding their continued objections to affordability pricing and the amendment to the statement of policy which they believe moves the county away from a program where the cost of constructing a MPDU is covered by the sale price. Representatives from the building industry also opposed the staff proposed methods for calculating an alternative payment, which were based the payment or recovery of some percentage of the "affordability gap" or difference between the cost of the MPDU and a similar market-rate unit.

At the end of the session, the Committee asked DHCA to convene a work group with representatives from the building industry to see if a proposal "that works" could be brought back to the Committee before the Council's winter recess. Given the range of issues raised by representatives from the building industry at the PHED Committee session and their overall comments about the loss they incur building MPDUs, at the end of the session, Council staff specifically asked the Committee whether the minimum requirement for 12.5% MPDUs was something the Committee was interested in changing. The Committee responded that they were not looking at changing this part of the basic requirements.

The requested MPDU work group met on October 21st and November 6th. At these sessions both DHCA and the representatives from the building industry provided revised proposals and options for further discussion. **However, there is not consensus on any of the**

major policy areas. Representatives from the building industry are proposing a re-write of both the MPDU law and the Workforce Housing law which would change the minimum requirements for both programs. There is also a substantial difference in the amount that DHCA and Council staff believe appropriate for an alternative payment and the amount proposed in the package from the building industry. **DHCA, Council staff, and the representatives from the building industry are seeking additional policy guidance from the PHED Committee on these issues.**

Five documents are attached to this memo:	**Circle**
Nov. 4, 2009 memo from DHCA Director Nelson in preparation for Nov 6th work group meeting	1-9
Nov. 6, 2009 memo from Emily Vaias on behalf of MPDU work group building industry representatives in response to Nov 4th memo from Director Nelson	10-17
Nov. 16, 2009 memo to PHED Committee from MPDU work group building industry representatives summarizing work group sessions. (This memo has not yet been reviewed or responded to by DHCA. Attachments to the memo, which include a re-write of Chapter 25A are not provided in this packet.)	18-24
Oct. 12, 2009 memo from DHCA Director Nelson in preparation for the October 21st work group meeting	25-34
Oct. 15, 2009 memo from Emily Vaias on behalf of MPDU work group building industry representatives in response to Oct 12th memo from Director Nelson	35-37

Council staff suggests that the Committee discuss and provide guidance on the following issues/questions.

1. Should the work group only address amendments to the MPDU program or should Workforce Housing also be included in this discussion?

Bill 38/13-07 amends only the MPDU program and does not make any changes to the Workforce Housing program. The MPDU program provides units to households with an income of 70% or less of the area median income (AMI). The Workforce Housing program provides units to households that earn between 70% and 120% of AMI. The MPDU program is a county-wide requirement. The Workforce Housing program is limited to zones in Metro transit areas.

As noted on ©10, representatives of the building industry believe that the MPDU program has not worked well for several years and needs a substantial overhaul. They argue that looking only at the MPDU program without looking at Workforce Housing requirements does not address the extent of the problem. They further believe that the PHED Committee did not limit the work group to only discussing the amendments to the MPDU program.

Council staff and DHCA understood the PHED Committees direction was to address the MPDU program issues raised in Bill 38/13-07 and not to address other building requirements, including Workforce Housing. While Council staff agrees the issued raised by the building community regarding Workforce Housing are legitimate, Council staff believes it is possible for the Committee and Council to move forward with changes to improve the MPDU program without opening the Workforce Housing program as a part of the same legislation.

2. Should there be any change to the minimum requirement that 12.5% of units be MPDUs?

The proposal from the building industry representatives would combine the MPDU program and Workforce Housing program into one "Affordable Housing" program. The minimum requirement would be that 10% of total units would serve those in the MPDU income range (70% or less of AMI) and 5% of total units would serve those in the Workforce Housing income range (71% to 120% of AMI). The building industry argues that this complies with the PHED Committee instruction not to lower the minimum of 12.5% of units required in Chapter 25A. (©12)

Council staff understands why from an economic standpoint the building industry is proposing this 10% MPDU and 5% Workforce Housing requirement as they argue that the affordable housing burden to too great. However, Council staff strongly disagrees that the proposal provides the housing required in Chapter 25A. The availability of housing for households with incomes of 70% of AMI or less is a much more significant problem than the availability of housing for households earning between 70% and 120% of AMI. While Council staff recognizes that in approving Workforce Housing the Council was finding a way to ensure that a variety of incomes would be able to find housing in Metro transit areas, the Council did not indicate that it had changed its policy on the need to provide housing for lower incomes, county-wide.

Is the Committee interested in changing the requirements regarding the number of MPDU that must either be provided in site, through an alternative payment, or at an alternative location from the minimum of 12.5%?

3. Should the amendments focus on the problems that are particular to high-rise construction or is there a need to amend the MPDU program county-wide for all types of construction?

The building industry has proposed changing the MPDU program county-wide. The mix of 10% MPDUs and 5% Workforce Housing (all referred to as "affordable housing units") would apply to all developments whether they are high-rise, garden apartments, townhouses, or single family homes.

Council staff suggests that the Committee reject this proposal. Up until this time, there have not been issued raised regarding an inability to comply in other than high-rise buildings. Concerns were raised by a builder of single family/townhomes regarding the impact of affordability pricing but Council staff believes this should be addressed separately (Issue #5).

4. What should the method be for calculating an alternative payment and what might be a reasonable price for such a payment?

Bill 13/38-07 as originally introduced would eliminate alternative payments (or "buy-outs"). The Committee has agreed that an alternative payment may be more beneficial that building MPDUs in certain high-rise developments and representatives from the building industry also support having an alternative payment. The Executive continues to support the original prohibition but DHCA has worked to provide alternatives for finding an appropriate way to calculate an alternative payment should the amendment be approved. Committee discussion has centered around the "affordability gap" between market prices and MPDU prices and the expectation that an alternative payment along with the monies provided by the MPDU buyer would allow another unit to be acquired in the same planning area (although the amendment does not require the money to be spent in the same planning area.)

At the first meeting of the workgroup, DHCA provided information on alternative payments from other jurisdictions and an example of how an alternative payment would be calculated based on the "affordability gap" (©33). The example used the 2008 median price for a new high-rise two-bedroom condo in the Bethesda planning area. The resulting payment would be $438,960 per forgone MPDU. Based on discussion at the first session, DHCA provided a modified proposal at the second session. Both to moderate the size of the alternative payment and to simplify how it would be calculated, DHCA proposed that a 4% fee be paid each time a market rate unit is sold. As can be seen on ©6, in a hypothetical 100 unit building in Bethesda, a fee of $23,840 would be made when each one-bedroom market rate unit sold. This is almost ½ the amount that would be assessed under the affordability gap model based on 2008 prices ($46,300 per market rate one-bedroom apartment). Because the fee would be paid as market rate units are sold there is no need for appraisals and the payment would be made as revenue is realized. Under this method, the "buy-out" of the one-bedroom MPDU would be $158,900. When combined with the $160,000 a MPDU household would likely be able to contribute, it is expected that an alternative unit could be acquired. At the last work group session, DHCA agreed that would consider further revisions to the 4%.

The representatives from the building industry propose that the alternative payment be $42,000 for a condominium and $33,300 for each rental unit (©19). And there was discussion at the work group sessions that alternative payments in the range of $20,000 to $30,000 might be appropriate in order to make projects viable.

Council staff continues to recommend that the amount of the alternative payment should be sufficient, along with the contribution from the MPDU buyer, to acquire another unit in the planning area or adjacent to the planning area. The alternative unit does not

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need to be new but the payment should not be so low that it takes payments from two, three, or four, units to accomplish this goal.

That said; the amount proposed by the representatives of the building industry is in line with some of the previously approved alternative payments for high-rise developments where apartments have been offered since 2005. DHCA's preliminary look at 15 high-rise buildings that have offered units since 2005 shows that six managed to construct all the required MPDUs without an alternative payment or assistance from a Payment-In-Lieu of Taxes (PILOT), while the remaining nine had assistance either through a buy-out or a PILOT. The alternative payments ranged from $21,000 to $55,000 per MPDU. A more recent alternative payment agreement (for a building that has not been offered) calls for a payment of $113,330 per forgone MPDU.

The work group needs direction from the Committee regarding this issue. Council staff believes that an alternative payment that is a percentage of each market rate unit sold is clear, equitable, and changes with the prices in the market place. It solves cash flow issues that would arise if a lump-sum alternative payment were required up-front or after a certain number of units were sold. Council staff also believes that while the previous agreements may have looked in detail at a project's finances to come up with the alternative payment, there is a fairness issue raised when one developer can forgo building an MPDU for $21,000 while another is required to pay $50,000 or $100,000. The MPDU is not built under any of these scenarios but the resources to replace it are substantially different.

Based on comments from the building industry, the Committee agreed that there should also be alternative payments allowed for rental buildings. If this same method were applied to rental properties, appraisals would be required on what the market-price of a unit would be.

5. Does the Committee continue to support "affordability pricing" and what adjustment has DHCA looked at to reduce fluctuations in the final price?

The Executive has proposed a move to "affordability pricing" which would base the sales price of an MPDU on what is affordable to households earning 60% of AMI. Certain assumptions regarding percent of income dedicated to housing, interest rates, and down payments are made. Condominium or HOA fees must be a part of the overall affordability price. This recommendation has been to ensure that MPDUs are in fact affordable to the income ranges eligible for the program.

Representatives from the building industry argue that the basis of the MPDU program is that the builder will not incur a loss by constructing the unit and that the sales price (or really the amount provided to the developer) must cover the construction cost. If there is a difference between the construction cost and the price an eligible MPDU household can afford, other programs or resources should cover this difference. (©12-13 and ©18).

At the work group session, a building industry representative specifically noted the uncertainty that comes from setting the price late in the process as the interest rate assumptions could change significantly over the time it takes to develop and offer a product.

