AGENDA ITEM #10
February 10, 2004

Briefing

MEMORANDUM

February 6, 2004

TO: County Council

FROM: Aron Trombka, AT Legislative Analyst

SUBJECT: Council Staff Report on the MPDU Program

Council Staff will present its report, "Strengthening the Moderately Priced Dwelling Unit Program: A 30-Year Review." **Councilmembers received a copy of the report under separate cover and should bring the report to the briefing.** The report is available on the Council's web site: www.montgomerycountymd.gov/council and at the Council's Legislative Information Services (Council Office Building, Fifth Floor).

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STRENGTHENING THE MODERATELY PRICED DWELLING UNIT PROGRAM: A 30 YEAR REVIEW

A Report to the Montgomery County Council

on

Future Program and Policy Options

February 2004

Prepared by County Council Staff
at the Request of Councilmember Michael Subin

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STRENGTHENING THE MODERATELY PRICED DWELLING UNIT PROGRAM: A 30 YEAR REVIEW

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100 Maryland Avenue
Rockville, Maryland 20850

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www.montgomerycountymd.gov/council

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CHAPTER 1
INTRODUCTION and SUMMARY FINDINGS AND RECOMMENDATIONS

A. Description of Project

In August 2003, then Council President Michael Subin directed Council Staff to conduct a comprehensive review of the County's Moderately Priced Dwelling Unit (MPDU) program. County land use patterns and housing market conditions have changed significantly since the County Council adopted the MPDU program in 1973. These changes affect how well the MPDU program may continue to achieve its fundamental goal of providing new affordable housing throughout all areas of the County. While the MPDU program is recognized as the preeminent program of its type, the program faces new challenges as the characteristics of the County evolve. Councilmember Subin asked Council Staff to examine the policies and procedures of the MPDU program and answer the following question: ***How would the MPDU law be different if it were written today rather than 30 years ago?*** This report analyzes various elements of the MPDU program and recommends modifications to strengthen the program for the decades ahead.

B. Project Methods and Scope

Council Staff examined the MPDU law and the regulations which implement the program as well as related housing, planning, and economic development policies and programs. Staff also reviewed the parts of the County's zoning law (hereafter referred to as the "Zoning Ordinance") which address MPDU requirements.

The analysis in this report relies heavily on data provided by the Department of Housing and Community Affairs (DHCA, the department that implements the MPDU program) and the Research and Technology Center of the Maryland-National Capital Park and Planning Commission (M-NCPPC). Staff spoke with program managers in other communities and interviewed experts in the fields of housing and real estate economics. Staff held a series of focus groups to learn about the interests and concerns of DHCA, planners, civic representatives, housing advocates, developers, and non-profit housing providers. In addition, Staff conducted a literature search and reviewed relevant case law.

Using the information collected from these sources for each element of the program, Council Staff developed a series of policy alternatives and recommends one or more options to strengthen the MPDU program. A summary of Staff recommendations appears at the end of this chapter. Detailed recommendations appear at the end of Chapters 5 through 14.

Staff found that the MPDU program affects and is affected by many other policies and programs. Undoubtedly, discussion of the MPDU program will expand to include related housing, planning, and development issues. To retain the focus of our analysis and recommendations, however, the scope of this report is limited to the MPDU program and associated policies that directly influence the program.

C. Summary of Findings and Recommendations

The County's MPDU program is a national model. The program has successfully dispersed affordable housing throughout the County. During the 30 years since its inception, the MPDU program has produced more than 11,000 affordable units, far more than any other community in the country. Moreover, the County MPDU program serves households at a lower percentage of area median income than served in most other communities.

As in 1973, County residents and businesses today recognize that providing adequate and affordable housing for all elements of the County's workforce is essential to the social and economic well-being of the County. Nonetheless, the MPDU program faces many emerging challenges. MPDU production is directly linked to the rate and location of development. As the County approaches build out, new MPDU production will decrease steadily. The future rate of MPDU production is unlikely to be sufficient to replace previously built MPDUs that become market rate units after their price and rent controls expire.

The MPDU program was designed when County land development was predominantly suburban in nature. Implementation of the MPDU program in non-suburban settings gives rise to economic and land use challenges uniquely identified with more urban or rural environments.

To address these challenges, Council Staff adopted the following principles that shaped our specific recommendations to strengthen the program for the future.

1. The success of the MPDU program depends on creating an environment where the private sector can integrate affordable housing into market rate development without economic hardship. The program must continue to achieve a balance among the number of MPDUs required, density bonuses, flexible development standards, and sales and rental pricing.

2. Achieving geographic dispersion of affordable housing must remain an overriding objective of the program. To this end, the County should promote production of MPDUs in areas where land use or economic constraints may make program implementation more difficult.

3. As the County approaches build-out, the stock of MPDUs could diminish significantly. Action must be taken to identify new sources for MPDUs and to retain the supply of MPDUs for longer periods.

A summary of major findings and recommendations of each chapter of this report appears on the following pages.

PROGRAM ELIGIBILITY (Chapter 5)

Major Findings:

- DHCA traditionally allows households with incomes up to 65 percent of the area median to participate in the MPDU program.

- A household at 65 percent of area median income likely would not qualify to buy any home in the County, with the possible exception of a few townhouses that sell well below the median price.

- A household earning as little as 60 percent of median income is likely to be able to afford the average rent for a two-bedroom apartment in the County.

Major Recommendations:

- The Council should modify the law to allow separate income eligibility limits for rental and sale MPDUs.

- The County should reduce income eligibility limit to 60 percent of area median income for garden apartments.

- The County should retain the income limit at 65 percent of area median income for sale units until the gap between the size of the applicant pool and the number of MPDUs offered for sale decreases but should consider raising the eligibility standard if the gap decreases.

- DHCA should annually update the income limits.

SALE CONTROL PERIOD (Chapter 6)

Major Findings:

- As the County moves closer to buildout, MPDU production necessarily will decline as the rate of overall development slows.

- Expiration of sale price controls results in a significant increase in sale prices. Nonetheless, post-control MPDUs remain more affordable than similar units initially sold at market rates.

- The County's MPDU program has the shortest sale control period of any major inclusionary zoning program in the country.

Major Recommendations:

- The County should extend the sale control period to 99 years and simultaneously create an equity trust fund to help MPDU owners build wealth from the increased value of their home. This combination would preserve MPDUs at controlled prices while giving MPDU owners the opportunity to profit from the sale of their property.

RENTAL CONTROL PERIOD (Chapter 7)

Major Findings:

- The County experienced a precipitous decline in the supply of rental MPDUs during the 1990s, as more than 2,000 MPDUs had their (then ten-year) rent controls expire. Few of the expired MPDUs were replaced as production of new rental MPDUs slowed dramatically.

- As a result of the 1989 amendment that extended the rental control period to 20 years, the entire existing supply of rental MPDUs will remain under rent controls until 2009. After that, the County will begin to lose units in the current MPDU inventory.

- Development loans typically have terms under five years and rarely, if ever, exceed 20 years. The decision to invest in a development is almost always predicated on rate of return calculations for a period significantly shorter than the 20-year MPDU rent control period. Extending the control period should have little impact on initial investment decisions.

- The County MPDU program has among the shortest rent control periods of any inclusionary zoning program in the country.

Major Recommendations:

- The County should extend the control period to 99 years for new rental MPDUs and should provide low interest loans for rehabilitation of older MPDUs.

ZONES SUBJECT to the MPDU REQUIREMENT (Chapter 8)

Major Findings:

- MPDU requirements, density bonus provisions, and optional method development standards do not apply in large lot residential zones.

- The County's Comprehensive Water Supply and Sewerage System Plan designates the RE-2 zone and non-clustered areas in the RE-1 zone as intended for individual septic systems. The Plan finds public sewer service appropriate for low density zones where the local master plan recommends clustered development.

- Applying the MPDU requirement to large lot zones would disperse affordable housing to new geographic areas of the County. However, by virtue of their low densities, large lot zones would only produce a modest number of new MPDUs and may offer unique challenges in achieving compatibility with surrounding development.

Major Recommendations:

- The Council should apply the MPDU requirement to properties in the RE-1, RE-2C, and RNC zones that are recommended for sewer service in a master plan and develop under a cluster option.

MINIMUM SUBDIVISION SIZE (Chapter 9)

Major Findings:

- The Zoning Ordinance includes MPDU development standards that provide more flexibility and options than are generally permitted under the base zone. Single family subdivisions of all sizes can take advantage of these standards.

- In most single family subdivisions, the MPDU requirement is fulfilled by constructing townhouses.

- If the minimum subdivision size had been reduced to 20 units five years ago, between 47 and 56 new MPDUs would have been produced. Had the reduction in subdivision size also guaranteed a bonus market rate unit, then between zero and 40 new MPDUs would have been produced over the five year period.

- As the County moves closer to build-out, large new single-family subdivisions will primarily locate in a few areas of the County. Large multi-family developments will be increasingly concentrated in central business districts and transit centers. In-fill development likely will become more prevalent than occurs today.

- There is no legal or policy requirement to guarantee bonus densities.

Major Recommendations:

- The County should reduce the minimum subdivision size to 20 units. In cases where the limited size of a property may present environmental or neighborhood compatibility challenges, the Planning Board could reduce or eliminate the MPDU requirement.

NUMBER OF MPDUs REQUIRED (Chapter 10)

Major Findings:

- Since 1989, over half of the approved site plans for developments with MPDUs were for development with no or extremely minimal density bonuses.

- Acreage, physical characteristics, zoning requirements, and land use policies influence the number of units produced at a given site. A developer may choose not to seek a density bonus to build a product that better responds to market preferences.

- The success of the MPDU program largely is a result of the balance achieved between the number of MPDUs required and the opportunity for developers to realize a reasonable profit.

Major Recommendations:

- The County should retain both the 12.5 percent minimum MPDU requirement and the existing bonus density schedule.

TYPE of UNITS REQUIRED (Chapter 11)

Major Findings:

- Demand is high for MPDUs, and units typically are sold or rented soon after a vacancy occurs.

- Approximately 70 to 80 percent of MPDU households include children.

- Nearly all single-family market rate units produced in the County include at least three bedrooms. In multi-family developments, the predominant practice is to build mostly one- or two-bedroom units.

- DHCA has approved buyout agreements that have allowed developers to produce multi-family MPDUs with fewer bedrooms than the law requires.

Major Recommendations:

- Single-family MPDUs should have a minimum of three bedrooms unless market rate units in the same development have fewer bedrooms.

- The County should retain the current standard that multi-family developments include efficiencies and one-bedroom units that are no greater than the respective proportion of the market rate units of those sizes.

- The County should discontinue the practice of signing buyout agreements that reduce the number of bedrooms in MPDUs.

MPDUs and the ECONOMICS of HIGH-RISE DEVELOPMENT (Chapter 12)

Major Findings:

- MPDU price controls have a greater net impact on high-rise development than on single family development because the cost of producing a high-rise unit cannot be adjusted to compensate fully for the reduced rental or sale income associated with an MPDU.

- High-rise development often involves high fixed costs. The economic viability of a high-rise project is related to the developer's ability to spread land and construction costs among the total number of units in the structure.

- DHCA has approved buyouts to address the economic challenges facing certain high-rise developments. Each of these developments was subject to sector plan height restrictions.

- The MPDU law limits buyouts to "exceptional cases" involving developments with high mandatory fees and does not authorize buyouts for any other purpose.

Major Recommendations:

- The County should address the economic challenges of high-rise development without resorting to buyouts.

- For height restricted high-rise buildings:

  - The Planning Board should prepare a Zoning Text Amendment to authorize unique MPDU development standards.

  - The Council should adopt a slightly lower MPDU requirement.

- If the Council wishes to consider increasing building heights to accommodate MPDUs, Staff recommends doing so through the master plan process.

- The Council should approve a regulation allowing the maximum rent for high rise MPDUs to exceed the maximum rent for garden apartments.

- The County should allow developers to provide additional affordable housing beyond what is required by the MPDU law as an offset to some or all amenity requirements.

BUYOUT CONDITIONS (Chapter 13)

Major Findings:

- The MPDU law limits buyouts to "exceptional cases" involving developments with high mandatory fees for bundled services. The MPDU law does not authorize the use of buyouts for any other purpose.

- DHCA's policy has been to approve buyout agreements for select projects that, in DHCA's view, would not be built without a reduction in the MPDU requirement. Given the County's overall housing shortage, DHCA uses buyouts to try to increase the supply of all types of housing.

- Since 2000, DHCA has approved buyout agreements to accept payment instead of producing more than 230 MPDUs.

- Some homeowner association or condominium fees cover the cost of recreational facilities that are reserved for the exclusive use of the community residents. The cost of these services and facilities do not necessarily have to be bundled into an indivisible package.

- DHCA has approved buyouts to assist non-high-rise projects in priority redevelopment areas. Several tools, other than buyouts, are available to support development in targeted areas including property tax abatements and grants and loans from Federal, State, and private sources.

Major Recommendations:

- The County should amend the MPDU law to allow buyouts only for elderly and special needs housing with costly indivisible service fees. For all other types of housing, the County should require unbundling of fees so that mandatory fees cover only the costs of essential common ownership maintenance and upkeep.

- The County should rely on incentives other than buyouts to promote development in priority redevelopment areas.

BUYOUT PAYMENT AMOUNT (Chapter 14)

Major Findings:

- The MPDU law requires that buyouts produce "significantly more" units than would have been built on site. The law does not define the term "significantly more," nor does it include any standard for measuring whether a buyout achieves this standard.

- DHCA approved eight buyout agreements from 2002 through 2003. In each case, the developer built some MPDUs on-site and made a payment to the Housing Initiative Fund for the required MPDUs not built on-site. Most agreements involved high-rise developments, with payments of $21,000 per unit for each MPDU not built.

- Based on current actual market rate and MPDU rents, one buyout approved in 2000 has a present value of about $133,000 per unit.

