

CITY OF MADISON  
**CITY ATTORNEY'S OFFICE**  
Room 401, CCB  
266-4511

DATE: August 15, 2011

**MEMORANDUM**

TO: Lucia Nunez, Alder Mark Clear

FROM: Michael P. May, City Attorney  
Adriana Peguero, Assistant City Attorney

SUBJECT: **Possible creation of MGO 4.28, requiring developers to construct accessible housing and pre-emption issues**

The Commission on People with Disabilities and Alder Mark Clear have requested that the OCA draft an ordinance that would require developers who receive a certain amount of financial assistance from the City for the development of housing construct 10% of the units to be Type-A Handicap Accessible.

The goal of this ordinance would be to prepare for an anticipated increase in the need for accessible housing that is inclusive and affordable. This memo addresses the City's authority to enforce such an ordinance and the potential legal challenges that may arise.

The International Building Code (IBC) is a model building code that was developed to consolidate existing building codes into one uniform code that could be used nationally and internationally. The purpose of the IBC is to protect public health, safety and welfare as they relate the construction of buildings. The IBC contains requirements related to the construction of accessible and usable buildings and facilities, and currently requires that when buildings are constructed with 20 or more units, 2% of those units must by Type-A Handicap Accessible.

Most states have adopted the IBC, including Wisconsin. Comm. 62.01, a section of the Wisconsin Administrative Code, fully incorporates the IBC, including the Type-A Accessibility requirements. Comm. 61.03(5)(b) states "a city, village, town or county may not enact and enforce additional or more restrictive standards for multifamily dwellings." "Multi-family dwelling" is defined as any apartment building, rowhouse, town house, condominium, or modular home that does not exceed 60 feet in height or 6 stories and that consists of 3 or more attached dwelling units."

The potential legal conflict arises out of the Commission's desire to draft an ordinance that places the 10% Type-A requirement on all newly constructed housing developments that receive financial assistance from the City. The Wisconsin Administrative Code referenced above clearly prohibits any city from imposing restrictions on multi-family dwellings that are more restrictive than what has been adopted in the IBC.

In January 1992, the State Attorney General issued an opinion on a similar issue related to fire

sprinkler systems, and advised that a municipality could not waive fees as to newly constructed one and two-family dwellings in which fire sprinkler systems had been installed because state statute expressly eliminated a municipality's authority to regulate areas explicitly within the scope of the state code. The opinion specifically states "a municipality may not, either directly or indirectly, exercise a power it does not have, particularly where to do so defeats the states purpose of providing a uniform regulation of a subject." The fact that smoke detectors were explicitly within the scope of the state code indicated that the Legislature intended them to be regulated solely on the State level, and that the municipality would have no authority to enact an ordinance which would require more than the state code requires, regardless of whether the city imposed those requirements only when an individual was seeking a financial incentive, in this case, a fee waiver.

It is the position of the OCA that if the City was to pass and enforce such an ordinance, we would be in conflict with the state code and the ordinance would be subject to legal challenges which would likely be successful. The only way to avoid this conflict is to draft an ordinance that would only require developers to meet this 10% Type-A Accessible requirement if they were constructing housing that does not fall under the definition of a multi-family dwelling. This means the ordinance would only apply to newly constructed housing that is greater than 60 feet in height or 6 stories. The Because the state code expressly states that municipalities may not create regulations that are more restrictive, the City does not have the authority to impose this requirement on all developers receiving financial assistance.

When looking at other programs the City maintains, it is clear that there may be goals, or expressions of support for projects that provide more accessible units than is required by State code, but there are no strict requirements imposed. For example, the Affordable Housing Trust fund did at one time have language establishing a "program-wide goal" of having 1 in every 5 units be fully accessible. But as the language makes clear, this was a goal rather than a requirement, and did not impose a restriction on every separate building unit that used those funds.

The TIF Policy has a similar statement in it, stating that the City "encourages projects that...enhance quality of life including accessibility...designs and fixtures that provide for fully accessible dwelling units." Again, this is not a strict requirement, but rather a statement indicating the City's support for the development of more accessible units.

An additional concern over creating an ordinance such as the one CPD requested is that there is currently a bill in the legislature (2011 SB 32) that would prohibit municipalities from enforcing ordinances establishing minimum standards for the construction, repair, and maintenance of places of employment and public buildings, further evidence of the legislature's intent that construction standards be regulated on the state level and leaving almost no authority in this area to municipalities.

After many discussions of these potential issues at CPD meetings, commission members decided to move ahead with a resolution for consideration of the Common Council and not go ahead with the draft I created, which limited the requirements to buildings that were greater than 6 feet or 60 stories. The commission wanted to express support of the construction of more accessible housing, while making sure they were not introducing an ordinance that would be

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ineffective on a practical level given the nature and size of most housing developments in the City.

Because of the potential legal conflicts discussed in this memo, it is the advice of the Office of the City Attorney that CPD support the passage of the proposed resolution and continue looking for ways to advocate for more accessible housing beyond passage of an ordinance making it a strict requirement for developers receiving city financial assistance.