To address the overall price issue, DHCA has proposed shifting the affordability price from being based on 60% of AMI to 70% of AMI (©4). This may mean that other resources will need to be brought to the table in order to get families earning 50% or 60% of AMI into MPDUs. In addition, DHCA believes it can set a ceiling on the interest rate assumptions to address the concern raised at the session.

6. What should the policy be regarding the use of Payment in Lieu of Taxes (PILOTS)?

PILOTs are one of the tools the county can use to reduce the cost of providing affordable housing. The proposal from the building industry representatives is that a PILOT be provided when requested by a developer to offset some of the cost of providing units on-site (©20). The developer would not have to show that the PILOT is needed for economic viability.

DHCA and Council staff agree that PILOTs are an important tool for the county. However, Council staff notes that every PILOT is forgone revenue to the county and there should be a clear policy when they will be used in non-HOC projects. In the high-rise developments offered since 2005, some received PILOTs and some did not. Three that received PILOTs also bought-out of a portion of the MPDUs required. Should PILOTs only be approved when all required MPDUs are provided on site? What if a portion is provided through an alternative location agreement? Should a PILOT ever be used when alternative payment has been approved?

7. What is the definition of "bonus density?"

A main concern of the building industry is that there is insufficient additional density provided to make providing MPDUs and Workforce Housing cost neutral. In their proposal, every development would automatically receive a 10% density bonus in order to provide the 15% affordable housing units (10% MPDUs and 5% Workforce Housing).

Council staff is concerned that there is an assumption that the approved existing density did not take into account the provision of 12.5% MPDUs. Council staff is also concerned that if every developer automatically gets a 10% density bonus then it really isn't a bonus at all; it is the approval of 10% additional density over what is described in the master plan. The PHED Committee is also currently considering the CR zone and it is not clear how this proposal would work within the CR zone that sets a maximum FAR with options on how to achieve the maximum density.

MEMORANDUM

November 4, 2009

TO: MPDU Development Work Group

FROM: Richard Y. Nelson, Jr., Director
Department of Housing and Community Affairs (DHCA)

SUBJECT: Bill 38/13-07: Moderately Priced Housing – Amendments
Second Meeting with the Development Community
November 6, 2009, 2:00 pm

The next meeting of the MPDU Development Work Group will take place on November 6, 2009, from 2:00 pm to 4:00 pm, in the Fifth Floor Council Conference Room in the Council Office Building, 100 Maryland Avenue, Rockville, MD 20850.

Prior to the first meeting on October 21, 2009, DHCA presented its proposals for implementing an affordability based pricing system, a proposed system for establishing alternative payments in lieu of building MPDUs, and a proposal relating to alternative location agreements. At the meeting, representatives of the development community provided an alternative proposal that included several changes to the MPDU and Workforce Housing laws. This memorandum provides DHCA's comments on the development community proposal, and, based on the discussions during the first meeting, also refines DHCA's affordability and alternative payment proposals that were set out in the October 12, 2009 memorandum..

Development Community Proposal - Summary

The development community's proposal includes the following:

- Combine the MPDU and Workforce Housing laws together into one "Affordable Housing" law that establishes a base minimum requirement of 15% affordable housing (10% MPDUs and 5% workforce housing) for all residential subdivisions of 20 or more dwelling units, which would entitle the applicant to a 10% density bonus, even if the affordable units are provided off-site (the proposed percentage of affordable units would be even lower for high rise buildings (5%) and mid-rise buildings (12%));

- Allow additional bonus density for providing more than the required 15% affordable units at a rate of seven (7) bonus units per additional MPDU and three (3) bonus units per workforce housing unit for high-rise buildings (with density bonuses for mid-rise buildings and townhouses to be determined);
- Allow developers of mid-rise buildings to provide only 10% affordable units on-site, and developers of high-rise buildings to provide only 5% affordable units on-site, while still allowing a 10% density bonus to be constructed on-site;
- Allow off-site locations for affordable housing units, while still allowing a 10% density bonus to be constructed on-site;
- Allow alternative payments to the Housing Initiative Fund for both sale and rental buildings in lieu of providing affordable housing units on a fee per square foot of gross floor area that increases with FAR (not including any square footage for bonus density or affordable housing), while still allowing a 10% density bonus to be constructed on-site, as follows:
  - First 1.0 FAR: $1.50/square foot;
  - Next 1.0 to 3.0 FAR: $4.00/square foot;
  - Next 3.0 and above FAR: $8.00/square foot;
- Reduce the control periods for both programs to 20 years for both sales and rental units;
- Require that the County provide PILOTs (payments in lieu of taxes) for all high-rise and mid-rise buildings that include affordable housing units on-site, if requested by the applicant;
- Eliminate the shared profit requirement for the MPDU and Workforce Housing programs; and
- Establish a Voucher Program through the Housing Initiative Fund to provide housing vouchers throughout the County for eligible households.

DHCA Comments on Development Community Proposal

The proposal from the development community represents an extensive rewrite of the MPDU and Workforce Housing laws. The proposal also represents a significant departure from 35 years of established County housing policy and drastically changes an inclusionary housing program that has essentially worked well over that same period of time. Also, the proposal is significantly outside the scope of the charge provided by the Planning, Housing, and Economic Development (PHED) Committee to the MPDU Development Work Group, which was as follows:

1) Determine an affordable MPDU sales price;
2) Determine an Alternative Payment for high-rise condominium and rental MPDUs; and
3) Establish guidelines for Alternative Location Agreements.

Following is a review of how the development community proposal does not address the PHED Committee's charge.

1) **Affordability**: The proposal does not address the issue that the sales prices of MPDUs, particularly MPDUs in high rise for sale buildings, are increasingly unaffordable to the program's target audience (households earning between 50% to 70% of area median income). This issue was one of the primary findings in the 2007 report of the Office of Legislative Oversight (OLO Report Number 2007-9, "A Study of Moderately Priced Dwelling Unit Program Implementation"). DHCA was charged with proposing a solution to this problem; therefore, a solution needs to be central to any proposed changes in the MPDU law.

2) **Alternative Payments**: Alternative payments would be allowed for both sale and rental buildings, and developers would still be allowed to construct 10% bonus density on-site. However, the proposed alternative payments, which are significantly lower than in the current MPDU law, bear no relation to the replacement cost of providing an affordable housing unit in Montgomery County. In the base case scenario provided at the meeting, the developer of a high-rise building on a 25,000 square foot site with a 4.0 FAR would pay a total of $397,500, or $26,500 per required affordable housing unit.

This amount is insufficient to purchase a replacement unit of affordable housing, based on recent sales data provided by both the development community and Park and Planning. Although alternative payments for mid-rise and townhouse units are not spelled out in the proposal, it appears from the example provided that these would be lower than the payments for high-rises, given that the example proposes lower payment rates per square foot for FARs of less than 3.0. The development community counters that instead of purchasing replacement affordable units, the MPDU alternative payments should be used to fund housing vouchers for individual households. A housing voucher program represents a long-term commitment of staff and financial resources that would quickly exhaust the minimal funds generated by the one-time alternative MPDU payments.

3) **Alternative Location Agreements**: In all cases, developers would still be allowed to construct 10% bonus density on-site. Additionally, for single family and townhouse developments, the proposal retains the requirement in current law for the DHCA Director to find that approving an Alternative Location Agreement would be to the public benefit, and would further the objective of providing a broad range of housing opportunities throughout the County. It does not require, however, that any additional affordable units be provided. The proposal also includes the following provisions:

a) Mid-rise buildings – 12% affordable housing units would be required off-site within any Metro Station Policy Area, and 15% affordable housing units would be required off-site anywhere else within the County, as compared to 10% affordable housing units required on-site. No finding of public benefit would be required.
b) High-rise buildings – 10% affordable housing units would be required off-site within any Metro Station Policy Area, and 15% affordable housing units would be required off-site anywhere else within the County, as compared to 5% affordable housing units required on-site. No finding of public benefit would be required.

4) **Summary**: In summary, the development community proposal would provide much less affordable housing than required under current law while granting much more bonus density than

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allowed by current zoning or current master plans. It also would make changes that would significantly reduce long-term affordability by shortening control periods, and income to the Housing Initiative Fund by eliminating shared profit and allowing alternative payments that are minimal in nature. Furthermore, the proposal introduces completely new elements to the program such as housing vouchers. The OLO Report, which prompted the County Executive to propose Bill 38-07, did not recommend any of the changes to the MPDU program that are outlined in the development community proposal.

Modifications to DHCA's Original Proposal

1) Determining an Affordable MPDU Sales Price – Affordability Model:

The development community stated that the proposed affordable sale prices for MPDUs in high rises are too low to make the projects financially feasible. To address this concern, DHCA proposes that MPDU sales prices in high rise MPDUs be based on 70% Area Median Income (AMI), rather than 60% AMI as originally proposed. Using the same assumptions as previously, this change would result in the following maximum sales prices per unit size:

Maximum Affordable Sales Prices Per Unit Size

Unit Type	Sales Prices Under New Proposal	Sales Prices Under Original Proposal
Efficiency	$160,600	$131,800
One Bedroom	$164,300	$134,000
Two Bedroom	$195,000	$160,600

2) Determining an Alternative Payment for High-Rise Condominium MPDUs

At the first meeting, the development community claimed that DHCA's proposed alternative payment was too high. The following concerns were expressed, followed by DHCA's response:

a) The median sales price for a new condominium unit in Bethesda used in DHCA's alternative payment example is not representative of sales prices for a new two-bedroom condominium in Bethesda.

DHCA has used the 2009 new sales data provided by the Maryland-National Capital Building Industry Association (M-NCBIA) to calculate new condominium median sales prices for Bethesda and Silver Spring based on number of bedrooms. The Bethesda median sales prices are based on three (3) high rise projects in downtown Bethesda: Lionsgate, the Trillium, and the Adagio. The Silver Spring median sales prices were based on the Argent, the only Silver Spring building with new condominium sales in 2009. Units with dens and multiple bathrooms have been included within each bedroom category. Use of this data produces the following median sales prices:

2009 Median High-Rise Condo Sale Prices, Downtown Bethesda and Silver Spring

Unit Type	Bethesda	Silver Spring
Efficiency	N/A	$248,000
One Bedroom	$596,000	$321,000
Two Bedroom	$1,184,000	$496,000
Three Bedroom	$1,671,000	N/A

b) The soft cost allowance is too small.