- Buyout payments to the Housing Initiative Funds do not increase the total amount earmarked for affordable housing.

Major Recommendations:

- To the extent buyouts are approved for future projects (other than for senior or special needs housing), buyout payment amounts should be linked to actual realized revenues.

- For senior and special needs housing, buyout payment amount should equal the full cost of providing a replacement unit and should not be based on any leveraging of resources.

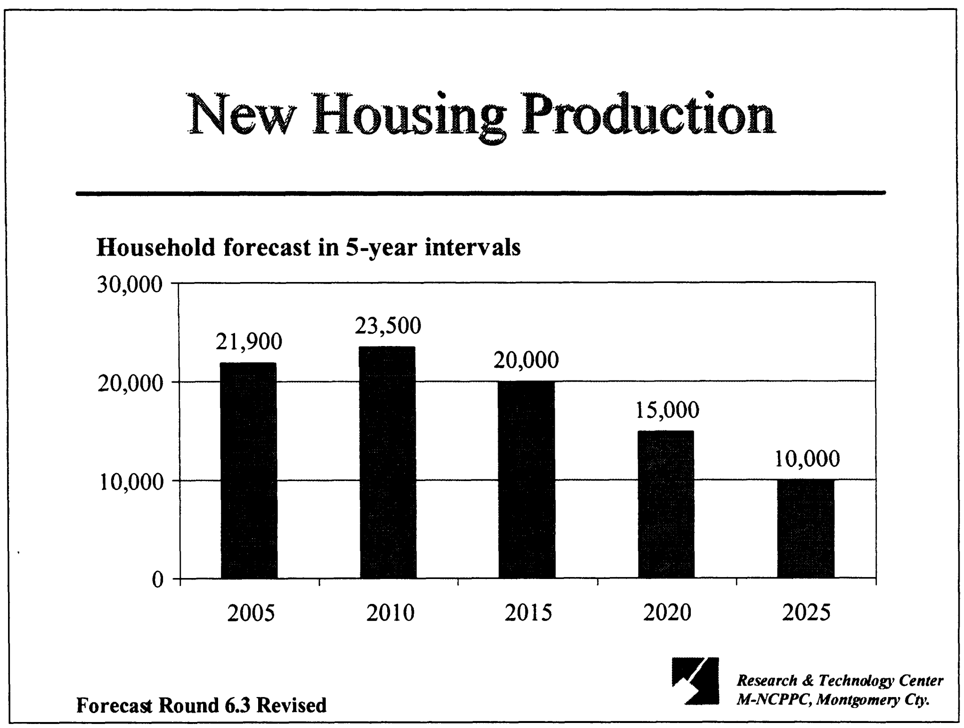
- The County should set up a separate account for buyout payments that does not reduce the annual General Fund contribution to the Housing Initiative Fund.

CHAPTER 2
GENERAL AND RECURRING THEMES

Certain central issues underlie the policy alternatives associated with various parts of the MPDU law. The themes discussed in this chapter recur in analyzing many policy trade-offs reviewed throughout this report.

1. ***The production of MPDUs is tied directly to the rate and location of housing development.*** By design, the MPDU program produces affordable housing units as a by-product of the development of new market rate housing. While certain policies may affect the production of MPDUs that occurs as a by-product of private development, it is the existence of private development itself that triggers the MPDU requirement. Thus, MPDU production is directly linked to the rate and location of development. As development patterns change in the County, MPDU production will change in a similar manner.

As the County approaches build out, new housing production is projected to steadily decrease. Planning staff forecasts that housing growth will slow as developable land becomes increasingly scarce.



As a result of a reduction in overall housing production, MPDU production likely will decrease proportionally. The future rate of MPDU production is unlikely to be sufficient to replace previously built MPDUs that become market rate units after their price controls expire.

2. ***Providing "workforce" housing is increasingly viewed as the primary objective of the MPDU program.*** When the MPDU law was enacted in 1973, the stated purpose of the program was to assist certain demographic groups including "young families, retired and elderly persons, single adults, female heads of households, and minority households." At that time, the Council also cited the need to provide housing for government employees and service personnel to justify creating the MPDU program. In recent discussions with various stakeholders, housing for moderate-income workers (of all demographic groups) emerged as the overriding benefit of the program.

3. ***The legal validity of the MPDU program does not depend on maximizing developer compensation.*** Some development attorneys have argued that the County's MPDU law would not withstand a constitutional challenge if developers are not guaranteed bonus densities or equivalent compensation on virtually a 1-to-1 basis for each MPDU they must include in their subdivisions. This conclusion is not legally sound. The MPDU program is a valid exercise of the County's police power to regulate housing development in the public interest. The issue of regulatory takings does not come into play because the relevant legislative actions – limits on the prices and rents that can be charged for some new housing units, and reserving them for eligible buyers and renters during priority marketing periods – have a substantial nexus to valid legislative purposes and have not been shown to deprive any developer of all economically viable use of any property. (Under applicable federal and Maryland caselaw, a simple reduction in potential revenue does not amount to a regulatory taking.) More importantly, these legal issues have never ripened, largely because (as the next paragraph points out) in practice developers have been well compensated for producing MPDUs through the flexible development standards as well the bonus densities.

4. ***The provision of flexible development standards as well as density bonuses preserves the program's "win-win" character.*** The County's MPDU program is widely cited as a national model because it produces affordable housing at no cost to the public sector and does not create economic hardship for property owners. Building industry representatives and academic articles frequently cite the program's density bonus as the primary factor in establishing a "win-win" situation in which the private sector willingly provides affordable housing for the community. The density bonus allows a developer to create MPDUs without diminishing the number of market rate units that may be built. Indeed, the bonus often permits the production of additional market rate units.

However, another factor, MPDU development standards, appears to be as important as density bonuses in maintaining the program's "win-win" character. The Zoning Ordinance contains MPDU development standards that provide more flexibility and options than would be permitted under the base zone without an MPDU requirement. The following three observations support the conclusion that the MPDU development standards provide substantial benefits which rival the density bonus in importance.

a) Since 1989, the Planning Board has approved 67 site plans for subdivisions with MPDUs. More than half of the approved site plans were for subdivisions with no (or extremely minimal) density bonuses (see chart on page 10 - 2). Developers of these projects took advantage of the flexibility provided by the MPDU development standards to accommodate MPDUs while still producing profitable market rate units.

b) A study of recent approved site plans that included little or no MPDU density bonuses reveals that these projects generally achieved actual densities up to 40 percent greater than similarly zoned non-MPDU subdivisions. While many factors influence achieved density, it appears that the flexibility of the MPDU development standards allows many subdivisions to accommodate additional units that might not have been generated under the normal zoning parameters.

c) Throughout the past two decades, developers of 16 subdivisions that were too small to be subject to the MPDU law have chosen to voluntarily build MPDUs with use of MPDU development standards but without receiving any density bonus.

5. *New challenges have emerged in implementing the MPDU program in urban and rural areas.* The MPDU program was designed when County land development was predominantly suburban in nature. Throughout the past three decades, the program has resulted in the creation of more than 11,000 MPDUs, almost all in suburban-scale single family detached, townhouse, and garden apartment zones. The number of units produced, as well as the general acceptance of the program, testifies that key elements of the law – set aside requirements, density bonuses, and flexible development standards – can be implemented successfully in suburban locations. Recently, issues have emerged regarding the implementation of the MPDU program in non-suburban settings, such as central business districts, transit centers, and large lot zones. For example, while the Zoning Ordinance allows flexibility in lot size, setback, and green space requirements for MPDU developments in most suburban zones, it includes no similar flexibility for high-rise residential development. In reviewing policy options, the Council should consider how well current provisions of the MPDU law apply in more urban and rural areas.

6. *The goal of geographically dispersing MPDUs sometimes conflicts with the goal of maximizing affordable housing production.* One of the central goals of the MPDU program is to disperse affordable housing throughout the County. Much of the public's support for the MPDU program stems from its perception that all large new residential development, regardless of its location, will contain its share of affordable housing. Because the cost of housing differs by location, the resources needed to produce a single MPDU in one place may be significantly greater than the cost of a similar unit constructed elsewhere in the County. For example, the cost of producing one high-rise MPDU may greatly exceed the cost of an affordable unit in a single family or garden apartment community. This situation leads to a policy trade-off. On the one hand, directing a developer to provide all required MPDUs on site assures that affordable housing is co-located with other residential development in diverse areas of the County. On the other hand, for the cost of providing moderate income residents an opportunity to live in a luxury high-rise, the County might be able to build or buy a greater number of more affordable units elsewhere, possibly just a few blocks away. Several policy issues involve measuring the relative importance of geographic dispersal versus maximizing production.

7. ***The MPDU program is only one element of the County's strategy to address the affordable housing shortage.*** As documented in Chapter 4, housing prices have increased markedly in recent years. As a result, many households cannot afford the monthly rent or mortgage payments needed to live in the County. The MPDU program generates housing for moderate income households (up to $38,000 per year for an individual or $56,000 for a family of five). A great need exists for housing for households with significantly lower income levels. The MPDU program addresses only one segment of the housing affordability problem, and must be coupled with other programs to comprehensively address this issue.

CHAPTER 3
PURPOSE, GOALS, and HISTORY of the MPDU PROGRAM

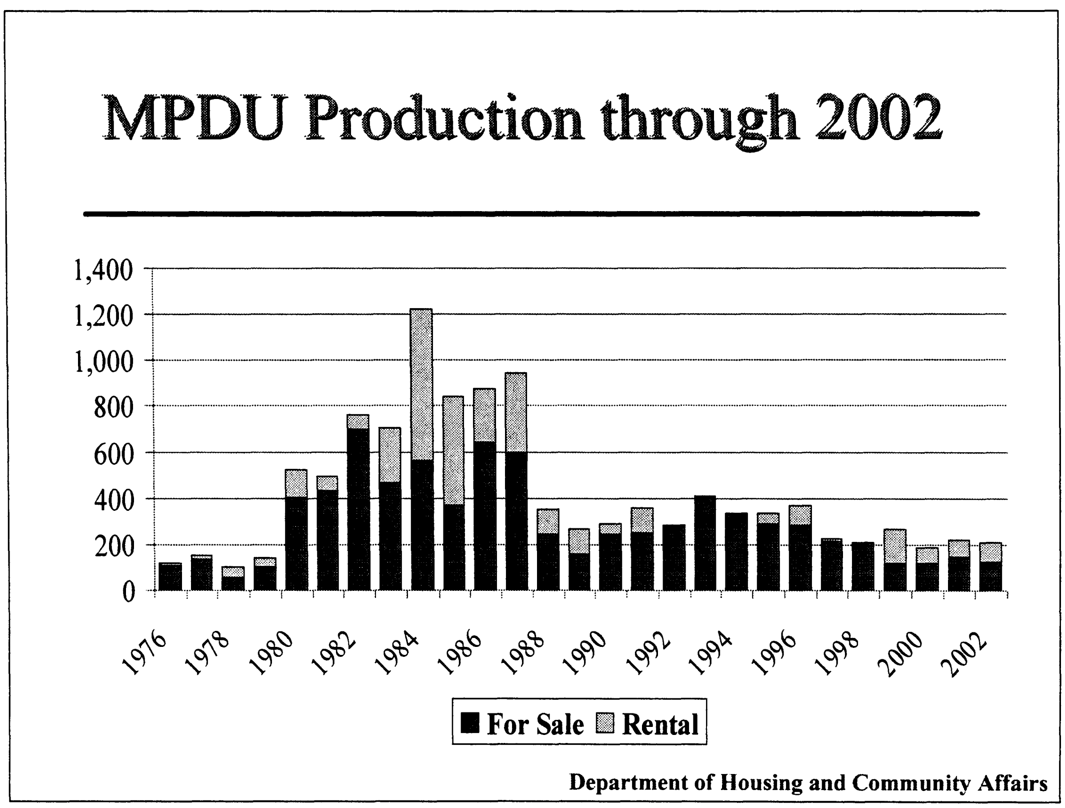
A. Inclusionary Zoning

The Montgomery County MPDU program was the first successfully implemented inclusionary zoning program in the country. Inclusionary zoning requires that a percentage of housing units in residential developments be made available for low- and moderate- income households. In exchange for building affordable housing, a residential developer is eligible to receive benefits, such as a density bonus or more flexible development standards. The purpose of inclusionary zoning is to routinely create affordable housing dispersed wherever new residential development occurs.

Nationwide, more than 125 communities have instituted inclusionary zoning programs. The communities range in size from the Town of Isleton, California with a population less than 1,000 to San Diego County, California with a population more than 1.2 million. A list of communities with inclusionary zoning programs appears on the following page.

B. Accomplishments of the MPDU Program

The County's MPDU program is widely recognized as the preeminent inclusionary zoning program in the country. During the 30 years since its inception, the County's MPDU program has produced more than 11,000 affordable units.



