

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

DATE: April 19, 2011

MEMORANDUM

TO: Lucia Nunez, Alder Mark Clear

FROM: Adriana Peguero, Assistant City Attorney

SUBJECT: **Creation of MGO 4.28, requiring developers to construct accessible housing**

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 be 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

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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."

It is the position of the OCA that if the City were 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. 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. 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.