The originally proposed soft cost allowance of 22.5% was based on the allowable sales price for MPDUs as defined in MPDU Executive Regulation 13-05AM, Section 5, "Establishing Sale and Rental Prices" (COMCOR 25A.00.02.05). DHCA has added construction loan expenses (represented by the prime rate plus 2 points) and a Marketing/Sales commission that is more reflective of market assumptions to this soft cost allowance, resulting in a new soft cost allowance of 28.5%.

c) Affordability Delta Method vs. Percent Fee Per Unit Method

Even after increasing the MPDU sales price and the soft cost allowance, the alternative payments for condominiums in Bethesda using DHCA's original method (an "Affordability Delta" method) are much higher per required MPDU than in the original example, because the median sales prices for two- and three-bedroom units are much higher than the original example (see below):

Alternative Payment Per Required MPDU Affordability Delta Method

Unit Type	Bethesda	Silver Spring
Efficiency	N/A	$62,491
One Bedroom	$308,666	$112,041
Two Bedroom	$707,135	$215,215
Three Bedroom	$1,005,505	N/A

(Note: although the MPDU law does not require three-bedroom MPDUs in multi-family buildings, the affordable price for a three-bedroom MPDU has been used to calculate the buy-out for a three-bedroom unit because otherwise the alternative payment would have been higher than shown.)

DHCA is therefore now proposing a different method for calculating alternative payments, which would be a per-unit fee of 4% charged to each unit in a building, based on

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actual sales prices and payable at settlement. A more detailed spreadsheet is attached, but a summary is provided below, with a comparison to the Affordability Delta method:

Fee for Each Unit in a 100-Unit Hypothetical Building

Unit Type	4% Fee/Unit		Affordability Delta Method	
	Bethesda	Silver Spring	Bethesda	Silver Spring
Efficiency	N/A	$9,920	N/A	$12,498
One Bedroom	$23,840	$12,840	$46,300	$14,260
Two Bedroom	$47,360	$19,840	$87,032	$26,902
Three Bedroom	$66,840	N/A	$134,067	N/A
Total Fee/Bldg.	**$4,557,800**	**$1,549,400**	**$8,594,086**	**$1,922,850**

The revised method of calculating an alternative payment results in a total payment of $4,557,800, which is significantly less than the $8,594,086 that would be paid using DHCA's initial proposal. Allocating this $4.5 million across the 13 required MPDUs in this hypothetical building, would result in lower payments per MPDU (as adjusted by the bedroom mix that would have been required).

Fee Per Required MPDU in a 100-Unit Hypothetical Building

Unit Type	4% Fee/Unit		Affordability Delta Method	
	Bethesda	Silver Spring	Bethesda	Silver Spring
Efficiency	N/A	$49,600	N/A	$62,491
One Bedroom	$158,900	$100,900	$308,666	$112,041
Two Bedroom	$408,100	$158,700	$707,135	$215,215
Three Bedroom	$408,100	N/A	$1,005,505	N/A

Different bedroom compositions have been used for the Bethesda and Silver Spring hypothetical buildings, based on the bedroom compositions of existing or proposed high-rise buildings in each of these areas, as follows:

- Bethesda: 20 One Bedroom, 65 Two Bedroom, 15 Three Bedroom
- Silver Spring: 5 Efficiency, 55 One Bedroom, 40 Two Bedroom

In addition, as noted above, in the Affordability Delta method the affordable price for a three-bedroom MPDU has been used to in calculate the alternative payment for a three-bedroom unit (even though three-bedroom MPDUs are not required in multi-family buildings) because otherwise the alternative payment would have been higher. However, in the percent fee per unit scenario, the two and three bedroom units have been averaged (the overall total does not change).

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Use of the 4% fee per unit method results in an alternative payment amount per required MPDU that, when combined with the MPDU affordability price per unit type, is sufficient to purchase a new or used condominium in each of the respective planning areas (based on 2009 sales data provided by M-NCBIA):

Bethesda			
Unit Type	**Fee Per Required MPDU**	**MPDU Affordability Price**	**Total Available to Purchase an Alternative Unit**
Efficiency	N/A	-----	-----
One Bedroom	$158,900	+ $164,300	= $323,200
Two Bedroom	$408,100	+ $195,000	= $603,100

Silver Spring			
Unit Type	**Fee Per Required MPDU**	**MPDU Affordability Price**	**Total Available to Purchase an Alternative Unit**
Efficiency	$49,600	+ $160,600	= $210,200
One Bedroom	$100,900	+ $164,300	= $265,200
Two Bedroom	$158,700	+ $195,000	= $353,700

3) <u>Establishing Guidelines for Alternative Location Agreements</u>

No change to original DHCA proposal.

4) <u>Determining an Alternative Payment for High-Rise Rental MPDUs</u>

If the PHED Committee and the Council wish to establish an Alternative Payment for high-rise rental MPDUs, DHCA would recommend use of the same formula as for high-rise condominiums, but that the fee per unit be based on an appraisal of the unit. The fee would need to be paid at the time of permanent financing, but no later than two (2) years after the initial occupancy permit is obtained. DHCA will consider alternative recommendations from the development community related to the schedule for paying the fee in rental buildings.

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Hypothetical 100-Unit Building, Downtown Bethesda

I. Percent Fee Per Unit Method

		4% Fee/Unit
Median 2009 One BR Unit Sales Price =	$596,000	$23,840
Median 2009 Two BR Unit Sales Price =	$1,184,000	$47,360
Median 2009 Three BR Unit Sales Price =	$1,671,000	$66,840

	Sales	4% Fee/Unit
20 One BR Units		
(Median One BR Sale Price x 20)	$11,920,000	$476,800
65 Two BR Units		
(Median Two BR Sale Price x 65)	$76,960,000	$3,078,400
15 Three BR Units		
(Median Three BR Sale Price x 15)	$25,065,000	$1,002,600
Total Sales/Fees	$113,945,000	$4,557,800
Average Fee Per Substituted MPDU =		$350,600
(13 required MPDUs)		
Fee Per Substituted One BR MPDU =		$158,900
(3 required)		
Fee Per Substituted Two BR MPDU =		$408,100
(10 required)		

II. Affordability Delta Method

	One BR	Two BR	Three BR	
Median 2009 Sales Price =	$596,000	$1,184,000	$1,671,000	
Less MPDU Price (@ 70% AMI)	- $164,300	- $195,000	- $264,700	
Difference Between Market and MPDU Price	$431,700	$989,000	$1,406,300	
Less Soft Costs (28.5%)	- $123,035	$281,865	- $400,796	
Fee Per Substituted MPDU =	$308,666	$707,135	$1,005,505	
Total Fees	$925,997	$5,657,080	$2,011,009	$8,594,086
(3 One BR, 8 Two BR, 2 Three BR)				
Fee Per Unit in Building =	$46,300	$87,032	$134,067	
Percentage of Sales Price/Unit =	7.8%	7.4%	8.0%	

Hypothetical 100-Unit Building, Downtown Silver Spring

I. Percent Fee Per Unit Method

		4% Fee/Unit
Median 2009 Efficiency Unit Sales Price =	$248,000	$9,920
Median 2009 One BR Unit Sales Price =	$321,000	$12,840
Median 2009 Two BR Unit Sales Price =	$496,000	$19,840

	Sales	4% Fee/Unit
5 Efficiency Units		
(Median Efficiency Sales Price x 5)	$1,240,000	$49,600
55 One BR Units		
(Median One BR Sales Price x 55)	$17,655,000	$706,200
40 Two BR Units		
(Median Two BR Sales Price x 40)	$19,840,000	$793,600
Total Sales/Fees	$38,735,000	$1,549,400
Average Fee Per Substituted MPDU =		$119,185
(13 required MPDUs)		
Fee Per Substituted Efficiency MPDU =		$49,600
(1 required)		
Fee Per Substituted One BR MPDU =		$100,900
(7 required)		
Fee Per Substituted Two BR MPDU =		$158,700
(5 required)		

II. Affordability Delta Method

	Eff.	One BR	Two BR	
Median 2009 Sales Price =	$248,000	$321,000	$496,000	
Less MPDU Price (@ 70% AMI)	- $160,600	- $164,300	- $195,000	
Difference Between Market and MPDU Price	$87,400	$156,700	$301,000	
Less Soft Costs (28.5%)	- $24,909	$44,660	- $85,785	
Fee Per Substituted MPDU =	$62,491	$112,041	$215,215	
Total Fees	$62,491	$784,284	$1,076,075	$1,922,850
(1 Efficiency, 7 One BR, 5 Two BR)				
Fee Per Unit in Building =	$12,498	$14,260	$26,902	
Percentage of Sales Price/Unit =	5.0%	4.4%	5.4%	

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LINOWES AND BLOCHER LLP
ATTORNEYS AT LAW

MEMORANDUM

TO: Richard Y. Nelson, Jr., Director
Department of Housing and Community Affairs
Montgomery County

FROM: Emily J. Vaias on Behalf of the MPDU Work Group

DATE: November 6, 2009

RE: Response to Your Memorandum of November 4, 2009 regarding Moderately-Priced Housing Amendments

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Thank you for your memorandum of November 4, 2009 in advance of our MPDU development work group meeting scheduled for November 6, 2009.