COMMUNITIES in the UNITED STATES with INCLUSIONARY ZONING PROGRAMS

Agoura Hills	CA	Isleton	CA	Rohnert Park	CA
Alameda County	CA	Laguna Beach	CA	Roseville	CA
Arlington	MA	Larkspur	CA	Sacramento	CA
Arroyo Grande	CA	Lexington	MA	Salinas	CA
Benicia	CA	Livermore	CA	San Anselmo	CA
Berkeley	CA	Lompoc	CA	San Benito County	CA
Boston	MA	Long Beach	CA	San Carlos	CA
Boulder	CO	Longmont	CO	San Clemente	CA
Brea	CA	Los Altos	CA	San Diego	CA
Brentwood	CA	Los Gatos	CA	San Francisco	CA
Brookline	MA	Loudoun County	VA	San Juan Bautista	CA
Burlington	VT	Mammoth Lakes	CA	San Juan Capistrano	CA
Calistoga	CA	Marin County	CA	San Leandro	CA
Cambridge	MA	Menlo Park	CA	San Luis Obispo	CA
Carlsbad	CA	Mill Valley	CA	San Marcos	CA
Chula Vista	CA	Monrovia	CA	San Mateo	CA
Clayton	CA	Monterey	CA	San Mateo County	CA
Contra Costa County	CA	Monterey County	CA	San Rafael	CA
Coronado	CA	Montgomery County	MD	Santa Barbara County	CA
Corte Madera	CA	Morgan Hill	CA	Santa Clara	CA
Cotati	CA	Morro Bay	CA	Santa Cruz	CA
Cupertino	CA	Napa County	CA	Santa Cruz County	CA
Daly City	CA	Nevada County	CA	Santa Fe	NM
Danville	CA	Newton	MA	Santa Monica	CA
Davis	CA	Novato	CA	Santa Rosa	CA
Del Mar	CA	Oceanside	CA	Sebastapol	CA
Denver	CO	Oxnard	CA	Solana Beach	CA
Dublin	CA	Palo Alto	CA	Somerville	MA
East Palo Alto	CA	Pasadena	CA	Sonoma	CA
Emeryville	CA	Patterson	CA	South San Francisco	CA
Encinitas	CA	Petaluma	CA	St John's County	FL
Fairfax	CA	Pismo Beach	CA	Sunnyvale	CA
Fairfax County	VA	Pleasant Hill	CA	Sutter County	CA
Frederick County	MD	Pleasanton	CA	Tallahassee	FL
Fremont	CA	Port Hueneme	CA	Tiburon	CA
Gonzales	CA	Portland	OR	Union City	CA
Half Moon Bay	CA	Portola Valley	CA	Vista	CA
Healdsburg	CA	Poway	CA	Watsonville	CA
Hercules	CA	Rancho Palos Verdes	CA	West Hollywood	CA
Hesperia	CA	Richmond	CA	Winters	CA
Holland	MI	Rio Vista	CA	Woodland	CA
Huntington Beach	CA	Ripon	CA	Yolo County	CA
Irvine	CA	Rockville	MD	Yountville	CA

Source: David Rusk

Note: Inclusionary zoning programs may exist in other communities.

From 1973 through 2002, communities with inclusionary zoning programs have produced a combined total of 38,500 affordable units.[1] No other program comes close to matching the productivity of the County's MPDU program. Thee County's program has produced 29 percent of all inclusionary zoning units in the entire country! The second most prolific inclusionary zoning program in the country in Irvine, California has produced fewer than 4,500 units since its inception in 1977. The MPDU program also has succeeded in dispersing affordable housing to every planning area in the County. The table below displays the number of MPDUs produced and the number currently under sales and rental price controls in each planning area.

Total and Currently Price Controlled MPDUs by Planning Area
1976 Through 2002

Planning Area	Total MPDUs	Percent Distribution of all MPDUs within the County	Current Price Controlled MPDUs: Price Controlled Privately Owned MPDUs*	HOC & Nonprofit Owned MPDUs	Total Price Controlled	Percent Distribution of Price Controlled MPDUs	Percent Price Controlled MPDUs of all Area Housing
	(A)	(B)	(C)	(D)	(E=C+D)	(F)	(G)
Aspen Hill	564	5.0%	53	122	175	4.5%	0.7%
Beth.-Chevy Chase	230	2.1%	25	12	37	0.9%	0.1%
Clarksburg	35	0.3%	31	4	35	0.9%	3.7%
Cloverly	277	2.5%	6	57	63	1.6%	1.1%
Damascus	242	2.2%	16	27	43	1.1%	1.5%
Darnestown	255	2.3%	35	44	79	2.0%	1.8%
Fairland	1,003	8.9%	65	84	149	3.8%	1.0%
Four Corners	50	0.4%	15	0	15	0.4%	0.1%
Gaithersburg	2,262	20.2%	311	351	662	16.9%	1.4%
Germantown	3,163	28.2%	1,060	344	1,404	35.9%	5.0%
Goshen	47	0.4%	0	11	11	0.3%	0.3%
Kens.- Wheaton	258	2.3%	13	36	49	1.3%	0.2%
North Bethesda	711	6.3%	265	51	316	8.1%	1.9%
Olney	776	6.9%	183	139	322	8.2%	2.8%
Potomac	395	3.5%	78	106	184	4.7%	1.1%
Rock Creek	23	0.2%	16	7	23	0.6%	0.6%
Seneca	12	0.1%	12	0	12	0.3%	1.7%
S. Spring/Takoma Pk	10	0.1%	10	0	0	0.0%	0.0%
Travilah	650	5.8%	132	122	254	6.5%	3.5%
White Oak	190	1.7%	14	28	42	1.1%	0.3%
Not Available	57		34		34		
Total	**11,210**	**100.0%**	**2,374**	**1,545**	**3,909**	**100.0%**	**1.2%**

*Total price controlled less HOC and nonprofit

Notes:

1) HOC owns other units that meet the MPDU requirement but were rented under other programs, such as subsidized bond funding.
2) Some HOC scattered site units that were purchased after the end of the MPDU control period are included.

Source: Montgomery County Planning Department, Research and Technology Center
Department of Housing and Community Affairs, May 2000. Updated by Sally Roman, Nov. 2003

[1] Source: David Rusk.

MPDUs represent only one portion of the County's supply of affordable housing. Areas such as Silver Spring and Wheaton were mostly built out before the MPDU law was enacted and therefore have relatively few MPDUs. Nonetheless, these areas host significant supplies of naturally occurring market rate affordable housing. These and other areas also host subsidized affordable housing provided by the Housing Opportunities Commission and other non-profit organizations.

C. Original Legislative Finding and Policy Goals

In first enacting the County's MPDU law in 1974, the County Council made a series of legislative findings related to the need to provide housing for residents with low and moderate incomes. The text of the MPDU law includes the following findings that explained why the County established an inclusionary zoning program.

> *(1) The County is experiencing a rapid increase in residents of or approaching retirement age, with consequent fixed or reduced incomes; young adults of modest means forming new households; government employees in moderate income ranges; and mercantile and service personnel needed to serve the expanding industrial base and population growth of the County;*
>
> *(2) A rising influx of residents into higher priced housing in the County with resultant demands for public utilities, governmental services, and retail and service businesses has created an increased need for housing for persons of low and moderate income who are employed in the stated capacities;*
>
> *(3) The supply of moderately priced housing was inadequate in the mid-1960's and has grown since then at a radically slower pace than the demand for such housing;*
>
> *(4) The inadequate supply of housing in the County for persons of low and moderate income results in large-scale commuting from outside the County to places of employment within the County, thereby overtaxing existing roads and transportation facilities, significantly contributing to air and noise pollution, and engendering greater than normal personnel turnover in the businesses, industry and public agencies of the County, all adversely affecting the health, safety and welfare of and resulting in an added financial burden on the citizens of the County;*
>
> *(5) A careful study of market demands shows that approximately one-third of the new labor force in the County for the foreseeable future will require moderately priced dwelling units;*
>
> *(6) Demographic analyses indicate that public policies which permit exclusively high-priced housing development discriminate against young families, retired and elderly persons, single adults, female heads of households, and minority households; and such policies produce the undesirable and unacceptable*

effects of exclusionary zoning, thus failing to implement the Montgomery County housing policy and the housing goal of the general plan for the County;

(7) Experience indicates that the continuing high level of demand for more luxurious housing, with a higher profit potential, discourages developers from offering a more diversified range of housing; and the production of moderately priced housing is further deterred by the high cost of land, materials, and labor;

(8) Actual production experience in the County indicates that if land costs can be reduced, houses of more modest size and fewer amenities can be built to be sold at a profit in view of the existing ready market for such housing;

(9) Every indication is that, given the proper incentive, the private sector is best equipped and possesses the necessary resources and expertise required to provide the type of moderately priced housing needed in the County;

(10) Rapid regional growth and a strong housing demand have combined to make land and construction costs very high and to have an effect on the used housing market by causing a rise in the prices of those units;

(11) In past years efforts have been made to encourage moderately priced housing construction through zoning incentives permitting greater density and through relaxation of some building and subdivision regulations. Very little moderately priced housing had resulted; and

(12) In some instances existing housing for persons of low and moderate income is substandard and overcrowded.

In originally enacting the MPDU law, the Council declared seven public policy goals:

(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 sizes;

(2) Provide for low- and moderate-income housing to meet existing and anticipated future employment needs in the County;

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

(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;

(5) Require that all subdivisions of 50 or more dwelling units include a minimum number of moderately priced units of varying sizes with regard to family needs, and encourage subdivisions with fewer than 50 units to do the same;[2]

(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; and

(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.

D. Legislative History of the MPDU Law

During the late 1960s and early 1970s, citizens groups and political leaders grew concerned that Montgomery County's housing market was becoming unbalanced, with most new housing marketed to high-income persons and too few housing options available for moderate-income residents. The reasons for the lack of affordable housing included: (1) a large increase in young families looking for housing; (2) controlled growth policies, which limit the pace at which undeveloped land may be subdivided into residential lots; (3) the failure of public infrastructure to keep pace with the demand for housing; and (4) the sale of luxury housing, with a higher profit potential, discouraged developers from offering a diversified range of housing. Housing prices had increased at a rate higher than general inflation because the demand for residential building lots greatly exceeded the supply.

In the early 1970s, housing advocacy groups, such as Suburban Maryland Fair Housing and the League of Women Voters, began to propose housing initiatives that required builders to supply a percentage of all units in new residential developments at prices affordable for low- and moderate-income households.

In 1971, the Council adopted two resolutions (Resolution 7-119 and 7-370), which formalized the Council's commitment to affordable housing. Later Council proposals and input from community activists, developers, and political leaders, resulted in the introduction in 1972 of Bill 3-72 which ultimately became Chapter 25A, the Moderately Priced Dwelling Unit (MPDU) law. The MPDU law was enacted the following year over the County Executive's veto, and took effect in 1974.

Bill 3-72 was intensely debated. County Executive Gleason vetoed the bill because he believed it was unconstitutional, constituted invasive public policy, and was too difficult to administer. As the Council considered this bill, four key questions emerged: (1) whether requiring developers to provide affordable housing units constituted a taking of property without

[2] A 2002 amendment to the MPDU law reduced the minimum subdivision size to 35 units.

compensation; (2) what the economic impact of affordable units would be on the value of other nearby homes; (3) if high-income home purchasers would move out of the County to other nearby jurisdictions to avoid living near affordable housing; and (4) whether providing bonus densities was appropriate because these densities could undermine land use considerations.

The final bill was the culmination of extensive study and months of negotiation. The Council made three important legislative findings that served as a guide for implementing the MPDU law: (1) moderately priced housing should be dispersed within the County, consistent with the General Plan and area Master Plans; (2) employees who work in the County should have the opportunity to live near their work; and, (3) housing should be provided for the County's young and elderly residents.

The Council avoided the taking of property without compensation issue by revising the original bill to provide bonus densities to developers who construct affordable housing. The MPDU program is believed to be the country's first mandatory inclusionary zoning law that specified a density bonus allowance for providing affordable housing. The density bonus was designed to provide some compensation to offset some of the lost revenue associated with building affordable units.

As the Council voted to override the Executive's veto, Councilmember Kramer summed up the sentiment of the Council: "We realize that we are testing a new approach to an ancient problem and, as many people resist change, some may be dubious about our MPDU legislation; however, they are a small minority as comments on this legislation have been generally optimistic. The entire State and, indeed, many communities across the country are watching our actions this morning."

As originally written, the MPDU law required any developer applying for subdivision approval, site plan approval, or building permits for construction of 50 or more dwelling units at one location was required to provide 15 percent of the units as MPDUs. Eligibility standards and requirements to build MPDUs were also established. The Montgomery County Housing Authority was given the option to purchase or lease up to one-third of all MPDUs constructed. Administration of the program was assigned to the Department of Housing. Land that was subdivided before the bill was enacted did not receive bonus densities, so these subdivisions were exempt from the MPDU requirement. The first MPDUs constructed under the program were offered for sale in 1976.

There have been a number of subsequent amendments to both the MPDU law and associated provisions of the Zoning Code. For example, in 1988 a committee composed of Planning Board staff, Housing Department staff, developers, and Councilmembers studied the program and recommended several substantive changes that were adopted in 1989. Some of the significant amendments made in the past 30 years have affected the number of MPDUs required, the size of the subdivision subject to MPDU requirements, the control period for sale and rental units, alternatives to and waivers from on-site MPDU construction, and a variety of zoning controls.

Number of MPDUs Required: As enacted in 1974, Chapter 25A provided that each residential development with more than 50 units must have at least 15 percent of the total units as MPDUs and receive a bonus density of 20 percent. In 1981, the law was amended to reduce the required number of MPDUs from 15 percent to 12.5 percent, with the bonus density remaining at 20 percent. In 1988, the law was further amended to insert a sliding scale related to the percent of MPDUs provided, and the maximum density bonus was increased to 22 percent for developments that included up to 15 percent MPDUs. In 2001, the Council amended the zoning law to decrease the minimum MPDU requirement in the Central Business District (CBD), Transit Station Residential (TSR), and Planned Development (PD) Zones providing for 28 or more units per acre to 12.5 percent, and allowed the density bonus in the TSR Zone to include market rate units as well as MPDUs. The amendment also permitted an MPDU density bonus in Optional Method development in CBD Zones.

Subdivision Size: MPDU requirements originally applied to each subdivision with 50 or more dwelling units at one location. In 2002, the law was amended to extend the MPDU requirement to each subdivision with 35 or more dwelling units, unless the Planning Board finds that a project could not achieve a bonus density of 20 percent or more at that location or that providing MPDUs would not allow compliance with applicable environmental standards or would significantly reduce neighborhood compatibility. The following year, the law was amended to clarify that developers are not prohibited from voluntarily building MPDUs and using the optional development standards in subdivisions with fewer than 35 dwelling units.

