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September 13, 2005

Mr. Timothy McGarry, Director
Division of Growth Management
2798 Overseas Highway; Suite 400
Marathon, Florida 33050

Re: Proposed Inclusionary Housing and Fee-in-Lieu Regulations

Dear Mr. McGarry:

Preliminary to the preparation of permanent land development regulations (LDRs) related to County affordable housing provisions, you have requested an opinion regarding the scope of the County's authority to apply inclusionary and fee-in-lieu requirements on new development and certain types of redevelopment. Specifically, you have asked, first, whether inclusionary housing requirements can be imposed against property owners engaged in the construction of new units and the redevelopment of existing mobile home and multi-family parcels; and, second, what background requirements must be met in establishing the amount of required affordable housing and/or a fee-in-lieu of actual construction. This letter is limited in scope to these issues and, specifically, the staff's proposed changes to § 9.5-266(b) of the LDRs.

There are no cases from the Florida courts addressing directly the issues of inclusionary housing or housing fees-in-lieu. However, the Legislature has authorized counties to impose any "measure which is adopted for the purposes of increasing the supply of affordable housing using land use mechanisms such as inclusionary housing ordinances." § 125.0103, *Fla. Stat.* Based on this express directive, it is our opinion that inclusionary housing and/or fee-in-lieu requirements may be imposed against new residential development and residential redevelopment that results in the elimination of existing workforce or affordable housing. However, there are several prerequisites to the implementation of these requirements that must be addressed and which are discussed.

Under the current staff draft, certain types of development and redevelopment would be required either to ensure that thirty percent (30%) of its units are "affordable" (the "inclusionary component") or to pay a "fee-in-lieu" of this requirement for each required affordable unit. The inclusionary and fee-in-lieu requirements would be calculated based only on the number of total units proposed beyond the first two. The inclusionary component, and/or the fee-in-lieu requirement, would apply to:

> "New residential projects of three (3) or more units <u>and redevelopment of existing parcels of ten (10) or more</u>

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> market rate housing units under one ownership or a redevelopment of a mobile home park, or projects containing both market rate residential units and commercial floor area...".[1]

Staff's proposed new language is underlined.

Although the Florida courts have not taken up these issue directly, the Florida Statutes, State Comprehensive Plan, Area of Critical State Concern provisions, and the Monroe County Comprehensive Plan 2010 require the County to make provisions for the preservation and creation of affordable and/or workforce housing. *See e.g.*, §§ 163.3202, 163.3220, *Fla. Stat*; and *2010 Comprehensive Plan*, Goal 601. Additionally, the Florida Supreme Court long ago recognized local government's authority to require new residential development to bear its proportionate share of the costs it imposes on the community. *See e.g., St. Johns County v. Northeast Florida Builders Association*, 583 So. 2d 635, 638 (Fla. 1991). However, there must be a "reasonable relationship" between the inclusionary component, a fee-in-lieu alternative, and the actual impact of the development being required to comply with either.

Inclusionary housing requirements stem from the premise that new market-rate units create a need for new affordable/workforce housing and, by consuming a limited supply of land and available permits, exacerbates affordable housing supply deficits and housing costs. *See e.g., Home Builders Ass'n of Northern Cal. v. City of Napa*, 108 Cal. Rptr. 2d 60 (Cal. Ct. App. 2001). Similarly, the conversion of existing affordable/workforce housing units to market rate will have similarly deleterious effects on housing. A recent case out of California illustrates the point.

In *San Remo Hotel v. City and County of San Francisco, California, et al.*, 117 Cal.Rptr.2d 269 (Cal. 2002), *aff'd*, 125 S.Ct. 2491 (2005), the city of San Francisco adopted a Hotel Conversion Ordinance (HCO) in order to mitigate the impacts of conversions from permanent residential units to tourist units. The HCO generally required each converted unit to be replaced or a "fee-in-lieu" of actual replacement be paid. The HCO was predicated upon the severe lack of affordable rental housing and the detrimental effect that the conversion of existing housing would have on that problem. The HCO was challenged on both due process and takings grounds. The California Supreme Court upheld the HCO because its requirements bore a "reasonable relationship" to the problem it sought to mitigate, namely the conversion of units previously available to lower income residents and members of the workforce.

The court noted that the HCO was predicated on the city's findings that (a) its affordable housing problems would be exacerbated by the unmitigated conversion of residential units to tourist units and that (b) the fee-in-lieu was reasonably related in amount to the impact of the conversions on the city's housing supply. 117 Cal.Rptr. at 274, 291. The court refused to second guess the city's findings in these respects because the inclusionary requirements were "legislatively-determined and formulaic" and were

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[1] Although § 9.5-266(b), LDRs requires an inclusionary component for "projects containing both market rate residential units and commercial floor area," the requirement is intended to mitigate the impact of only new housing units on affordable housing and is not applied against the commercial component of such projects.

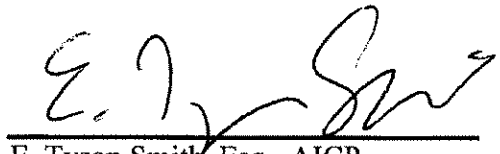
not applied as *ad hoc* exactions on individual applicants. *Id.* at 289-92. The Florida courts are similarly deferential to the legislative determinations of local government.

Under Florida law there must be a rational relationship between the development activity being regulated and the harm to be mitigated. For that reason, it is our opinion that the inclusionary component and the fee-in-lieu may be applied against only new residential development, as is currently required, and conversions from existing affordable/workforce housing to market-rate housing. However, no inclusionary requirement should be applied against the redevelopment of housing that does not either increase the number of market rate units (and thereby increase the need for additional affordable/workforce housing) or decrease the number of affordable/workforce housing units (and thereby exacerbate the existing affordable/workforce housing deficit). Therefore, in addition to inclusionary requirements currently applicable to new market-rate units, the conversion away from housing that is available to the targeted workforce can be mitigated through inclusionary and/or fee-in-lieu requirements.

In implementing these requirements, a reasonable relationship must be shown between (a) the inclusionary component and fee-in-lieu requirements and (b) the impacts of new market rate housing and the conversion of affordable/workforce housing. Various County data, including housing prices, employee generation rates, construction costs, and documented housing supply deficits, support the application of inclusionary housing and fee-in-lieu requirements. The ordinance should include procedural and substantive safeguards to enhance its defensibility; including, for example, an appeal or variance from the strict application of its terms where it is shown that no reasonable relationship exists between the impact of a particular development and the inclusionary requirement.

If you have any questions or wish to discuss this matter further, please do not hesitate to call.

Sincerely,



E. Tyson Smith, Esq., AICP
for White & Smith, LLC

cc: Robert Shillinger, Assistant County Attorney

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