We still do not see a recognition of the realities of the market place in the proposals offered to date. Further, the continued effort to make the housing industry shoulder 100% of a community wide goal of providing more affordable housing is not achievable, productive, or equitable. The extreme positions still being proposed are inefficient, will result in a further shutdown of the housing industry in the County, further increase existing housing costs and the affordability gap due to a lack of supply, and lead to fewer affordable housing units or subsidy resources in the end. The MPDU program, originally designed for green field development, where the promise of increased density offset the cost of providing a 'public good,' has over the years produced fewer and fewer units as large-tract development decreased and in-fill, vertical construction increased. Increased requirements of development, combined with the 2005 changes made by the Council did not result in more units, despite the lowering of the threshold. The program, in fact has not worked well for several years, as evidenced by several proposals to "fix it." Today, as new development is increasingly directed to high-rise development on the most expensive real estate in the County, it is clear that the program needs a substantial overhaul to once again be a workable model throughout the country. That said, we are responding to your memo on a point-by-point basis.

A. <u>Development Community Proposal – Summary</u>

You have summarized our proposal in a succinct form; however, this necessarily misses some of the important points, which we tried to address in the legislation. For instance, in your first bullet point it is correct that we are proposing, as the standard; a 15% affordable housing requirement that provides for a 10% density bonus even if the units are off-site. However, you then say that this would be 5% for high-rise and 12% for mid-rise, but this is not accurate.

What we have proposed is that:

- if a mid-rise or high-rise development is to locate affordable units off-site anywhere within the County, the new development would still be required to provide the 15%.
- for mid-rise buildings, if the off-site locations get closer to the otherwise financially challenging areas, the 15% would go down to 12% if the off-site location is within the Metro Station policy area, and to 10% if the MPDUs are built on-site.
- for high-rise buildings, if the MPDUs are built within the same policy area, the requirement would be set at 10%, and if provided onsite, it would be 5%.

As we have discussed, the intention of this provision is to make affordable housing financially possible in high-rise and mid-rise structures and in areas close to Metro, with recognition that these areas are inherently more expensive. Therefore, if there is no reduction or accommodation for their increased costs, they cannot be economically produced. In point of fact if they could be produced, they would be.

The remaining summarized items are fairly accurate. However again, we would point out that the ability to construct the 10% density bonus onsite, ***even*** if the affordable units are provided elsewhere, is a logical way to fund such units. Control of the building density rests with the Planning Board to be determined at the time of site plan. This is essentially a zoning and site plan issue that has to do with the County's recognition that higher densities must be provided in order to house the expected inflow of population. Therefore, by simply providing more units, this does not equate to bad housing policy nor bad zoning policy; consequently, this should not be a concern to DHCA and the inference that allowing the 10% bonus is somehow an unreasonable modification, does not seem well placed. Overall, the County needs to provide more housing; doing so will help to level the playing field and the affordability of all units. More importantly, it will allow for the potential production of more affordable units as well.

B. DHCA Comments on Development Community Proposal

In your opening paragraph on page 2 under this section, you state that the development community has presented "an extensive rewrite of the MPDU and workforce housing laws."

You go on to say that this "represents a significant departure from 35 years of established County housing policy and drastically changes an inclusionary housing program that has essentially worked well over that same period of time. Also, the proposal is significantly outside the scope of the charge provided by the PHED Committee."

- We take issue with this characterization. We believe the PHED Committee charged us to develop a proposal that will produce the 12.5% mandate imposed by Chapter 25A while insuring that a development be viable. There is no way for the private sector to constructively comment on the existing MPDU law (Chapter 25A) without considering the implications of the Workforce Housing law (Chapter 25B). Therefore, for us to only propose minor modifications to one law and not address the other would not be addressing the full extent of the issue. The proposed comprehensive "redo" is, in our opinion, the only way that we can comply with the PHED directive.

Also, we again do not believe that the PHED Committee limited the scope of our work together to looking at the affordable sales prices, alternative payments for high-rise condominium and rentals, and guidelines for alternative location agreements. We believe the Committee recognizes the issues of the private sector being able to provide affordable units especially in high-rise and mid-rise structures and asked us to come up with reasonable, practical, and achievable solutions. We believe we have provided a working draft, albeit it not perfect, for accomplishing this goal.

You go on to address each of these issues independently and we shall respond to them accordingly.

1. Affordability

You correctly indicate that our proposal does not specifically address the gap between affordability and pricing for MPDUs. This is because we are attempting to make the production of affordable housing units reasonably affordable to developers. You are seeking only to look at this equation from the side of the consumer, whereas if you properly consider the production side, it will naturally have an effect on the ultimate pricing. If the overall price of producing the units can be made affordable, and developers can find a way to provide units and/or provide payments to the County, then those residents in need of housing can find it at a price point which they can afford. The OLO Report No. 2007-9, focuses only on the cost to the consumer without any consideration of the cost to produce the units. Therefore, this report is essentially flawed and was viewed in a vacuum. Further, the concept that the ultimate purchase price for the qualified resident is directly tied to the price that the developer must pay to buy out or provide units as well as the costs to a person to own such units is flawed. As we have discussed, the affordable housing unit purchaser who may wish to buy a condominium unit, should actually determine that the payment of fees and costs to live in the condominium outweigh any benefits they may ultimately receive as they are not entitled to any investment return on their purchase. This seems again to be an unreasonable position that discourages the purchase of MPDU condominiums, and it is also not good public policy to steer affordable households in this direction.

2. Alternative Payments

Again, it is correct that we have provided for alternative payments off-site and still allowed for the 10% bonus density on-site in order to fund these off-site units. The statement that the proposed payments are less than what the current MPDU law provides is not correct. The current law does not set the alternative payments. In fact, it requires that the Director take into account the market factors affecting the feasibility of this program as we have been illuminating in our discussions to date. If the current MPDU law were working, we would not be trying to fix it. Lastly, there is no relationship between the replacement cost of providing an affordable unit with the payment costs, as this is exactly the affordability model that you are proposing and which we know does not work. If in fact we could afford to pay the difference in the affordability model, we would be providing the units. While this appears to be an attractive housing model for the County, the affordability cost simply cannot, and should not, be borne by the market buyers and the private housing sector cannot be expected to wholly fund the gap in housing costs.

If affordable housing is considered a "public good" by the general public and government, the cost to bridge this gap should not be borne by one particular sector of the development community. The MPDU law was not suppose to be a burden and in fact was suppose to allow for an equalizing of value between market rate units and MPDUs such that there was no loss to the developer. This fundamental fairness is how the law has withstood legal challenge.

If you are to transform this into a pure affordability model, as you are proposing, there is no relationship between the cost a developer is required to expend in order to fund the County's housing program. Further, there is no linkage between the provision of housing and the need to provide affordable housing. This burden must be borne by the community at-large if an affordability model is pursued. Expecting a one-to-one exchange is simply an unattainable, economically unviable goal, and is not consistent with the marketplace or conversations that we have had with the County over the past several years and particularly within the past year.

You mentioned that we did not provide the alternative payment price for mid-rise and townhouse units, but as we continue to work with these builders we will ascertain reasonable numbers for your consideration. However, your assumption that these payment rates would be lower is not entirely accurate.

You also mentioned that the housing voucher program is a long term commitment of staff and resources; we do not disagree. However, two less costly alternatives to providing yearly subsidies are: to provide below market financing, which lowers the monthly carry to the point where it is affordable, and/or providing funds to increase the MPDU buyer's down payment so as to lower the loan amount to an affordable level. Further, we also believe that there has been significant investment of staff and resources on both the public and especially the private side regarding the existing MPDU program and the intended Workforce Housing program. It is time that the County accesses the future realities of these programs and their ability to serve the intended purpose.

3. Alternative Location Agreements

Again, you seem troubled by the fact that we need to obtain the 10% bonus density in order to help pay to locate affordable units off-site. This is simply an economic reality and if units could be obtained off-site for no cost then presumably the County could provide them itself. Consequently, a price must be paid by someone and the use of increased density is a no cost option for the County. Further, it is accurate that although we have maintained the current system regarding single family units, this is again in part because this current MPDU program seems to have worked adequately for these types of units (although we continue to solicit input from this currently decimated sector of our industry). Also, as we have discussed, the majority of the economic issues with the MPDU mandate are found in high-rise and mid-rise construction.

However, as everyone seems to recognize, mid-rise and high-rise construction cannot shoulder the burden of affordable housing as the laws currently exist today. Therefore, these multi-family units can not be subjected to the burden of proof required for approval of these alternative location agreements. The law itself must recognize this up front and not require individual findings of public benefit.

4. Summary

Your opening line states that the development community's proposal "would provide much less affordable housing than required under current law while granting much more bonus density than allowed by current zoning or current master plans." This is simply not a fair nor accurate statement. It assumes that housing will continue to be proposed and constructed in Montgomery County, disregarding that the law may continue as it is or in fact become more burdensome, as is being proposed. This ignores the marketplace and the fact that many developers are looking elsewhere solely because of Montgomery County's MPDU and Workforce Housing laws. Because of the burden placed upon housing developers under the current law and the proposed amendments, not only will affordable housing be severely reduced but market rate housing will as well. This reduction in overall housing units simply adds to the demand and the ultimate cost of housing in Montgomery County. As to zoning and master plan permitted density, the development community proposal provides the Planning Board with the authority to ascertain the correct density and compatibility of a project with the surrounding community. Therefore, it should not be the concern of DHCA that these projects can include more density and in fact should include more density on sites close to public transportation. DHCA should be concerned with producing more overall housing units and in turn, more affordable units. Ultimately, there will be a balancing between the Planning Board's planning and design objectives and the County's housing policy. The fact that the OLO Report did not recommend the changes that the development community has proposed is simply because it did not consider the production side of the equation or the marketplace realities of producing affordable housing.

C. Modifications to DCA's Original Proposal

We appreciate your willingness to modify some of your original proposals however, as you will see below, these proposals do not go far enough to make a housing program that we believe will work in the near or long term.

1. Determining an Affordable MPDU Sales Price – Affordability Model

We appreciate the increase in the area median income (AMI) from 60% to 70% for MPDUs and high-rise structures. We would simply add that in some instances this may need to be even higher.