Control Periods: The original MPDU law created a five-year control period for both sale and rental units to help preserve the supply of affordable housing units and to prevent investor purchases. A ten-year control period was also considered; however, this length of time was viewed as a potential hardship on multi-family rental projects and purchasers looking to move into other housing types as their incomes increased.

In 1981, the MPDU law was amended to double the control period to ten years. The Council also considered an amendment that would have extended the control period to 99 years, but this amendment was viewed as too restrictive for property owners. The Council ultimately approved a ten-year control period for both sale and rental units.

In 1989, the MPDU law was amended to extend the control period for MPDU rentals to 20 years. The ten-year control period for rental units was not believed to offer a public benefit equal to the benefit provided by sale units. The purpose of this extension was to enhance the contribution of rental MPDUs to a level equivalent to for sale MPDUs.

In 2001, the MPDU law was amended to restart the price control period for MPDUs if a sale unit is resold during the original ten-year period. The goal of this amendment was to help maintain the availability of MPDUs that are sold during the initial control period.

Alternatives to Building MPDUs and Waivers: In 1974, the MPDU law was amended to include a waiver provision for the MPDU requirement, which could be granted by the Planning Board because of "exceptional topographical conditions or other extraordinary situations or conditions of specific parcels of land, and the strict application of the requirements would result in peculiar and unusual practical difficulties, or exceptional or undue hardship upon the applicant." These waivers were to be strictly limited. The MPDU law was also amended to provide that an applicant could transfer finished lots to the County instead of constructing MPDUs on site. This change was made to provide developers with flexibility from the mandatory MPDU construction requirements because some developers argued that they were unprepared to build housing units at lower costs.

In 1981, the waiver provision was further amended to clarify that waivers relate only to the number and location of MPDUs. In 1988, the process for granting waivers to the MPDU requirement was modified as it relates to unbuildable portions of land that are used in computing density. The change established that an applicant's inability to use the optional density bonus is not in itself grounds for waiving the MPDU requirements.

The MPDU law was also amended in 1988 to provide that a developer can make a payment to the Housing Initiative Fund (HIF) instead of building MPDUs on site. This alternative is limited to projects with costly mandatory fees (see Chapters 13 and 14 of this report). In addition, the Department of Housing and Community Affairs (DHCA) must determine that a cash contribution can achieve "significantly more" units or units that are more affordable than building the required number of MPDUs on site.

Zoning Legislation: The initial MPDU zoning legislation authorized an increase in density above the total number of dwelling units otherwise permissible and established optional method development standards to accommodate the construction of MPDUs in certain one-family residential zones. Later zoning legislation extended the density and optional development provisions to the Planned Development, Central Business District, Transit Station, and Multi-Family zones, as well as certain mixed use zones such as the RMX and MXPD Zones.

As it became evident that developers needed greater flexibility to comply with MPDU program requirements, additional revisions to the Zoning Ordinance were enacted. It was necessary to ease restrictions on minimum acreage and building coverage requirements for the MPDU density bonus to be achieved in certain zones. Revisions were made to address difficult site conditions to permit the construction of townhouses in certain one-family detached residential zones for projects that contain MPDUs. Site plan review procedures were simplified to eliminate certain one-family detached dwellings from site plan approval requirements, reduce minimum lot sizes, and otherwise reduce unit production costs.

In 1988, the maximum MPDU density bonus was increased from 20 percent to 22 percent to conform the Zoning Ordinance to the MPDU law. Revisions throughout the Zoning Ordinance were made to implement the new maximum density bonus for projects that include MPDUs.

Recent Council Attention to the MPDU Program: Additional zoning and related measures to increase the effectives of the MPDU program have been considered at several worksessions conducted by the Council's Planning, Housing, and Economic Development (PHED) Committee. The PHED Committee has been particularly concerned about the stagnation of MPDU production as the County gets closer to build out and the declining number of MPDUs retained by the program. The Committee initiated a study to examine the feasibility of extending the MPDU program to the County's large lot zones, which have a residential density of less than one dwelling unit per acre. The study resulted in the introduction of zoning legislation to extend the MPDU program to the RE-1, RE-2, RE-2C, and RNC zones.

As noted previously, another measure initiated by the PHED Committee to increase MPDU production was recently enacted. Bill 18-02 added smaller subdivisions to the program. As previously structured, only subdivisions with 50 or more dwelling units were subject to the MPDU requirements. Bill 18-02 extended the MPDU requirement to each subdivision with 35 or more dwelling units. It is expected that to achieve the maximum bonus density, townhouses will likely be the most prevalent unit type in these smaller subdivisions.

As a result of other PHED Committee initiatives, legislation was enacted to restart the control period for an MPDU if the unit is resold during the original ten-year period. Under Bill 31-01, if an MPDU unit that was initially offered for sale after March 1, 2002 resold, the unit must be treated as a new sale and a new control period begins on the date of the sale. A related proposal by the Committee to stabilize the number of MPDUs already in the program was to lengthen the resale control period from 10 to 15 years. The Planning Board did not recommend this change. In the final analysis, it was generally agreed that lengthening the resale period was not as critical as the passage of Bill 31-01, which provided some of the same benefits for the program; however, the Committee did not rule out studying this issue further.

A recurring housing problem considered by the PHED Committee has been the extra costs involved in building MPDUs in high-rise residential developments. The problem has been addressed to some extent by Bill 10-01 which lowered the MPDU requirement in the Central Business District, Transit Station Residential, and high density Planned Development Zones from 15 to 12.5 percent and increased the financial feasibility of providing MPDUs in high-rise buildings.

A detailed history of major amendments to the MPDU law appears in Appendix B.

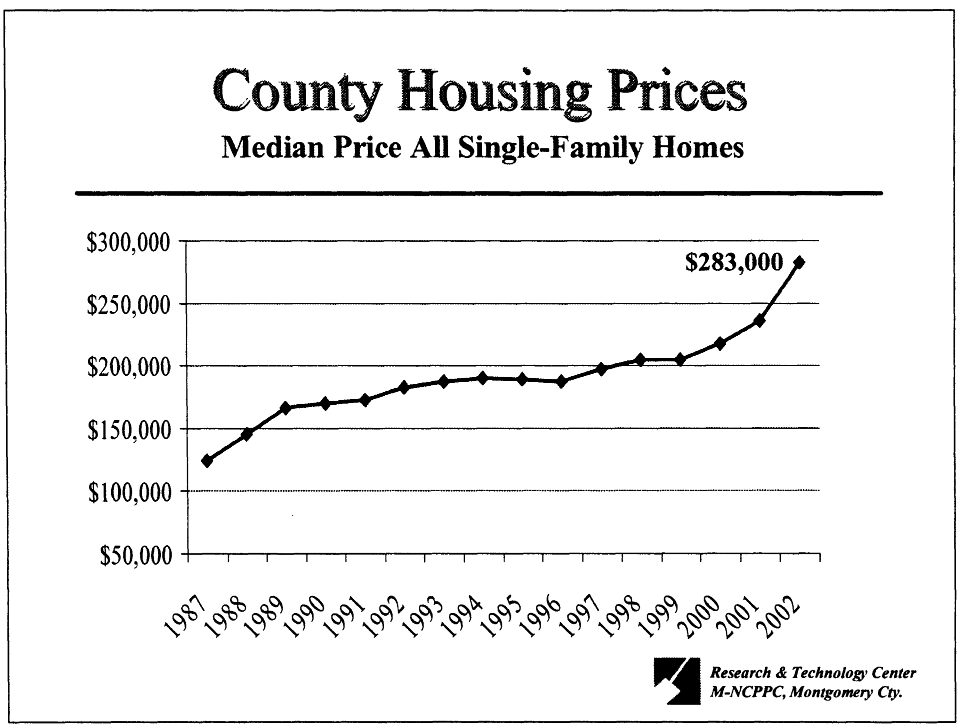
CHAPTER 4
CURRENT HOUSING MARKET CONDITIONS

A substantial need currently exists in the County for housing that moderate income households can afford. Recent housing price increases have significantly outpaced the rate of growth in household income. As housing prices increase at a more rapid rate than income, housing becomes affordable to fewer and fewer households in the County.

The median household income in Montgomery County was $78,647 in 2002. A moderate income household is defined in the County as a household earning 65 percent of area median income. In 2002, an annual household income for a family of four of just over $51,000 would be characterized as moderate. Demographic data compiled by Planning staff reveals that in 2002 about 30 percent of County households earned less than $50,000.

A. Sale Prices

Housing sale prices in the County have increased significantly in recent years.



The tables on the following page display median housing sale prices and median household incomes in the County for 2000 and 2002.

Median Housing Sale Prices in Montgomery County

	2000	2002	2 Yr. Increase
New Single Family Detached	$390,670	$481,286	23.2%
Existing Single Family Detached	$262,950	$340,000	29.3%
New Single Family Attached	$262,384	$277,978	5.9%
Existing Single Family Attached	$142,725	$185,000	29.6%

Median Income in Montgomery County

	2000	2002	2 Yr. Increase
Household Income	$74,930	$78,647	5.0%

Source: Dept. of Park and Planning, Research and Technology Center

Several standards may be used to measure the affordability of housing prices. One indicator sets the maximum affordable housing purchase price at three times annual household income (assuming interest rates in the neighborhood of six percent). Thus, a household earning the County median income of $78,647 likely could qualify for a loan to buy a home at a price up to $236,000. Consequently, a County household earning the median income likely could afford to buy an existing townhouse but would not qualify for most new or existing detached homes and most new townhouses.

Using the three-times-income standard, a moderate income household earning $51,000 per year would likely qualify to buy a home that costs up to $153,000, an amount significantly lower than the median price for all housing types. Thus, the moderate income household likely would not qualify to buy almost any home in the County as illustrated in the table below.

Household Income and the Ability to Purchase a Home (2002 Data)
(negative numbers indicate inability to afford a home)

	Household Earning Percent of Median Income	
	100%	65%
Annual Household Income	$78,647	$51,121
Maximum Affordable Home Price (assuming 3 times annual income)	$235,941	$153,362
Difference between Maximum Affordable Home Price and Median Price:		
New Single Family Detached	($245,345)	($327,924)
Existing Single Family Detached	($104,059)	($186,638)
New Single Family Attached	($42,037)	($124,616)
Existing Single Family Attached	$50,941	($31,638)

B. Rental Costs

The rental housing market in the County also has experienced rapid price increases. The Office of Landlord-Tenant Affairs and the Research and Technology Center of the Department of Park and Planning report that the average rental rate in the County grew by nearly 16 percent from 2000 to 2002, a pace over three times greater than the average increase in income during the same period.

A commonly used barometer to measure housing affordability is the percentage of monthly income spent on rent and related sheltering costs. The Federal Department Housing and Urban Development established 30 percent of income as its standard for housing affordability. A household that spends greater than 30 percent of its income on rent may compromise its ability to afford other essential goods and services.

The National Low Income Housing Coalition (NLIHC), in cooperation with the Maryland Department of Housing and Community Development, recently completed a study of rental housing affordability in Maryland. The October 2003 study concluded that the fair market rent for a two-bedroom apartment in the County is $1,218.

The NLIHC study found that the more than 101,000 households that rent homes in the County have a median income of $51,508. Applying the standard of 30 percent of income for housing costs, a household at the median income for renters could afford to spend no more than $15,452 per year on rent. This equates to a maximum affordable monthly rent of $1,288. While a median income household could afford the average two-bedroom rent of $1,218, most households earning less than median income could not afford to pay prevailing County rents. A household earning less than $48,720 would have to spend more than 30 percent of its income to afford the average County rent. Indeed, the NLIHC study found that nearly 46 percent of County renters would have to spend greater than 30 percent of its income to pay rent for a median priced two-bedroom apartment in the County.

C. Conclusion

Many moderate income households in the County cannot afford market priced housing. The goal of the MPDU program to create and retain affordable housing remains as pertinent today as it did when the program was initiated in 1973.

CHAPTER 5
PROGRAM ELIGIBILITY

POLICY QUESTION: *Who should be eligible to buy or rent an MPDU?*

A. Current Law

The MPDU law requires the County Executive to establish by regulation household eligibility standards for the MPDU program. Eligibility standards must consider MPDU sale and rental prices, financing costs, and family size. Under regulations approved by the Council in September 2002, a household is eligible for the MPDU program if the combined gross annual income of all wage earners in the household falls at or below the following limits:

Household Size	Maximum Annual Income
1	$38,000
2	$42,000
3	$47,000
4	$52,000
5	$56,000

The $52,000 maximum annual income for a four-person household is about 65 percent of area median income. The MPDU law does not define "moderate income" in relation to median income, and DHCA traditionally has used 65 percent as the standard for the MPDU program.

In April 2003, the Council approved a regulation that established procedures that would apply to an MPDU household in a rental unit whose income exceeds the eligibility limit. The regulation directs the property owner to take one of two actions if a tenant's income exceeds the eligibility limit by 20 percent. The property owner may require the tenant to vacate the MPDU within six months. Alternatively, the owner may let the tenant remain in the apartment and pay market rent. Under the latter option, the property owner must designate a substitute unit as an MPDU to replace the unit that was converted to market rate.

In addition to income requirements, the MPDU law limits program eligibility to households whose members have not owned a home during the previous five years. The MPDU law gives the DHCA Director the discretion to waive the five-year restriction "for good cause."

A sale MPDU must be occupied by the owner and must not be rented to a third party, except in rare temporary circumstances (such as a short term job transfer).

B. Policy Considerations

Income and other eligibility standards define the target population that will be served by the MPDU program.

1. How much does a "moderate income" household earn?

Standards differ regarding the definition of "moderate income." Under the County definition, a family of four could earn up to $52,000 (about 65 percent of area median income) and remain eligible for the MPDU program. Many federal programs (such as the Housing Choice Voucher program and the Community Development Block Grant program) define a "moderate income" household as one earning up to 80 percent of area median income. These Federal programs generally define "low income" households as those earning less than 50 percent of area median income. The County standard of 65 percent falls exactly at the mid-point between the 50 percent and 80 percent levels.

2. How do the MPDU income eligibility standards compare with the starting salaries of public service employees?

One of the objectives of the MPDU program is to offer housing opportunities for those who perform important jobs as part of the County's workforce but do not earn high salaries. As a point of reference, a starting County police officer earns $38,600. A starting teacher in Montgomery County Public Schools earns $38,700 (with a bachelor's degree) or $42,600 (with a master's degree).

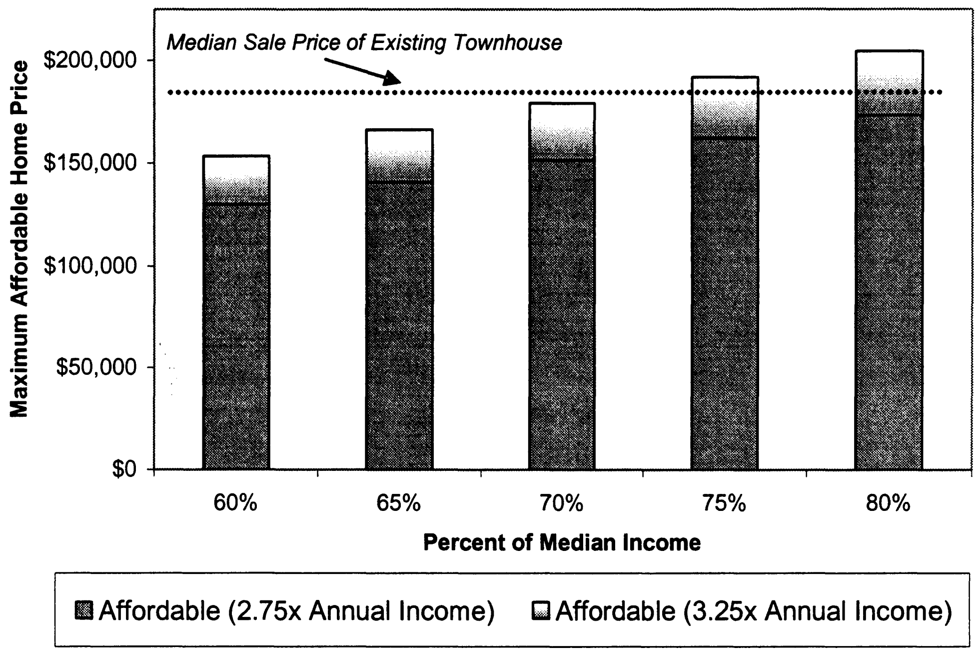
The income for a starting police officer or teacher who is single currently falls just above the MPDU eligibility limit. Starting salaries for police officers and teachers fell below the MPDU eligibility limits for single individuals when the Executive last submitted an income limit regulation in September 2002. Later increases in compensation raised police and teacher starting salaries above the MPDU income limit for a single person. A starting police officer or teacher with a family currently would qualify for the MPDU program, assuming the household has minimal other sources of income.

3. What price home can a moderate income household afford?

<u>Home Purchase</u>: As mentioned in Chapter 4, one way to measure housing affordability is to compare housing prices with household income. While many factors have an effect on housing affordability, many households can afford to buy a home that costs up to three times its annual household income. Using this standard, a moderate income household earning $51,000 per year (65 percent of median income) would likely qualify to buy a home that costs up to $153,000, which is $32,000 below the median price for an existing townhouse in the County and $187,000 below the median price for an existing detached home. Thus, a moderate income household likely would not qualify to buy any home in the County, with the possible exception of a few townhouses that sell well below the median price.

The chart below illustrates the price of a home that a household earning between 60 percent and 80 percent of area median income can afford. For the purpose of this calculation, home affordability is shown as a range from 2.75 to 3.25 times annual household income. This multiplier is inversely related to mortgage interest rates.

Housing Affordability by Percent of Median Income

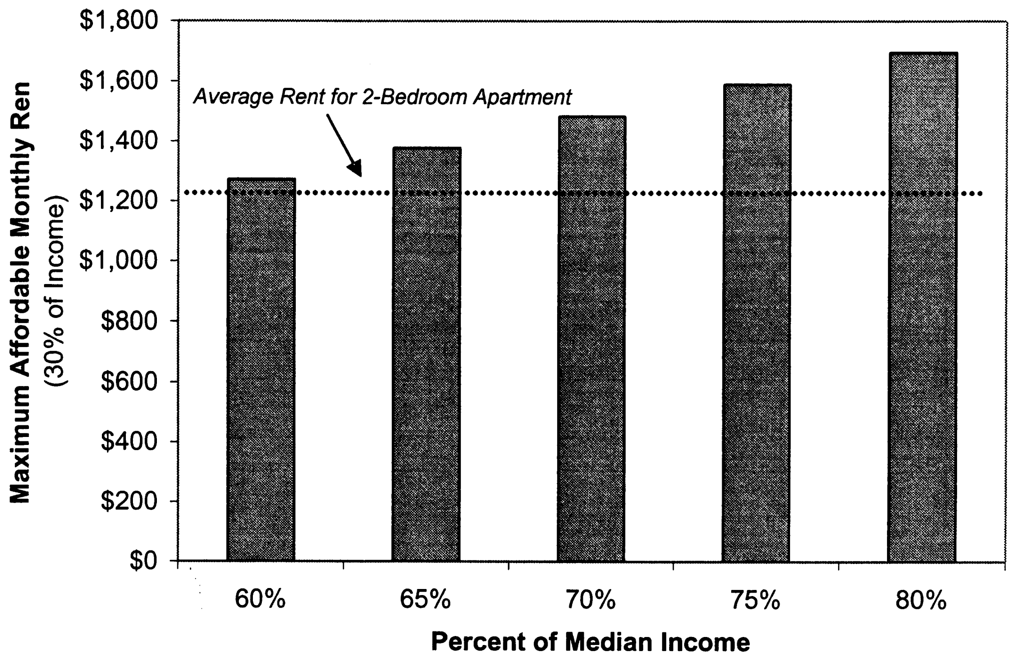


This chart reveals that households earning between 60 and 70 percent of median income are unlikely to be able to afford most existing townhouses. Under certain economic conditions (such as low interest rates), households earning 75 to 80 percent of median income would be able to afford an existing townhouse in the County.

Home Rental: The National Low Income Housing Coalition (NLIHC), in cooperation with the Maryland Department of Housing and Community Development, recently completed a study of rental housing affordability in Maryland. This October 2003 study concluded that the fair market rent for a two-bedroom apartment in the County is $1,218.

The Federal Department Housing and Urban Development has set 30 percent of income as a standard for housing affordability. Based on the data in the NLIHC report, the chart on the following page illustrates the monthly rent that a household earning between 60 and 80 percent of area median income can afford.

Rental Housing Affordability by Percent of Median Income



The NLICH report shows that a household earning as little as 60 percent of median income is likely to be able to afford the average rent for a two-bedroom apartment. However, the NLIHC study found that renters in the County have a median income almost 40 percent lower than the median income for all County households. The NLIHC study also found that nearly 46 percent of County renters would have to spend more than 30 percent of their income to pay the rent for an average priced two-bedroom apartment in the County.

4. *What are the income eligibility standards in other jurisdictions with inclusionary zoning requirements?*

The Montgomery County MPDU program serves households earning below 65 percent of area median income (AMI). Cambridge, Massachusetts and Santa Fe, New Mexico similarly set income eligibility at 65 percent of AMI. Most inclusionary zoning programs in the country serve households earning a higher percentage of AMI. The Fairfax County, Virginia program serves households earning up to 70 percent of AMI. San Diego, California; Boulder, Colorado; and Portland, Oregon each set income eligibility at 80 percent of AMI. Some communities target their inclusionary zoning programs to households that earn amounts greater than AMI. For example, households earning between 80 percent and 120 percent of AMI are eligible for the program in Boston, Massachusetts.

Several communities have established different eligibility levels for rental and sale units. Denver, Colorado allows households up to 65 percent of AMI to qualify for rental units while households with incomes up to 80 percent of AMI may qualify to buy price controlled homes. Many California communities employ multiple income eligibility levels. For example, Berkeley has three sub-components of its inclusionary zoning program. Berkeley reserves a portion of price controlled units for households below 50 percent of AMI, another portion for households below 80 percent of AMI, and a third portion for households earning up to 120 percent of AMI.[1]

C. Policy Alternatives

Staff has identified five policy alternatives for the Council to consider. The final option may be combined with any of the alternatives.

Alternative Choices

1. *Retain current eligibility standards:* The Council could confirm the existing MPDU eligibility standards.

2. *Raise the income eligibility standards:* The Council could raise the income eligibility standards above the current level of 65 percent of AMI to 70, 75, or 80 percent of AMI to increase the number of households eligible for the MPDU program.

3. *Lower the income eligibility standards:* The Council could reduce the income eligibility standard below the current level of 65 percent of AMI. The Council could lower the income eligibility standard to 50 or 60 percent of AMI if it sought to target the program for more needy households.

4. *Establish tiered income eligibility to distinguish between rental and sale units:* The Council could adopt separate income eligibility limits for rental and sale units. The Council could set income eligibility for rental units at a level below that for sale units.

5. *Establish tiered income eligibility based on a unit's cost of production:* The Council could adopt two tiers of income eligibility based on the cost to produce a given housing unit. For example, the Council could retain the current standard of 65 percent of AMI for most units but set an income limit of 75 percent of AMI for high cost (such as high-rise or large lot) units. High cost units could also rent or sell at higher rates than standard MPDUs.

Additional Option

A. *Mandate annual updating of income limits:* The MPDU law does not specify how frequently DHCA must update the income limits. The Council could amend the law to require DHCA to annually update the income limit regulation.

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[1] Source: David Rusk.

D. Council Staff Recommendations

Staff recommends Alternative 4: establish separate income eligibility levels for rental and sale units. Staff suggests that the rental eligibility level be reduced to 60 percent of AMI. While Staff finds that current market conditions warrant raising the eligibility level for sale units above 65 percent of AMI, we recommend deferring this action until the MPDU waiting list shortens. Staff further recommends that the law require DHCA to annually update the MPDU income limits.

The housing affordability data in this chapter show that buying a home is out of the reach of most households earning 65 percent of AMI. However, households at this income level do have some opportunity to find affordable rental housing. Staff believes that income eligibility for the MPDU program should be calibrated as much as possible to serve those households that generally cannot afford market rate housing. The data suggest that households even at 70 percent of AMI cannot afford to buy a home at current prices. Conversely, among renters, households below 60 percent of AMI have the greatest need for assistance.

Staff recommends that the Council modify the law to allow separate income eligibility limits for rental and sale MPDUs. Staff suggests reducing the income eligibility limit to 60 percent of AMI for garden apartments to meet the needs of those who cannot afford rental housing. As discussed later in this report, the economics of high rise construction warrant higher rent payments than for other types of rental housing. **Staff recommends retaining the eligibility limit for high rise rentals at 65 percent of AMI (or slightly higher, see Chapter 12).**

Theoretically, the County should set the income limit for sale MPDUs above 65 percent to serve additional households that cannot afford to buy a home. However, Staff notes that the current application pool for MPDU purchases is about nine times greater than the number of MPDUs offered for sale each year. Raising the income limit today would merely result in increasing the number of households competing for the same limited supply of homes. **Staff believes that the County should retain the income limit at 65 percent of AMI for the indefinite future.** If the gap between the size of the applicant pool and the number of MPDUs offered for sale decreases in the future, then the County should review current income and housing cost data and consider raising the level above 65 percent.

As evidenced by the example of starting salaries for County teachers and police officers, income levels may change sufficiently from year to year to alter a household's MPDU eligibility status. Moreover, recent trends in housing prices (see Chapter 4) suggest that the affordability of housing may vary significantly during a 12-month period. The current MPDU income eligibility standards were approved in September 2002. **Staff recommends that the Council amend the MPDU law to require DHCA to annually update the income limit regulation, based on current income and housing cost data.**

CHAPTER 6
SALE CONTROL PERIOD

POLICY QUESTION: How long should price controls apply to sale MPDUs?

A. Current Law

The MPDU law establishes a control period during which sale units are subject to price controls. During the control period, an owner must not sell an MPDU at a price higher than the maximum price set by DHCA. The MPDU law sets the control period at ten years for sale units. The Council originally adopted the MPDU law with a five-year sale control period. In 1981, the Council extended the control period to ten years.

In 1991, the Council approved Executive Regulation 35-90, which adopted a formula for setting the maximum price for the initial sale of an MPDU. Based on this regulation, DHCA develops and periodically updates pricing standards to set the initial sale price for MPDUs. Initial MPDU sale prices vary depending on the type of unit, number of bedrooms, number of bathrooms, and other features of the unit.

A unit must not be resold within the control period for an amount greater than the original purchase price adjusted for inflation, the value of improvements, closing costs, and any sales commission. Any MPDU offered for resale during the control period must first be offered to DHCA and HOC and then to households on the MPDU eligibility list. Resale of a unit before the end of the original control period restarts a new ten-year control period.

An owner who sells an MPDU after the end of the control period must pay the Housing Initiative Fund half of the difference between the fair market resale price and the original purchase price adjusted for inflation, the value of improvements, and any sales commission. The MPDU law specifies that the seller retains at least $10,000 of the difference. DHCA and HOC may buy a unit the first time it is sold after the control period and may resell the unit to an MPDU eligible buyer.

B. Policy Considerations

The length of the MPDU control period is intended to strike a balance between the goals of preserving units as affordable and allowing the property owner to realize some appreciation from the property.

1. *How many sale MPDUs are now under price control? Is the supply of sale MPDUs increasing or decreasing?*

At the close of 2002, about 2,200 sale MPDUs were under price control in the County. The number of sale MPDUs peaked at more than 4,300 in 1990. The County experienced a steady decline in the supply of sale MPDUs during the 1990s, a trend that has continued to the present. The decline in the supply of sale MPDUs reflects the number of existing units that leave price control in excess of the number of new units produced. From 1980 through 1996, an average of 392 new sale MPDUs were produced each year. In contrast, MPDU production fell to an average of 158 sale units a year from 1997 through 2002.