2. Determining an Alternative Payment for High-Rise Condominium MPDUs

a. Sale Prices

You explained that you have used median sales prices for three (3) projects and it appears that these may actually be averages instead of medians. Further, this is a subset of the entire pool of units and there are inconsistent size comparisons within these charts. It is also true that an MPDU can be constructed and sold for less then a market rate unit, based on ultimate finishes, appliances, etc. Therefore, to use the median sales price based on your current data as the starting point for a comparison of affordability is not accurate. It also ignores the range of resale units that are available at affordable prices.

b. Soft Cost Allowance

We appreciate your increase of soft cost from 22.5% to 28.5%, however, we believe and have presented information to you showing that these costs are actually closer to 33.5% and may even be higher for smaller projects and as regulatory costs increase.

c. Affordability Delta Method Versus Percent Fee Per Unit Method

Clearly, we appreciate your recognition that the proposed or previously proposed affordability delta method, even with the new median and soft cost allowance, would produce infeasible buyout figures -- $308,000 for a one bedroom unit in Bethesda, $112, 041 in Silver Spring; $707,135 for a two bedroom in Bethesda, $215,215 in Silver Spring; and $1,005,505 for a three bedroom in Bethesda.

Looking at the 4% fee method, this still results in payment amounts far exceeding those which the industry can afford including $158,900 for a one bedroom in Bethesda and $109,000 in Silver Spring, with two bedroom units costing $408,100 in Bethesda and $158,700 in Silver Spring. This 4% fee calculation assumes many more three bedrooms than are generally provided and ultimately results in payments that are eight to ten times greater than the development community had proposed. With such a huge gap it is difficult to provide a detailed response thereto. However, the overall inequity here, as mentioned above is simply that all new housing development is being required to fund and/or provide affordable housing for all County residents. This is simply unfair and there is no linkage to new housing and affordability that would justify such action. Further, there is no requirement that only new housing should be considered for housing residents of moderate income. Therefore, using pricing of new units skews this fee substantially. There must at some point be a better balancing of equities in this program that can again result in the production of more housing units throughout the County. The proposed 4% fee does not accomplish this result.

3. Establish Guidelines for Alternative Location Agreements

Overall, the prior alternative location section did not provide the bonus density for off-site units, which as we have mentioned is simply not practical nor in the County's interest and efforts to promote affordable housing. This again ignores the economics of project development and we have continued to provide information to address this issue but it seems to be ignored. Further the proposed increase in the off-site requirement simply increased an already infeasible burden.

4. Determining Alternative Payments for High-Rise Rental MPDUs

Essentially, you are proposing a similar fee structure for rental as you did for condominium units based on an appraisal. Although payment of the fee after occupancy is appreciated, it does not address the first problem of the payment amount far exceeding the practical ability of a developer to fund the construction of affordable units.

We continue to work within the development community to ascertain more data and economics to support the few missing pieces in our position, however, we believe there must be substantial changes in policy that recognize the current problems with the MPDU and the Work force Housing laws, and there must be an ability to review these items in a comprehensive manner to construct a more realistic and pragmatic housing program.

LINOWES AND BLOCHER LLP
ATTORNEYS AT LAW

MEMORANDUM

TO: PHED Committee

FROM: Building Industry – Affordable Housing Working Group
Edited by Emily J. Vaias, Raquel Montenegro, Peter Gartlan, Tom Farasy

DATE: November 16, 2009

RE: Status of MPDU Legislation

Working Group Efforts

Since the PHED Committee worksession on September 14, 2009, the Affordable Housing Working Group has met twice and has exchanged memoranda in an attempt to craft strategies for updating the County's Affordable Housing legislation. The Affordable Housing Working Group consists of the DHCA Director, DHCA Staff, Linda McMillan (from Council Staff), Tiffany Ward (from Marc Elrich's Staff), and representatives from the Building Industry (several mixed use/multi-family developers, builders and MNCBIA Representatives). DHCA prepared two memos (dated October 12, 2009 and November 4, 2009, both attached hereto as Exhibit "A") and the Building Industry prepared two memos (dated October 15, 2009 and November 6, 2009, both attached hereto as Exhibit "B").

In summary, there has not been consensus on several major points of discussion and it seems the Council needs to provide some additional guidance as to how it would like the Working Group to proceed in trying to find a solution to the current housing situation. We have provided below a summary chart identifying the points of contention; however the one overarching policy disagreement is whether the County recognizes that due to the higher costs of land and construction in more densely populated urban areas, that high-rise multi-family housing projects cannot provide MPDUs and WFH units under the current program nor can they make use of the unrealistic alternative payment option as currently written or proposed by DHCA. If the County wants multi-family projects in Metro Station and CBD areas, there must be a shift of policy.

Comparison and Comments		
DHCA's Proposal	**Building Industry (BI) Proposal**	**Comments**
1) Look only at MPDU Law not considering impact of WFH	1) Combine MPDU and WFH into one Affordable Housing Law; comprehensive review	1) MPDUs cannot be viewed in a vacuum, not realistic; we need a comprehensive solution
2) Affordability Model to determine Sales Prices for MPDUs – results in 2-bedroom prices of $195,000	2) Sales prices must be enough to cover the cost to develop the unit and if this is not affordable to an MPDU	2) The MPDU Law was originally enacted, and withstood legal challenge, in part

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Comparison and Comments		
DHCA's Proposal	**Building Industry (BI) Proposal**	**Comments**
and 1-bedrooms at $164,300	purchaser, the County must make up the difference, not the developer.	because it was not intended to be a tax, penalty or fee on housing developers; the language read, "Ensure that private developers constructing [MPDUs] under this Chapter incur **no loss or penalty as a result thereof**, and have reasonable prospects of realizing a profit on such units by virtue of the MPDU density bonus provision…"
3) Affordability Model for alternative payments for high-rise buildings – Payments calculated by charging a 4% fee on sales of all units in a project (and for rentals, use appraised value) – Results in per-MPDU payments in Bethesda for 2-bedroom units = $408,000, 1-bedroom unit = $158,900; in Silver Spring, a 2-bedroom unit = $158,700, 1-bedroom unit = $100,900	3) Reasonable Fee per square foot comparable to neighboring jurisdictions – Using the DHCA 12.5% MPDU ratio results in alternative payments for each AHU unit of approx: $42,000 ea condo unit $33,300 ea rental unit based on 1,350 & 1,050 GSF avg/unit. No WFH has been built to date in a for-profit environment. – Price per unit type varies with the mix of units for a given project	3) Note DC exempts most CBD locations from both on site AHU or Fee requirements
4) No bonus density allowed if MPDUs are not built on-site	4) Provide bonus density whether units are on-site or off-site	4) The cost to provide the units must be made up in extra market rate units, regardless of whether on-site or not

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Comparison and Comments		
DHCA's Proposal	**Building Industry (BI) Proposal**	**Comments**
5) Maintain 12.5% MPDUs and no bonus, with bonus up to 22% when 15% is provided, and 10% WFH with 10% FAR increase	5) Provide 10% bonus for providing 15% Affordable Housing Units (10% MPDUs and 5% WFH); increase bonus 7 du/1 MPDU and 3 du/1 WFH	5) Developers' proposal provides a no-cost incentive to providing both types of units
6) Calculate required MPDUs including bonus density, so true 22% bonus never achieved	6) Calculate both bonus density and MPDUs/WFHs on base density, not on bonus	6) The County's methodology does not provide the true bonus, instead of 22%, only get approx. 16%
7) Average median income (AMI) increased for MPDUs from 60% to 70%	7) AMI minimum of 70% with increases as needed	
8) Looking at Boulder, Colorado, San Francisco, CA and Berkley, CA as comparisons	8) Compare to Arlington, VA and D.C., these are our competitors	
9) PILOTS allowed under current regulation which requires proof that the "reduction allowed by the PILOT is the amount needed to make the project financially feasible with the [MPDUs] provided on-site."	9) PILOTS that do not require a showing of financial feasibility for the whole project, or that units be provided on-site	9) PILOT currently not always available; PILOT will provide "reasonable expectation of profit" that MPDU law always promised. Only uses real estate tax revenue which increases dramatically along w/ other tax revenue when a project goes forward
10) Federal tax credit programs must still account for full 99 years of MPDU rental program per DHCA "interpretation"	10) Federal or State tax credit programs that provide more units for lower income people, should not be subject to 99 year requirement	10) The greater public benefit received by providing more units at lower income level should offset the longer

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Comparison and Comments		
DHCA's Proposal	**Building Industry (BI) Proposal**	**Comments**
		time period
11) Housing Vouchers are too expensive	11) Housing Voucher Programs provide a better match between families and housing	11) Simply one more tool to maximize Housing Improvement Fund ("HIF") flexibility & meet need
12) Unit size and vertical location parity is not addressed	12) Establish minimum sizes for high-rise AHUs by type	12) The changes made to Ch. 25A in 2005 inefficiently added costs reducing the ability to add AHU's or financial resources
13) Concerned about density bonus increasing beyond master plan calculations	13) Providing affordable housing is a goal that needs to be recognized even if it exceeds master plan recommendations	13) Grants Planning Board ability to exercise their judgment on planning issues such as compatibility
14) Differentiate high-rise only	14) Draw a distinction between high-rise, mid-rise, townhouse and single-family for bonuses and alternate payments	14) One size does not fit all
15) Permits off-site location within Policy Area only	15) Allows off-site locations county-wide	
16) Decisions of on- or off-site must be made at site plan	16) Extend time for deciding if units are on- or off-site until occupancy	
17) Control period requiring 99 years for rental and 30 years for sale	17) Reducing control period to 20 years for all units	17) Regardless of prior unexplained silence by the industry, it does affect values and the cost to provide AHUs

As you consider the Building Industry's Proposal and recommendations and compare it to the proposed legislation and DHCA's latest Proposals and Comments, we respectfully request you keep in mind the following:

General Background

- Moderately Priced Dwelling Units (MPDUs) – limited production of both market rate units and MPDUs
- Work Force Housing (WFH) – no private WFH since inception
- Pending MPDU Legislation – further "taking", a "killer" and "not feasible" as proposed
- We are constraining Smart Growth and transit-oriented development (TOD), because the current MPDU/WFH legislation makes high-rise development prohibitively expensive. As written, the MPDU/WFH legislation is a disincentive for Smart Growth/TOD.
- MPDU and WFH requirements are wasteful and not an efficient use of resources as currently required; DHCA and/or HOC can and should produce more units and do so more cost effectively.
- The producers of new housing cannot and should not be asked to shoulder the inflated 1:1 cost to produce an MPDU as proposed by DHCA under the pending legislation; this is a community wide issue and needs to be addressed and funded in an equitable manner.
- Federal, 25A MPDU and 25B WFH programs are simply different points of the housing affordability spectrum and must be considered together as they relate to the housing industry's ability to contribute to this community-wide AHU goal and obligation to the extent legislated.

Specific Background

1. Alternative Agreements

- 1989 thru 2003 – 19 total, only 7 high-rise and 2 mid-rise multi-family buildings on County's list; Alternative payments escalated from $15-18,000 and peaked in the $20-30,000 range/MPDU unit.

- 2004 to April 2005 – Few with some not built; major issue – Condo "buyout" prices escalated from mid-teens to around $50,000/MPDU unit; few rental projects or comparables; and the latter ones were not successful investments

- April 1, 2005 to present – Alternative Review Committee (ARC) in place with only 1 example, "Woodside Court", a small stick-built building.

2. Recent Projects w/ MPDU Bonus Density – Most typically started as condo and especially those with 15% bonus, expecting buyout. No alternative agreements have been executed since the market peaked in late 2005, except one (1). Again, many of the condo projects have not been successful.

3. Related and referenced bodies of work references

- *"Strengthen the [MPDU] Program – A 30 Year Review"*, a Report to the Montgomery County Council on Future Program and Policy Options, February 2004. ***[Notes impediments to providing AHUs in high-rises, especially rentals, and need for alternative agreements to maximize community benefits. DHCA's current efforts are inconsistent with this nearly 6-year-old finding by the County].***

- *"A Study of [MPDU] Program Implementation"*, Office of Legislative Oversight, Report # 2007-9, July 19, 2007 does not take economic feasibility or real-world conditions into account. ***[Note: County starting to tighten AHU requirements while multi-family market was past peak beginning in 2004 and 2005 with few new rentals in process. This Study simply assessed a system that kept 25A alive and on life support with Alternative Agreements and PILOT's during the late 90's and early 2000's. No systemic or significant adverse findings were reported. The changes from 2005 forward hurt an already declining housing situation and the proposed MPDU changes introduced with and after this report was issued are a continuation of this failed approach to simply layer more costs on an overburdened industry without regard for the economic consequences of the burdens or the economics of producing housing (e.g., only one ARC approval since 2004!)].***

- *"Housing Policy Element of the General Plan: Preliminary Pro Forma Analysis of MPDU Bonus Density"*, memo by Jacob Sesker, et al., to the Montgomery County Planning Board, May 8, 2008. ***[Concludes that the MPDU bonus density returns decline with the 22% bonus approach). The Building Industry proposal provides an updated option].***

Comments

The Building Industry has also recommended Affordable Housing mitigation measures in addition to those in the proposed revision/consolidation of 25A & B which include:

A. Alternative Agreements – Continue, allow, and encourage alternate agreements under all affordable housing programs; promote economic activity, equity, and flexibility and provide the kind of housing needed. We have requested demographic information from DHCA to better understand the type of demand here. (See attached email to DHCA, Exhibit "C")

B. DHCA can be more active in creating more and a broader range of Affordable Housing – Alternative Agreements with payment to HIF can fund DHCA projects, which provide more targeted, cost-effective housing paired with efficiencies of public financing, and where need is greatest. Possible teaming with non-profits, etc. may help here (e.g., MHP).

C. Find other HIF & AHU-generating revenue sources – Either provide additional general revenue source or other dedicated funding sources; new market-rate housing implementation and development can no longer carry the "community- wide" moral responsibility, public policy generated financial burden of funding affordable housing.

D. Land Use Policy – Encourage more density, height and associated AHU bonus density in CBD's and other transit and core areas in that 22% is no longer enough to subsidize AHU's in most urban planning areas (see Sesker's memo dated 5/8/08).

E. Impact, PAMR and Permit Fees – Eliminate all of these changes for CBD developments. A positive, per-project encouragement for CBD rather than suburban development, and helps more urban development better compete with sprawl.

F. Moratoriums in the CBD's – The threat of moratorium in County growth areas is unsustainable and will stifle growth around transit stations.

G. Foreclosures – Consider a program that allows HOC to buy up foreclosed properties and enter them into the affordable housing program. This addresses a major concern regarding vacant foreclosed properties, and also may allow a dispersed stock of affordable housing under the control and stewardship of HOC.

Thank you for your consideration. Please remember, we can only create affordable housing, fund AHUs, and limit rent growth with additional supply if we are able to produce new market housing within the competitive constraints of the marketplace.

Attachments

L&B 1255032v4/01086.0018

MEMORANDUM

October 12, 2009

TO: MPDU Development Work Group

FROM: Richard Y. Nelson, Jr., Director
Department of Housing and Community Affairs (DHCA)

SUBJECT: Bill 38/13-07: Moderately Priced Housing – Amendments
Meeting with the Development Community

At the September 14, 2009 work session of the Planning, Housing, and Economic Development (PHED) Committee, the PHED Committee members requested that DHCA meet with representatives of the development community to discuss several issues pertaining to the above bill. DHCA has scheduled a series of meetings to review these issues (see enclosed letter).

The following are initial recommendations by DHCA (further details and analysis are included on subsequent pages of this memorandum):

I) Determining an Affordable MPDU Sales Price – Affordability Model

- Recommendation: Affordability set at 60% of Area Median Income (AMI), adjusted for household size, assuming 30% of gross monthly income is available for monthly housing costs.

II) Determining an Alternative Payment for High-Rise Condominium MPDUs

- Recommendation: For each required MPDU, 77.5% of the difference between the actual sales price of a market unit and the affordable MPDU price of the unit, based on number of bedrooms.

III) Establishing Guidelines for Alternative Location Agreements

- Recommendation: The number of MPDUs provided at the alternative location or locations would need to be at least 15 percent of the total approved units in the original building.

IV) Determining an Alternative Payment for High-Rise Rental MPDUs

- Recommendation: The same methodology as for-sale projects would apply, but payment would be based on the appraised value of a unit rather than its sales price.

I) Determining an Affordable MPDU Sales Price – Affordability Model

Under the MPDU affordability pricing model, the Department would set the MPDU sales price based on an amount that is affordable to households eligible to participate in the MPDU program based on the households' verified income and household size. To calculate this, DHCA would first determine the amount of gross monthly income available to make mortgage loan principal and interest payments. From this, DHCA would calculate the total mortgage a household can support (assuming prevailing mortgage interest rates, loan types, and loan terms). This mortgage amount, combined with a 5% down payment, would constitute the affordable MPDU sales price.

Methodology

MPDU sales prices would be set at a level affordable to households earning 60 percent (60%) of the area median income, as adjusted by household size. DHCA has selected this income level because the MPDU Program is designed to serve "moderate-income" households; that is, households earning between 50% and 70% of median. DHCA would then set the portion of a household's gross monthly income it is expected to pay towards housing expenses (a "monthly housing income"). Under DHCA's proposed model, an eligible household would be expected to pay no more than thirty percent (30%) of its gross monthly income towards its monthly housing costs including expenses such as mortgage principal, mortgage interest, real estate taxes, hazard insurance, private mortgage insurance, and condominium/homeowners' association (HOA) fees, but excluding utilities. The Department would then determine the sale price using the following pricing model and procedures described below.

The gross annual income used to calculate the sales price is based on one and one half (1½) people per bedroom. Therefore:

(1) The maximum sales price for an efficiency unit is calculated using the income for a one person household.

(2) The maximum sales price for a one bedroom unit is calculated using the mid-point between the income for a one person household and a two person household (e.g. 1.5 people per bedroom).

(3) The maximum sales price for a two bedroom unit is calculated using the income for a three person household.

(4) The maximum sales price for a three bedroom unit is based on the mid-point between the income for a four person household and a five person household (that is, 4.5 people per bedroom).

Bedroom Size	Household Size
0	1 person
1	1.5 people
2	3 people
3	4.5 people

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To calculate the sales price for any unit by bedroom size, DHCA would first calculate the the corresponding household's "gross monthly income" by dividing the gross annual income by twelve (12) months. This gross monthly income is then multiplied by thirty percent (.30) to determine the household's "monthly housing income". For example, the sales price for a 2-bedroom condominium would be calculated based on the gross annual income for a 3-person household earning 60% of the median income. In current numbers, this would be as follows:

Household Size	(a) Annual Gross Income at 60% AMI*	(b) Monthly Gross Income [column (a)/ 12 months]	(c) Monthly Housing Income [column (b) x .30]
3 people	$55,500	$4,625	$1,388

* - rounded to the nearest $500

In determining the affordable sales price based on this total monthly housing income, DHCA would also assume that each household would provide a 5% down payment, with 95% of the purchase price financed though a conventional, 30 year, fixed-rate mortgage. Furthermore, DHCA would develop estimated monthly housing expenses for items such as real estate taxes, hazard insurance, private mortgage insurance (PMI), and condominium/HOA fees. Currently, DHCA has set the following values for these expenses:

- Real estate taxes = 1% of property value, annually
- Hazard insurance = $200 per year
- PMI = as set by PMI rate tables, this varies by loan type, amount financed, and other factors; in this example and at 95% financed, the percentage of PMI would be 0.78% (.0078) of the mortgage amount
- Annual condominium/HOA Fees = $4.25 per sq. ft (high rise) and $1.25 per sq. ft. (non-condominium townhouses)

From the maximum "monthly housing income", subtract monthly condominium fees, monthly hazard insurance, monthly private mortgage insurance, and monthly real estate taxes to calculate the amount available to pay the principal and interest on a mortgage, as the following example for a high rise condominium demonstrates:

High Rise Condominium Example
(Based on a 900 square foot unit)

Monthly Housing Income	**$ 1,387.50**
Less: Monthly Condominium Fee	**- $ 318.75**
Less: Monthly Insurance Premium & Real Estate Taxes	**- $ 150.51**
Less: Monthly PMI Payment	**- $ 99.18**
Equals: Amount Available for Principal and Interest Payments	**$ 819.06**

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Divide the total amount available for principal and interest by the applicable annual mortgage loan constant[1] for a 30 year, fixed rate conventional mortgage at the prevailing mortgage interest rate. (DHCA will use the interest rate charged by the Housing Opportunities Commission's First Trust Mortgage Purchase Program for first-time home buyers, which is currently 5.0%). The resulting figure represents the "maximum mortgage amount" the eligible purchaser can afford to support.