A graph displaying the annual changes in the supply of sale MPDUs appears on the following page. Whether the overall supply of sale MPDUs rises or declines in the future depends on the rate of production and the length of the control period. As the County moves closer to buildout, MPDU production necessarily will decline as the rate of overall development slows.

2. *What policies and practices retain sale MPDUs as affordable housing beyond ten years?*

Restart of Control Period: Last year, the Council amended the MPDU law to restart the ten-year price control period for units resold before the end of the original control period. This policy should have a significant effect on the duration that MPDUs remain under price controls. In 2003, the average age of a privately-owned price controlled MPDUs put up for resale was six years. Thus, on average, these resold units will remain under price control for a minimum of 16 years – six years before the resale and an additional ten years after the resale. The effective control period for resold units could extend for a greater duration if multiple successive owners each choose to sell after owning the unit for fewer than ten years.

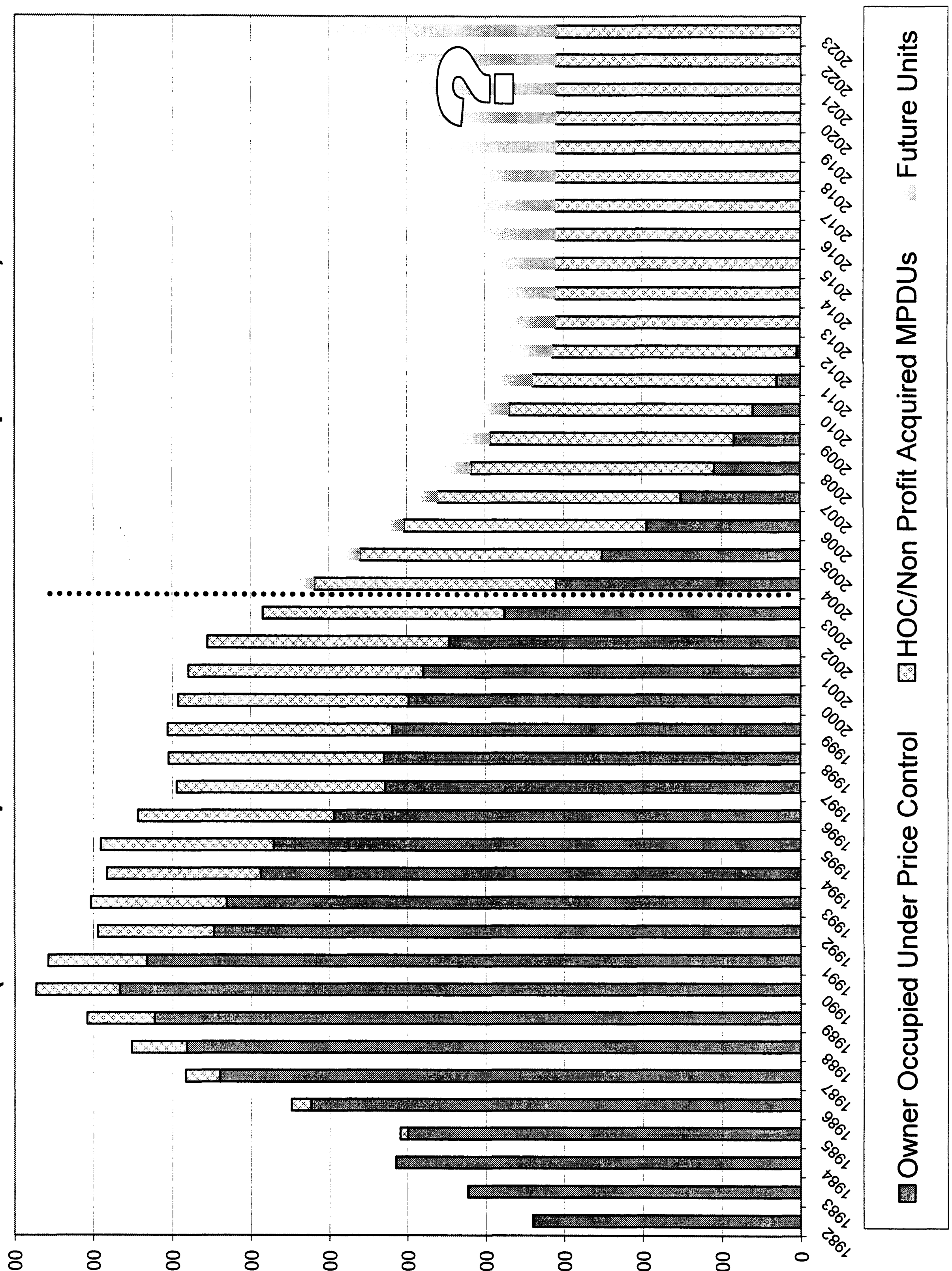
Non-Profit Acquisition: The Housing Opportunities Commission (HOC) and other non-profit entities may purchase an MPDU at its initial sale or at resale (either during or after price control). The law allows HOC or DHCA to acquire up to one-third of MPDUs and caps the combined total amount of units acquired by all government and non-profit entities at 40 percent of all MPDUs. Historically, the provision has been interpreted to limit government and non-profit MPDU acquisition to the stated percentages within a subdivision rather than within the County as a whole.

Through 2002, HOC and other non-profits acquired a total of 1,545 MPDUs. HOC and other non-profits generally rent these units to families below the MPDU income eligibility level. Thus, once HOC acquires a former MPDU, the length of the control period becomes moot and the unit remains affordable for however long the non-profit owns the property.

3. *What effect would modifying the MPDU sale control period have on the supply of affordable housing and on the economic well-being of MPDU owners?*

The MPDU law requires the owner of a sale unit to live in the home. Resale of an MPDU gives an owner an opportunity to improve his or her economic condition by realizing the equity invested in the home and (for sales after the control period) any appreciation in its sale price. The owner of a sale unit benefits from the expiration of the control period since the house may command a higher sale price (with the owner keeping half of the increased value).

Supply of Sale MPDUs Under Price Control
(Owner Occupied and HOC/Non Profit Acquired Units)



Expiration of the control period may have a downside for some MPDU owners. Removal of price controls may result in a higher property tax burden on the homeowner. A household that once qualified for an MPDU may have difficulty paying higher property taxes if its household income has not risen above MPDU eligible levels.

Expiration of price controls may remove a unit from the County's supply of affordable housing. Whether or not a post-control unit remains affordable is a function of the size, type, and location of the unit as well as prevailing market conditions.

4. How do recent post-control resale prices compare to current controlled prices?

Expiration of the control period lets the owner sell the unit at whatever price a buyer is willing to pay. The table below displays the average prices of post control MPDUs sold in 2002.

2002 MPDU Resale Prices
Post Control Period Sales

	Number	Avg. Sale Price
Garden Condominium	15	$117,900
Townhouse	11	$151,600
Duplex	2	$185,000
Single Family Detached	1	$179,000

Source: Department of Park and Planning

MPDUs sold after the control period expired remained more affordable than similar units in the County. For example, the median sales price for used townhouses in 2002 was $185,000, 22 percent higher than the average post-control MPDU townhouse resale price of $151,600. Nonetheless, expiration of the control period appears to result in a significant increase in MPDU sale prices. Post-control period MPDUs generally command higher prices than would have been realized under price controls. The table below shows the average asking price for MPDUs sold in 2003.

2003 MPDU Resale Prices
Price Controlled Sales

	Number	Avg. Sale Price
Garden Condominium	4	$86,300
Townhouse	13	$106,800

Derived from DHCA records

Comparing post-control sales with controlled sales reveals that townhouses built as MPDUs but sold at market rate commanded prices about 42 percent higher than prices for townhouses still under MPDU controls. Post-control garden condominiums sold at prices about 37 percent higher than controlled units of the same type. This analysis is based on a relatively small number of units sold, and so the actual relationship between controlled and non-controlled

MPDU prices may differ somewhat from the percentages cited above.[1] Nonetheless, the data demonstrates that removal of price controls results in a significant increase in MPDU prices (even though these units remain less expensive than units produced for market rate sale).

5. *How much should an MPDU homeowner benefit from increases in home value?*

The current law allows MPDU owners who stay in their unit more than ten years to build wealth both from their equity investment and from increases in their home's value. However, the law also requires each MPDU owner to share any home value windfall with the County. An owner who sells an MPDU after price controls have expired must pay the Housing Initiative Fund half of the difference between the resale price and the original purchase price, adjusted for inflation, the value of improvements, and any sales commission. The County's half of the windfall value provides funds for different types of affordable housing projects supported through the Housing Initiative Fund. The current policy strikes a balance between promoting personal economic growth for MPDU buyers and returning profits to the community to assist those who still need affordable housing.

The goal of letting moderate income households build assets through MPDU ownership is predicated on the assumption that home ownership is the primary means for these households to accumulate wealth. This assumption may be true for a household with wage earner(s) that have continuing limited income potential. Other households may experience significant growth in income after qualifying for an MPDU. While all MPDU buyers must be income-eligible at the time of purchase, no income test is applied when a unit is resold. The same windfall distribution rules apply no matter what the household income when the unit is resold.

6. *What sale rental control periods apply in other jurisdictions with inclusionary zoning programs?*

The County's MPDU program has the shortest sale control period of any major inclusionary zoning program in the country. The next shortest sale control periods among major programs exist in Denver, Colorado and Fairfax, Virginia, with 15 year price controls, and Boston, Massachusetts and Santa Fe, New Mexico with 20 year sale controls.

The most common sale control period is 30 years, which is the period required by the City of Rockville. The cities of San Diego, California and Portland, Oregon have rental control periods between 50 and 60 years. Burlington, Vermont has adopted a 99 year sale control period. In Boulder, Colorado and Cambridge, Massachusetts, sale controls continue in perpetuity.[2]

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[1] This analysis compares 2002 market prices against 2003 controlled prices. A comparison using 2003 market prices likely would reveal even higher post-control resale prices.

[2] Source: David Rusk.

C. Policy Alternatives

In addressing the duration of the sale control period, the Council should consider two competing policy goals – preserving affordable units and allowing a home owner to build wealth. Extending the sales control period clearly preserves units as affordable for moderate income families. However, extended price controls also prevent an MPDU owner from maximizing his or her profit from the sale of the property. Staff has identified the following policy options for the Council to consider. The first three choices represent alternatives from which only one may be selected. The next three options may be combined with any of the alternatives.

Alternative Choices

1. *Retain current control period:* The Council may decide that the current sale control period achieves the proper balance between preserving affordable units and providing economic benefit to property owners, and could retain the ten-year price controls.

2. *Extend the control period:* The Council could extend the control period for sale units as one way to preserve the stock of future MPDUs for a longer duration. Possible lengths for the sale control period include 20, 30, 40, 50, or 99 years.

3. *Make the control period permanent:* The Council could extend the control period for sale units in perpetuity as a means of preserving a permanent stock of MPDUs.

Additional Options

A. *Create a "home equity trust fund":* The County could create a "home equity trust fund" that would give MPDU owners an opportunity to build wealth through home ownership even with an extended or permanent control period. The "home equity trust fund" would provide a cash benefit to individuals who sell their MPDU at a controlled price after a designated period of ownership. When an MPDU owner sells the unit at a controlled price, the seller would receive a lump sum distribution from the trust fund based on a formula linked to the market rate value of the unit at the time of sale. This approach is intended to provide an MPDU owner an opportunity to build wealth while retaining price controls for an extended period.

B. *Impose an income eligibility test for windfall benefits:* The Council could impose an income eligibility test for receipt of windfall benefits from the sale of an MPDU. The income test could reduce or eliminate the windfall received by MPDU owners who experienced a significant increase in household income, and would apply either at the time of a post control period sale or at the time of a distribution from the home equity trust fund.

C. *Encourage HOC and non-profit to buy MPDUs:* The County could encourage HOC and other non-profits to buy MPDUs as a mean of preserving a portion of the MPDU stock as affordable (either as resold MPDUs with permanent price controls or as rental units for

MPDU or lower income levels). Non-profit acquisition of MPDUs might occur either during or after price controls.

D. Council Staff Recommendations

Staff recommends Alternative 2: extend the sale control period to 99 years <u>in combination with</u> Option A, create an MPDU Preservation Fund. This strategy would preserve the MPU stock while giving MPDU owners an opportunity to build wealth.

Staff recommends that DHCA begin to compile data on the annual earnings of MPDU seller to see if an income test on windfall benefits is warranted. Staff also encourages HOC and non-profits to acquire MPDUs within the concentration limits stated in the law.

Staff sought a means to preserve MPDUs at controlled prices while also giving each MPDU owner the opportunity to profit from the sale of his or her property. **Staff believes that achieving both objectives is feasible by combining an extended control period with the creation of an equity trust fund to help MPDU owners build wealth from the increased value of their home. Staff recommends extending the control period to 99 years for newly built sale MPDUs.** A 99-year control period roughly corresponds to the useful life of a home. Under the extended control period, the County would not restart the price control clock when a unit is sold.

Staff recommends extending the sale control period only in conjunction with the creation of a home equity trust fund. This fund (which could be called the "MPDU Preservation Fund") would provide a lump sum cash payment to MPDU owners who sell their homes at a controlled price after a designated period of ownership. The lump sum payment could be based on a formula linked to the change in value of the home. As is the case today, the payment amount would equal 50 percent of the measured increase in home value. Indices that could be used to measure the change in home value include assessments of comparable homes, the increase in the median cost of a similar type of home, or the appraised value of the particular home. Similar to current policy, an MPDU owner would be eligible to receive a payment from the MDPU Preservation Fund after owning the home for ten years.