(a) Monthly Housing Income Available for Principal and Interest	(b) Mortgage Constant for a 30 Year Mortgage, 5.0% Interest Rate	(c) Maximum Mortgage Amount
$ 819	0.005368	$152,570

Divide the "maximum mortgage amount" by ninety-five percent (95%) to calculate the "maximum affordable MPDU sales price" after accounting for a down payment of five percent (5%).

Maximum Mortgage Amount	**$ 152,570**
Divided by: 100% - 5% down payment	**.95**
Equals: Maximum Affordable MPDU Sales Price	**$ 160,600**

The maximum affordable MPDU sales price in the example above would be $160,600 after accounting for monthly condominium fees and other factors. An example of how this model would be used to calculate the maximum affordable sales price for a three-bedroom, non-condominium townhouse is shown below.

Three-Bedroom Townhouse Example
(Based on a 1,200 square foot unit)

Household Size	(a) Annual Gross Income at 60% AMI*	(b) Monthly Gross Income [column (a)/ 12 months]	(c) Monthly Housing Income [column (b) x .30]
4.5 people	$64,000	$5,333	$1,600

* - rounded to the nearest $500

[1] The mortgage constant, or installment to amortize, represents the amount of each periodic loan payment expressed as a percentage of the original loan, necessary to pay the contract rate of interest (expressed as *i*) and the entire principal in equal periodic installments over the term of the loan (expressed as *n*). It is the periodic payment necessary to repay a loan of $1 completely without resorting to a balloon payment. Thus, the mortgage constant is always the periodic payment for a loan of $1 expressed on an annual basis. As a mathematical product, the applicable loan constant can be found on standard charts.

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Monthly Housing Income	$ 1,600.00
Less: Monthly HOA Fee	- $ 125.00
Less: Monthly Insurance Premium & Real Estate Taxes	- $ 202.19
Less: Monthly PMI Payment	- $ 137.47
Equals: Amount Available for Principal and Interest Payments	**$ 1,135.34**

Divide the total amount available for principal and interest by the applicable annual mortgage loan constant for a 30-year, fixed rate mortgage.

(a) Monthly Housing Income Available for Principal and Interest	(b) Mortgage Constant for a 30 Year Mortgage, 5.0% Interest Rate	(c) Maximum Mortgage Amount
$ 1,135	0.005368	$211,438

Divide the "maximum mortgage amount" by ninety-five percent (95%) to calculate the maximum affordable MPDU sales price.

Maximum Mortgage Amount	$ 211,438
Divided by: 100% - 5% down payment	.95
Equals: Maximum Affordable MPDU Sales Price	**$ 222,566**

The maximum affordable MPDU sales price in the example above would be $222,566 after accounting for monthly HOA fees and other factors.

Additional Considerations

The affordability-based model for establishing MPDU sales prices is affected by annual changes in household median incomes, shorter term fluctuations in prevailing mortgage rates, and condominium and HOA fees. Because the model is intended to ensure that the units are produced are affordable for purchase by the households served by the MPDU program, DHCA proposes that the sales prices be set at the time the units are offered for sale to MPDU program participants (that is, at the time the MPDU Offering Agreement is executed between the builder and DHCA). It is only at this time that the prevailing mortgage interest rates are known. To set the sales price at any time prior to this would negate the intent to make the unit affordable to person in the MPDU program.

Finally, as part of this model, the Department will periodically establish and review the assumptions and factors it will use under this pricing model. In addition, if this model is adopted, DHCA would establish more specific and instructive minimum specifications for MPDUs.

II) Determining an Alternative Payment for High-Rise Condominium MPDUs

The County Executive does not support an alternative payment option for MPDUs, because use of this option will reduce the promotion of income diversity within communities that is one of the underlying goals of the MPDU program. However, at the direction of the PHED Committee, DHCA and Council staff have researched alternative payment options for inclusionary zoning programs in several cities around the country in order to develop a recommendation for discussion with the development community and the PHED.

All of the options that staff reviewed are based in some way on the "affordability gap" (i.e., the difference between either the market price or development cost of a housing unit and the affordable sales price to a household whose income falls within the target range of the inclusionary zoning program). While most of the programs reviewed set their affordability prices at a higher level than Montgomery County (between 80% and 120% of Area Median Income (AMI), compared to the proposal for 60% of AMI for Montgomery County), most also have lower thresholds for triggering inclusionary zoning requirements (generally between 5 and 10 units, compared to 20 units in Montgomery County), and require a higher percentage of inclusionary units (from 15% to 20%, compared to 12.5% to 15% in Montgomery County).

Following is a brief review of some alternative payment options, and DHCA's recommendation for an alternative payment methodology for the MPDU program.

Alternative Payment Based on a Percentage of the Difference between Individual Market Sale Prices and the Affordable Price for an Inclusionary Unit

<u>Example: Berkeley, CA</u>

Berkeley's inclusionary zoning program was adopted in 1986, but the city did not adopt an alternative payment provision until 2006. The city actively encourages alternative payments for condominium units, due to expensive condominium fees (alternative payments are not allowed for rental projects, however). Therefore, in devising a formula for alternative payments, the city sought to set a fee of approximately two-thirds of the difference between the market price and the affordable price of inclusionary units.

Berkeley's alternative payment is based on the actual market sales prices of the market units in the development. The fee is the equivalent of 62.5% of the difference between the sales price and the affordable price of inclusionary units (affordability is based on 80% of AMI). However, the fee is spread out over all of the market units in a development, rather than applied to specific "substituted" units, which prevents any potential price manipulation of the substituted units. Because Berkeley's required percentage of inclusionary units is 20% (whether on-site or alternative payment – the ordinance has no provision for off-site units), the fee works out to 12.5% of the difference between the sales price of each unit in a development and the affordable price of an inclusionary unit (20% of 62.5% equals 12.5%). Because 12.5% is the required condominium conversion fee in Berkeley, city staff felt that charging an equivalent amount for alternative payments would be justified.

The number of household members used to determine affordability is based on square footage of units rather than number of bedrooms, with a maximum of 1,200 square feet (6 person household). The fee is due at the time of closing on each market unit in a development. The alternative payment option is as of right, and there is no minimum on-site requirement or development size, so developments as small as 5 units (the program threshold) can opt for the alternative payment. If the program administrator suspects that the sale of any given unit is not "arms length," the appraised value of the unit may be used instead of the sales price.

Alternative Payment Based on Difference Between Cost of Constructing an Inclusionary Unit and the Affordable Price for an Inclusionary Unit

Example: San Francisco, CA

San Francisco's inclusionary zoning ordinance was adopted in 2003, but several changes were made to the ordinance in 2006. San Fransisco's alternative payment amount is calculated as the difference between the construction cost per unit of a certain bedroom size and the affordable sales price of a unit of the same bedroom size. An initial construction cost per unit type was determined through a study conducted in 2006; the construction costs are adjusted annually based on changes in the Construction Cost Index published by Engineering News-Record (ENR). The city intends to commission a new analysis of construction costs every 5 years.

The city has a uniform, city-wide alternative payment based on number of bedrooms, ranging from $179,952 for an efficiency unit to $374,712 for a three-bedroom unit (in 2008). The affordable sales price per unit type is based on 80% of AMI, and ranges from $181,193 for an efficiency unit to $265,114 for a three-bedroom unit. The program threshold is 5 units, and the alternative payment requirement is applied to 20% of the total units (if affordable units are constructed on-site, the requirement is 15%). The alternative payment option is allowed as of right, but this option must be selected prior to plan approval (a developer may decide later on to provide the units on-site, but cannot select the alternative payment option after plan approval). The alternative payment may be applied to either for-sale or rental projects, but in either case the entire payment is due prior to release of the first site or building permit.

Alternative Payment Based on a Percentage of the Difference between Median Sales Prices Per Unit Type and the Affordable Price for an Inclusionary Unit

Example: Boulder, CO

Boulder's inclusionary zoning program was adopted in 2000. At that time, the alternative payment was calculated based on a portion of the difference between median sales prices of detached and attached units, and the affordable price of an inclusionary unit (the full difference was not charged because the city acknowledged that other sources of financing would be available to leverage additional affordable units). The affordable inclusionary price is based on a 1,200 square foot unit.

The current (2009) alternative payment is $119,922.35 for a detached unit, and $110,117.70 for an attached unit. (Boulder does not have any high rises due to a 55-foot citywide height limit.) The alternative payment amount changes yearly based on the percentage change in median sales prices of housing units that are 1,200 square feet or less, built within the last 10 years. If a developer wishes to build market rate units that are smaller than 1,200 square feet, he/she may calculate the alternative payment by multiplying 20% of the total floor area of the market rate units by a constant (in 2009, $99.94 for detached units and $91.81 for attached units). However, in either case, at least half of the inclusionary units must be on-site, or the alternative payment will be increased by 50% (unless the project is a rental development).