Because control period restrictions are terms of the sales contract, it would be legally difficult to apply an extended control period to MPDUs that already have been sold. However, the MDPU Preservation Fund may be used to encourage voluntary sales of existing post-control period MPDUs at controlled prices by offering sellers a payment similar to the increase in the appreciated value of their home.

A trust fund would require capitalization. Staff suggests that the County could designate a part of the County's annual transfer to the Housing Initiative Fund (HIF) to capitalize the MDPU Preservation Fund. An annual contribution between $1,000,000 and $1,500,000 from HIF to the MDPU Preservation Fund should be sufficient to fund home owner payments and keep the fund solvent for decades. The suggested annual contribution represents between six and nine percent of the $16.1 million annual commitment that the County has made to HIF. If at any time, the County cannot maintain sufficient resources in the MDPU Preservation Fund to make payments, then the sale control period would revert to ten years and MPDU owners would sell their homes at market rate after the price controls expire.

The County also could explore the possibility of imposing an income test at the time of MPDU resale. The purpose of this test would be to withhold a portion or the entire windfall from increased home value for households that were once moderate income but have become significantly wealthier while living in the MPDU. To date, DHCA has had no reason to collect data on the incomes of those who sell MPDUs. As such, there is no way of knowing what percentage of MPDU sellers has achieved a marked increase in household income.

Staff recommends that DHCA begin to collect data on the incomes of MPDU sellers. If this data reveal that a significant percentage of sellers have enjoyed a large increase in income, then the Council may consider imposing an income test for receipt of windfall benefits from the sale of an MPDU. The income test could reduce or eliminate the windfall received by MPDU owners who have experienced a large increase in household income and could apply at the time of either a post control period sale or at the time of a distribution from the MPDU Preservation Fund. The income test would apply only to the appreciated value of the home and would not diminish the home owner's ability to recover the equity invested in the home.

Finally, Staff encourages HOC and other non-profit groups to purchase MPDUs as a mean of maintaining a supply of housing that may serve households at income levels too low to qualify for the MPDU program. Indeed, extension of the sale control period may allow non-profits to acquire units over ten years of age that may have been too expensive at market rates. Staff supports non-profit acquisition of MPDUs within the concentration limits currently established in the law. Staff does not recommend modifying the law to allow non-profits to acquire a higher percentage of homes in a neighborhood.

CHAPTER 7
RENTAL CONTROL PERIOD

POLICY QUESTION: How long should rents be controlled for MPDUs?

A. Current Law

The MPDU law establishes a control period in which rental units are subject to maximum rent limits. For the first 20 years after initial rental, a MPDU must not rent at an amount greater than that established through regulation. The Council originally adopted the MPDU law with a five-year rental control period. The Council extended the control period for rental units to ten years in 1981. In 1989, the Council extended this control period to 20 years.

In April 2003, the Council approved Executive Regulation 11-02 which tied maximum MPDU rents to the program's eligibility income limits. The regulation uses a formula that converts income limits for different family sizes into maximum rents based on a standard of 1.5 persons per bedroom and an assumption that tenants should pay 25 percent of their annual income on rent (exclusive of utilities). The formula in Executive Regulation 11-02 AM currently produces the following maximum monthly rents for MPDU garden apartments:

Efficiency	$790 / month	Two Bedrooms	$980 / month
One Bedroom	$835 / month	Three Bedrooms	$1,125 / month

These rent limits are based on current MPDU income limits and will change automatically with an adjustment to the approved income limits. DHCA is working to develop a regulation establishing maximum rents for MPDUs in high-rise buildings. DHCA expects the Executive to submit this regulation to the Council in early 2004.

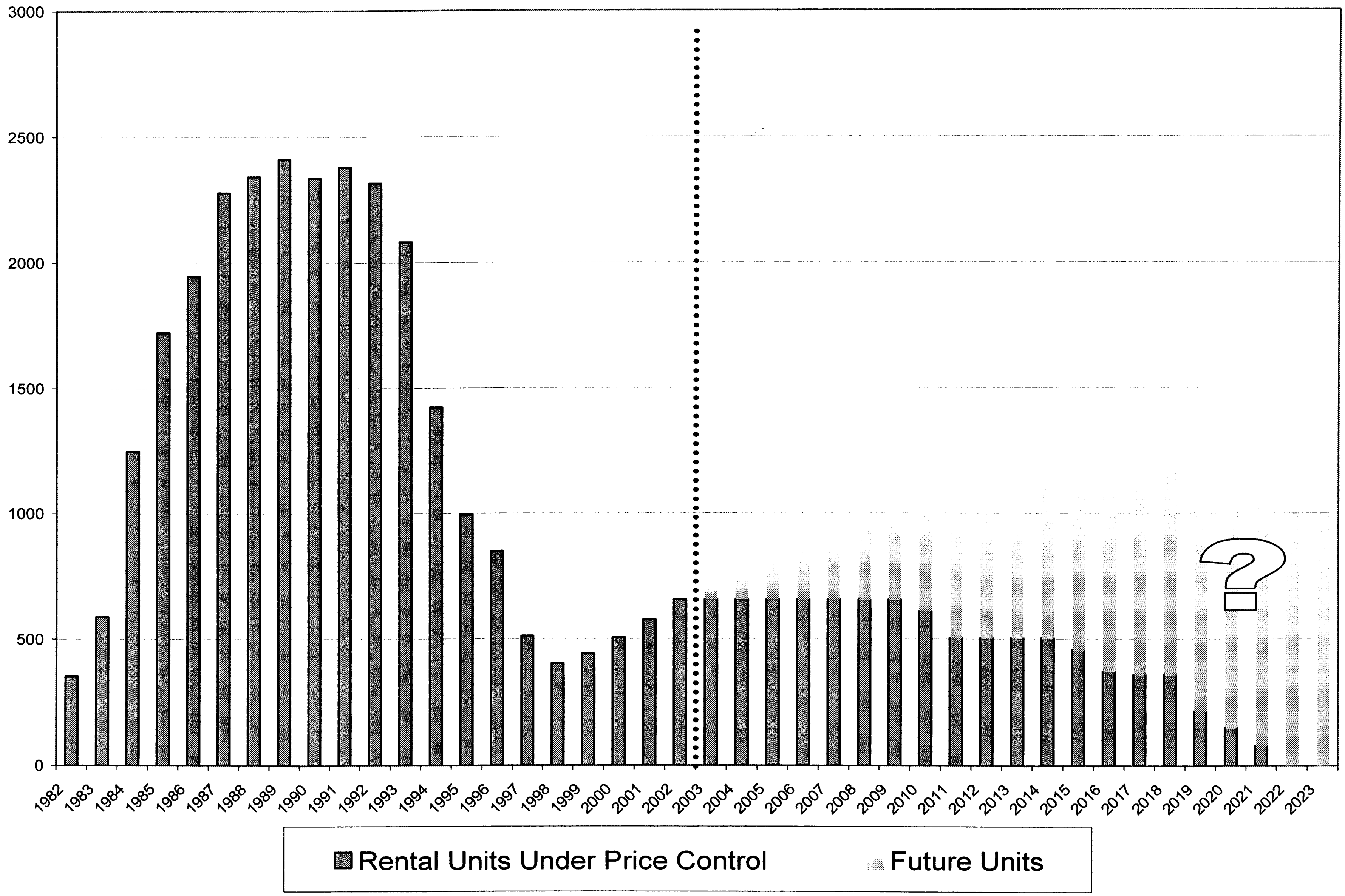
B. Policy Considerations

The length of the MPDU control period is intended to balance the goals of preserving units as affordable and letting the property owner maximize the economic benefit from the property.

1. *How many rental MPDUs are now under rent control? Is the supply of rental MPDUs increasing or decreasing?*

At the close of 2002, about 650 rental MPDUs were under rent control in the County. The number of rental MPDUs peaked in 1989 at more than 2,400 units. The County experienced a precipitous decline in the supply of rental MPDUs during the 1990s, as more than 2,000 MPDUs had their (then ten-year) rent controls expire. Few of the expired MPDUs were replaced as production of new rental MPDUs slowed dramatically. During the 1980s, an average of 241 new rental MPDUs were produced a year; in contrast, MPDU production fell to an average of 44 rental units a year during the 1990s. A graph displaying the annual changes in the supply of rental MPDUs appears on the following page.

Supply of Rental MPDUs Under Price Control



A nearly ten-year slump in multi-family housing production ended in the late 1990s. In the first three years of the current decade, an average of 72 new rental MPDUs were produced each year.

As a result of the 1989 amendment that extended the rental control period to 20 years, the entire existing supply of rental MPDUs will remain under rent controls until 2009. After that, the County will begin to lose units in the current MPDU inventory. Whether the overall supply of rental MPDUs rises or declines in the future depends on the rate of production and the length of the control period. As the County moves closer to buildout, MPDU production necessarily will decline as the rate of overall housing development slows. In addition, the County's policy of accepting payments in lieu of MPDUs in certain developments (known as alternative agreements or "buyouts") has impacted rental MPDU production. The issue of buyouts and their effect on MPDU production is discussed in Chapters 12 and 13 of this report.

2. *What effect would modifying the MPDU rent control period have on the County's supply of affordable housing and the economic well-being of MPDU owners and tenants?*

By definition, rental units are occupied by a non-owner. The tenant gets no benefit from expiration of the control period and may have to relocate to another development to retain a controlled or otherwise affordable rent. In addition, expiration of the control period may remove a unit from the County's supply of affordable housing. Whether or not a post-control period unit remains affordable is a function of the size and location of the unit as well as prevailing market conditions.

Expiration of the control period benefits the property owner, who is then free to raise rents to current market rates. The magnitude of this benefit is determined by the difference between market and MPDU rents when the controls expire.

While the value of the expiration of rent controls may be meaningful at the time of expiration, the promise of increased revenues from rent increases 20 years in the future has negligible impact on the financial viability of a project at the time of development. Development loans typically have terms under five years and rarely, if ever, exceed 20 years. The decision to invest in a development is almost always predicated upon rate of return calculations for a period significantly shorter than the 20 year MPDU rent control period.

A direct proportional relationship exists between the duration of the control period and the supply of MPDUs. For example, extending the rental control period from 20 to 50 years represents a 250 percent (or 2 ½ times) increase in the length of rent controls. As new units are produced, the overall rental MPDU supply will continuously grow without any loss of units for 50 years. After 50 years, the County supply of rental MPDUs would be 250 percent (or 2 ½ times) greater than would have existed under a 20 year control period as shown in the table on the following page.

Total MDPUs Under Rent Control
(assumes average annual production of 75 units per year)

	With 50-Year Controls	With 20-Year Controls	Ratio
After 1 Year	75	75	1 to 1
After 10 Years	750	750	1 to 1
After 20 Years	1,500	1,500	1 to 1
After 30 Years	2,250	1,500	1.5 to 1
After 40 Years	3,000	1,500	2 to 1
After 50 Years	3,750	1,500	2.5 to 1

Note: the ratios remain unchanged at any assumed annual production rate.

3. *How long are rents controlled in other jurisdictions with inclusionary zoning programs?*

The County MPDU program has among the shortest rent control periods of any inclusionary zoning program in the country. Of major programs, only Denver, Colorado, at 15 years has a shorter rental control period. Fairfax County, Virginia and Santa Fe, New Mexico each have a 20 year rent control period similar to that of Montgomery County. Many communities have adopted significantly longer control periods. The City of Rockville's rent control period extends for 30 years. The cities of Cambridge, Massachusetts; San Diego, California; San Francisco, California; and Portland, Oregon each have rent control periods between 50 and 60 years. Burlington, Vermont has adopted a 99-year rental control period. In Boulder, Colorado, rent controls continue in perpetuity.[1]

C. Policy Alternatives

Staff has identified the following policy alternatives for the Council to consider. The first three choices represent alternatives from which only one may be selected. The fourth option may be combined with the second or third alternatives.

Alternative Choices

1. *Retain current control period:* The Council may decide that the current control period for rental MPDUs achieves the proper balance of preserving affordable units and providing economic benefit to property owners, and could retain the 20-year control period for rental MPDUs.

2. *Extend the control period*: The Council may extend the control period for rental units to preserve the stock of future MPDUs for a longer duration. Possible rental control periods include 30, 40, 50, or 99 years.

[1] Source: David Rusk.

3. *Make the rent controls permanent:* The Council may maintain rent controls for the life of each unit as a means of preserving a permanent stock of MPDUs.

Additional Option

A. *Provide rental unit rehabilitation assistance:* A property owner may use increased revenues from expired MPDUs to help fund rehabilitation of those units (which would be 20 years old when controls expire). The Council could establish a rental MPDU rehabilitation assistance program if it also decides to extend the control period beyond 20 years. For example, the County could use the newly created "MPDU Preservation Fund" (see Chapter 6) to offer interest-free loans for the rehabilitation of 20-year-old MPDUs that will remain under rent control for an extended period.

D. Council Staff Recommendations

Staff recommends Alternative 2 that extends the rent control period to 99 years. Staff suggests that a MPDU Preservation Fund could provide rehabilitation loans to multi-family properties with MPDUs.

As with sale MPDUs, the optimal length of the rent control period involves a trade-off between preserving the MPDU stock and giving property owners an opportunity to profit from their investment. Unlike sale units, however, rental units are occupied by a non-owner. A tenant sees no benefit from the expiration of the control period. Expiration of rent controls benefits the entity that owns the property at the end of the control period.

Staff finds that expected rent increases 20 years in the future will have negligible impact on the financial viability of a project at the time of development. The decision to invest in a development is almost always predicated on rate of return calculations for a period significantly shorter than the 20 year MPDU rent control period. For that reason, extending the control period beyond 20 years should have a limited effect on the viability of new multi-family projects.