The maximum inclusionary sales price is currently 70.7% of AMI, and maximum income for purchasers of inclusionary units is 80.7% of AMI (including an asset test). The full alternative payment is due prior to issuance of building permits. Boulder's inclusionary zoning requirement applies to both sales and rental projects, but all privately developed inclusionary units must be sales units due to a state prohibition on rent-controlled units. (The city uses alternative payment fees to develop affordable rental housing through non-profit associations.)

Boulder has no threshold number for its inclusionary zoning requirement – even single-unit developments must comply, although most pay an in-lieu fee. At least 20% of the total number of units must be made permanently affordable to low- to moderate-income households, unless some method of alternative compliance is selected (in addition to the alternative payment, land dedication or dedication of existing off-site units is permitted).

The current alternative payment covers approximately 50% of the affordability gap. However, since the program was adopted, the affordability gap in Boulder has doubled. City staff is now seeking a change in the inclusionary zoning ordinance to allow a 15% increase in the alternative payment each year until the payment reaches 75% of the affordability gap.

Analysis of Alternative Payment Options

San Francisco's and Boulder's approaches to the alternative payment fee have the advantage of ease of determining the alternative payment requirement, which provides greater certainty for developers, and also provide a mechanism for determining alternative payments for rental as well as sales projects. However, a uniform alternative payment requirement does not take into account differences in market prices throughout a jurisdiction, which are considerable in Montgomery County. Moreover, requiring an up-front payment of the full fee at building or site permit is a considerable burden, particularly for rental projects.

Berkeley's alternative payment method, although more complicated to administer, has several advantages for Montgomery County. Unlike the other methods, basing alternative payments on actual market sales would capture differences in land values throughout the County, and would also increase the ability of the County to finance affordable units in the same planning area as the original development. The timing of payment of the fee (at closing of individual units rather than at building permit) would be more easily absorbed by developers, and would also provide some protection if market values drop precipitously between project approval and unit closings (while conversely allowing the County to capture a portion of the "windfall" if market

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values increase significantly). Berkeley's method also avoids the speculation involved in estimating construction costs or determining which types of units should be included in annual median sales.

Recommendation for Montgomery County

DHCA recommends that the County's alternative payment for an MPDU be set at 77.5% of the difference between a market sales price and the affordable price of an MPDU. This percentage is derived by deducting 22.5% in soft costs (the soft cost allowance built in to current MPDU sales prices).

Following is an example of how the proposed alternative payment fee would be applied to a two-bedroom high-rise condominium market unit in a 200-unit building with a sales price of $727,000 (the 2008 median sales price of a new, high-rise condominium unit in the Bethesda planning area), assuming an income of 60% of AMI for a 3-person household (1.5 people per bedroom), and an inclusionary requirement of 12.5%:

Montgomery County Example: Alternative Payment Proposal

Sales Price of Two-Bedroom Market Unit		**$727,000**
Less: Affordable MPDU Price (3 person household @ 60% AMI; 5.0% Interest)	-	$160,600
Difference between Market Price and MPDU Price		$566,400
Deduct Soft Cost Percentage (22.5%)	x	.775
Alternative Payment Per Required MPDU		**$438,960**

III) Establishing Guidelines for Alternative Location Agreements

The proposed amendments to Chapter 25A for alternative location agreements are an attempt to provide a specific public benefit for alternative MPDU locations (i.e., a higher percentage requirement of MPDUs), rather than leaving the determination of public benefit to the Director of DHCA, as provided in the current law. The alternative location option would be as-of-right for high-rise buildings, provided that the MPDUs are built or rehabilitated to standards established by DHCA, and the proposal meets the following criteria:

- The number of MPDUs provided at the alternative location or locations is equal to at least 15 percent of the total approved units in the original building;
- At least one more MPDU is provided than would have been built if 12.5% of the units in the original building were MPDUs;
- No more than one-third of the total number of units at the proposed alternative location or locations will be MPDUs; and
- The MPDUs at the proposed alternative location or locations have at least as many bedrooms as would have been required under Sections 25A-5(b)(3) if all MPDUs had been located on the site of the original building.

As with alternative payments, any subdivision for which an alternative location agreement is approved would not be eligible for a density bonus.

IV) Determining an Alternative Payment for High-Rise Rental MPDUs

As with condominiums, the County Executive does not support an alternative payment option for rental MPDUs, for the reason stated above. However, at the direction of the PHED Committee, DHCA and Council staff have endeavored to develop a recommendation for alternative payments for high-rise rental buildings for discussion with the development community and the PHED.

Determining alternative payments for rental units is even more problematical than determining such payments for condominium units. For a sale unit, the value of the difference between the market price and the inclusionary price can be captured at a specific point in time (i.e., at the closing of each market unit). However, the rent differential between a market unit and an inclusionary unit spans a 99 year period (the length of the control period for rental units in Montgomery County).

Rather than trying to capture some proportion of this 99-year rent differential, DHCA recommends that an alternative payment for rental units be calculated according to a method similar to the proposal for alternative payments for sale units. Instead of sales prices, alternative payments would be based on appraisals of individual rental market units of each required bedroom type (as if they were sales units), and payments would be due in up to four quarterly installments of equal amounts. The first would be payable when the building is 70% leased, or 2 years after the initial occupancy date (whichever is earlier), with subsequent payments due every three months afterwards until the full amount is paid. Alternatively, this amount could be a loan with a market interest rate payable over a 5 year period.

The above methodology would require a change in the most recent draft of the MPDU bill, which states that the alternative payment for a rental project would be based, for each unbuilt MPDU, on a percentage of the difference between the annual rental charged for each market price unit and the rent that would be charged for the same unit if it were an MPDU.

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LINOWES | AND | BLOCHER LLP

MEMORANDUM

TO: MPDU Working Group

FROM: Emily Vaias

DATE: October 15, 2009

RE: Proposed Revisions to MPDU And Workforce Housing Laws

EXECUTIVE SUMMARY

Overview: We were tasked to develop a revised MPDU and Workforce Housing Law that is simple, fair, and reasonable, and yet maintains the affordable housing inclusionary zoning regime that has been in place since 1974. To that end we have made the following revisions:

1. Combined the MPDU and Workforce Housing laws together in one "Affordable Housing" law. We will need to delete Article V (Workforce Housing) from Chapter 25B as well as make other corresponding amendments to 25B. In addition, changes will be needed to Chapter 59 (Zoning) as well as the relevant Executive Regulations.

2. Reduced the control period for both programs, for both rental and sales units to 20 years. The current control periods of 30 and 99 years causes the units to be stigmatized, and fails to account for renovation costs which will lead to a deteriorating housing stock and "ghettoization" of the units.

3. Established a base requirement that all residential subdivisions containing 20 or more dwelling units must provide at least 15% affordable housing which is made up of a minimum of 10% MPDUs and minimum 5% workforce housing. These requirements are then adjusted for multi-family buildings, with a distinction made between mid-rise (up to 5 stories/wood frame) and high-rise (more than 4 stories, steel and concrete construction). There is a recognition that multi-family dwellings, especially high-rise, are more expensive to construct and it is very difficult to provide units in these buildings without suffering substantial economic losses. Therefore, lower requirements are established if the affordable units are provided on-site, and then off-site options are provided, by right, that provide greater requirements as the units are placed further away from the project.

4. Established that the minimum 15% affordable housing requirement entitles the applicant to a 10% bonus density, and that all bonus densities are allowed even if the affordable units are provided off-site. This is necessary in order to fund the units, wherever they may be located.

5. The calculation method has been codified (it's currently unwritten and convoluted) so that the affordable housing and bonus density are based upon the base density allowed under the zone or sector plan, which precludes using the bonus units to calculate the affordable housing requirement and vice versa. We have also eliminated the rounding disparity and specified that all rounding shall be up to the next whole number.

6. Providing more than the require 15% affordable units entitles an applicant to increased bonus density based on the type of units. The bonus is calculated at a rate of 7 bonus units per additional MPDU and 3 per workforce housing unit for high-rise buildings. These numbers are consistent with the memo provided by Jacob Sesker at M-NCPPC.

7. Allowed the height and density limits to be exceeded for the purpose of providing affordable housing, but do not specify how much the limits may be exceeded and leave it to the Planning Board to determine the final height and density at site plan.

8. Allowed the payment of a fee in lieu of providing affordable housing units that is fair and reasonable based on unit types.

9. Allowed the Housing Initiative Fund to establish a Voucher Program and use some of its funds to provide vouchers throughout the County so that people can live where they choose and don't necessarily have to live in an MPDU or Workforce Unit in order to get the benefit of the program.

10. Use of the payment option does not eliminate the bonus density which is an across the board bonus of 10% for providing 15% affordable units, or payment of the fee based square footage. The fee is still an exaction, which is directed at a problem not caused by the project. The government should be required to offer some compensation otherwise it acts as an unauthorized and improper tax.

11. Require the use of PILOT programs when requested by the applicant and will help provide units on-site.

12. Leave low-income housing to the County to provide and manage, except that federal or state programs that do provide for low income housing may be used as a substitute to the new law at the election of the developer.

13. Eliminate the limits on re-sale that have nothing to do with, and are outside of the control period. People who live in a house for 20 years should be able to sell it without

paying the government a percentage of the profit. Also the government should not want to stigmatize the affordable units by treating them differently in the long term.

14. We need input on the mid-rise, townhouse and single-family buy-out options, so please provide this if possible.

As you know, we are scheduled to meet with DHCA next Wednesday, October 21, 2009 at 2:00 p.m.; therefore, we need to get everyone's thoughts and comments quickly (I apologize for the short fuse). We would like to hear from everyone by 6:00 p.m. on Monday, October 19, 2009. Thereafter, we hope to send this to DHCA on Tuesday, prior to our meeting on Wednesday.

Thanks.