Staff finds the benefit of preserving affordable housing greatly outweighs the drawback of controlling future rent revenues. Therefore, **Staff recommends extending the control period to 99 years for new rental MPDUs.**

In conjunction with the recommendation in Chapter 6 to create an MPDU Preservation Fund, **Staff suggests that the County should establish a rental MPDU rehabilitation assistance program if the Council decides to extend the control period beyond 20 years.** The County could use MPDU Preservation Fund resources to offer low-interest or interest-free loans to rehabilitate 20-year-old MPDUs.

CHAPTER 8
ZONES SUBJECT to the MPDU REQUIREMENT

POLICY QUESTION: Should MPDUs be required in large lot residential zones?

A. Current Law

All proposed subdivisions with 35 or more dwelling units is zoned with a density greater than one unit per acre must comply with the MPDU law. The Zoning Ordinance establishes the residential zone classifications and the zones in which the MPDU density bonus and optional development standards apply. The MPDU requirements, density bonus provisions, and optional method development standards do not apply in large lot residential zones and rural zones.

B. Policy Considerations

In 2001, the Council's Planning, Housing, and Economic Development (PHED) Committee asked the Planning Board to evaluate the feasibility of extending the MPDU requirement to subdivisions in the RE-1, RE-2, RE-2C, RC, and RNC Zones. In 2003, the Planning Board transmitted a Zoning Text Amendment (ZTA) that proposes applying the MPDU requirement to properties in the RE-1, RE-2, RE-2C, and RNC zones that are recommended for public sewer service in a master plan. A copy of the ZTA recommended by the Planning Board appears in Appendix C.

Large lot zones are located predominantly in the residential wedge areas of the County. The largest concentrations of undeveloped properties in these zones are located in the Cloverly, Olney, Sandy Spring/Ashton, Upper Rock Creek, and portions of the Fairland and Potomac Subregion planning areas.

1. *How many new affordable units might result from applying the MPDU law to large lot zones? What factors would influence actual MPDU production in these zones?*

Two years ago, Planning Board Staff analyzed the likely housing yield that would be achieved by applying the MPDU requirement to 44 large lot-zoned properties of sufficient size to support MPDUs. Housing yields in large lot zones often are restricted by environmental constraints, including steep slopes, streams, and stream buffers. Planning staff assumed that in most cases units could be clustered to avoid environmentally sensitive areas. Only the most severely constrained sites were eliminated. The table on the following page shows the Planning Staff's estimated potential MPDU yield by zone, adjusted to account for environmental constraints.

Estimated Potential Large Lot MPDU Yields by Zone
(Adjusted for Environmental Constraints)

	New MPDUs at:	
	12.5% MPDUs	15.0% MPDUs
RC	12	17
RE-1	51	73
RE-2	90	123
RE-2C	76	83
RNC	9	12
Total	**238**	**308**

Note: Zoning changes proposed in the Upper Rock Creek Master Plan could increase potential MPDU production in the RNC zone.

2. *How would the availability of public sewer service influence MPDU production on the large lot zones?*

Potential housing unit yields in large lot zones may be difficult to achieve because of the amount of land needed to provide septic systems in areas not designated for public sewer service. Only five of the 44 identified large lot properties (two in the RNC zone and three in the RE-2C zone) are designated for sewer service, with a combined potential MPDU yield of 20 to 27 units. Planning Staff research indicates that actual housing generation in projects with septic systems falls well below that in projects served by public sewer. Extending public sewer allows clustering of units and a greater likelihood of achieving full density. Clustering also offers an opportunity for more flexibility in project design.

3. *What is County policy regarding public sewer service in large lot zones?*

The County policy regarding the extension of sewer service is contained in the Comprehensive Water Supply and Sewerage System Plan. The approved Plan designates all zones with densities of two or more units per acre as "intended" for sewer service. The Plan designates areas zoned for non-clustered low density development (such as in the RE-2 zone and select properties in the RE-1 zone) as intended for individual septic systems. However, the Plan identifies public sewer service appropriate for large lot zones where the local master plan recommends cluster development.

4. *What MPDU optional development standards might be appropriate for large lot zones?*

The Zoning Ordinance authorizes the use of optional development standards in certain zones where MPDUs are required. MPDU optional standards vary by zone. MPDU optional standards are less restrictive in regard to unit type, density, lot size, and setback requirements than the standard method of development in the same zone. If MPDUs are required in the large lot zones as recommended by the Planning Board, appropriate optional standards should be considered.

To maintain compatibility with surrounding housing, the Planning Board proposed that MPDU optional standards for the RE-1, RE-2C, and RNC zones allow only single-family detached and duplex units, but not townhouses. (In suburban areas of the County, townhouses are generally considered to be compatible with single-family detached housing.) The Planning Board also recommends development standards for large lot zones that establish alternative setbacks, minimum lot area, and minimum lot width. These dimensional and size requirements should be consistent with the overall density, clustering, and housing type standards of the zone.

5. *When a residential density is established in a master plan, does the density include or exclude MPDUs?*

The Zoning Ordinance imposes no general limit on increasing base residential density to accommodate MPDUs as required by the law. In the absence of any provision to the contrary, residential density recommended in a master plan would not include the added MPDUs. Planned Development and certain other zones clearly state that the MPDU bonus densities are in addition to the master plan recommended maximum density. The Zoning Text Amendment recommended by the Planning Board proposes limiting development density, including MPDUs, in the RNC zone to a maximum of 1.22 dwelling units per gross acre.[1] The proposed amendment further states that the density recommendation must conform to the recommendation of the applicable master plan.

C. Policy Alternatives

In evaluating this issue, the Council must weigh the relative benefits of different policy objectives. Applying the MPDU requirement to the large lot zones would increase MPDU generation and disperse affordable housing to new geographic areas of the County. However, by virtue of their low densities, large lot zones would only produce a modest number of new MPDUs and may offer unique challenges in achieving compatibility with surrounding development.

Council Staff identified the following policy alternatives. The first four choices represent alternatives from which only one may be selected. The next two options may be combined with the second through fourth alternatives.

Alternative Choices

1. *Do not expand the zones now subject to the MPDU requirement*: The Council could make no changes to the zones subject to the MPDU requirement.

2. *Extend the MPDU requirement to zones with densities less than one unit per acre*: The Council could apply the MPDU requirement to all residential subdivisions (that exceed the minimum size requirement) in the RE-1, RE-2, RE-2C, and RNC zones.

[1] A density limit of 1.22 units per acre results from applying the maximum allowable MPDU density bonus (22 percent) to one acre zoning.

3. *Extend the MPDU requirement to large lot zones where a master plan recommends sewer service*: The Council could apply the MPDU requirement to properties (that exceed the minimum size requirement) in the RE-1, RE-2, RE-2C, and RNC zones when the local master plan recommends public sewer service.

4. *Apply the MPDU requirement to clustered development in large lot zones where a master plan recommends sewer service*: The Council could apply the MPDU requirement to properties (that exceed the minimum size requirement) in the RE-1, RE-2C, and RNC zones that are recommended for sewer service in a master plan and develop under a cluster option. This differs from the previous alternative in that MPDU requirement would not extend to the RE-2 zone, where clustering is not allowed.

Additional Options

A. *Establish MPDU development standards for large lot zones:* If the Council extends the MPDU requirement, the Council should then decide on development standards for the added zones. The major development standard decision revolves around permitted unit types. For each zone with an MPDU requirement, the Zoning Ordinance should specify whether detached, duplex, four-plex, and townhouse units are permitted.

B. *Review master plan maximum densities for RNC zoned properties*: If the Council applies the MPDU requirement to the RNC zone, the Planning Board should consider whether it is necessary to draft limited amendments to the Sandy Spring/Ashton and Potomac master plans to adjust densities to accommodate possible MPDU density bonuses.

D. Council Staff Recommendations

Staff recommends Alternative 4: apply the MPDU requirement to clustered development in areas in the RE-1, RE-2C, and RNC zones where the approved master plan recommends sewer service. Staff supports creating flexible MPDU development standards for these zones.

Staff supports a uniform policy that master plan densities not include MPDUs. Amendments to the Sandy Spring/Ashton and Potomac master plans may be necessary to review density limits that were set without consideration of MPDUs.

The question of MPDUs in large lot zones involves a trade-off between competing policy goals – geographic dispersal of affordable housing and consistency of land use in the low-density residential wedge. Applying the MPDU law would generate a modest increase in MPDU production and advance the objective of dispersing affordable housing to all geographic areas of the County. However, building an MPDU on a one- or two- acre lot that is both economically viable and compatible with surrounding development may be difficult to achieve.

Staff believes that the County can reasonably disperse MPDUs to those portions of the residential wedge with clustered development. Clustered development allows sufficient variation in housing types, lot sizes, and lot coverage to accommodate MPDUs that fit in with adjacent housing without excessive cost to construct. **Therefore, Staff recommends that the Council apply the MPDU requirement to clustered subdivisions in the RE-1, RE-2C, and RNC zones where a master plan recommends sewer service.** A subdivision in the RE-1 zone that does not develop under the cluster option would not be required to build MPDUs.

Staff recommends that the master plan process is the appropriate way to decide whether clustering is appropriate for a given property. Through the master plan process, decisions regarding clustering and sewer service are studied in the context of related land use, environmental, housing, and public facility considerations. Staff does not believe that the sewer category change process alone involves sufficient review of interrelated policies to determine whether a development should be clustered or should include MPDUs.

Staff does not recommend requiring MPDUs in the RE-2 zone because this zone does not permit clustering. The Staff recommendation applies the MPDU requirement to precisely the same zones that the Comprehensive Water Supply and Sewerage System Plan identified as intended for public sewer service.

Staff further recommends that MPDU development standards for clustered low-density zones encourage flexibility in lot size and lot coverage requirements. The MPDU optional standards should allow a variety of housing types, including duplexes and possibly four-plexes, built to a scale compatible with the neighborhood.

As previously mentioned, the Planning Board recommends limiting development density, including MPDUs, to a maximum of 1.22 dwelling units per gross acre in the RNC zone. Staff believes that the recommended master plan density, considering the MPDU requirement, could be adjusted below the maximum appropriate development density. **Staff supports a uniform policy that residential densities specified in master plans should not include MPDUs. Planning Staff should consider whether amendments are necessary to the Sandy Spring/Ashton and Potomac master plans which each include RNC zoning with density limits that were very carefully set without consideration of MPDUs.**

CHAPTER 9
MINIMUM SUBDIVISION SIZE

POLICY QUESTION: What should be the smallest subdivision where MPDUs are required?

A. Current Law

The MPDU law applies to every subdivision with 35 or more residential units that is located in a zone where the MPDU requirement applies. Last year, the Council amended the MPDU law to reduce the minimum subdivision size where MPDUs are required from 50 to 35 units. The purpose of this amendment was to increase the production of new MPDUs from in-fill and other small developments.

The MPDU requirement only applies to developments of 35 to 49 units if the property can accommodate a 20 percent density bonus and the Planning Board finds that achieving the bonus density would not conflict with environmental standards and regulatory requirements and would not significantly reduce neighborhood compatibility. In addition, when the Planning Board approves a subdivision of 35 to 49 units, the number of MPDUs required must be reduced by one unit if necessary to assure that the subdivision includes at least one bonus market rate unit.

B. Policy Considerations

Reducing the minimum subdivision size where MPDUs are required would result in greater production of MPDUs. However, pursuing this policy goal raises several corollary policy considerations.

1. What is the relationship between subdivision size and the number of MPDUs?

In reducing the minimum subdivision size last year, the Council sought to assure that application of the law to smaller subdivisions would generate an increase in both MPDUs and market rate units. To achieve this goal, the Council added the provisions that: (a) limit application of the law to developments of 35 to 49 units which can accommodate a 20 percent density bonus; and, (b) adjust the number of MPDUs so that the development includes at least one bonus market rate unit.

For subdivisions of 50 units or more, the current law does not guarantee that imposing the MPDU requirement will result in a net increase in market rate units. Indeed, the law imposes a base MPDU requirement of 12.5 percent without providing any density bonus. In extending the law to subdivisions between 35 and 49 units, the Council intended that these developments gain at least one bonus market rate unit. Under the formula in the existing law, small subdivisions rarely would qualify for an increase in market rate units, even with the maximum number of MPDUs.

2. *How do subdivisions benefit from MPDU development standards?*

Independent of whether application of the MPDU law results in a net increase in market rate units, the property owner and developer benefit by being able to develop the property under the MPDU standards in the Zoning Ordinance. The Zoning Ordinance includes development standards for subdivisions with MPDUs that provide more flexibility and options than are generally permitted under the base zone. For example, the MPDU development standards often allow smaller lot sizes and different unit types than otherwise would be permitted in the base zone. Subdivisions of all sizes can take advantage of these standards which reduce development costs and often let a property accommodate more units than would be achievable under the base zone.

3. *Is there a critical mass of units necessary to make the MPDU requirement feasible in certain zones?*

In most single family subdivisions with more than 50 units, the MPDU requirement is fulfilled by constructing townhouses. The MPDU development standards allow townhouses in single-family detached zones. Townhouses typically are built in a group of at least five or six attached units. It is often economically infeasible to construct a row of attached homes with fewer than five or six units in a manner compatible with other units in the subdivision. In a few cases, developers in single family zones have met their MPDU requirement by building small detached units or duplexes with a façade similar to adjacent non-MPDU detached units. However, alternative unit types generally are more expensive to design and build than standard townhouses.

4. *How would changing the minimum subdivision size affect MPDU production?*

Council Staff asked Planning Staff to estimate how many MPDUs would have been produced if the County reduced the minimum subdivision size five years ago. As illustrated in the table below, if the minimum subdivision size been reduced to 10 units five years ago, the 34 subdivisions approved between 1998 and 2002 would have produced between 83 and 99 new MPDUs (depending on achieved density bonus), *assuming that the law did not guarantee a minimum number of market rate units.* If the minimum subdivision size had been reduced to 20 units, the 15 approved subdivisions would have produced between 47 and 56 new MPDUs using the same assumptions.

Number of MPDUs That Would Have Been Produced With Reduced Minimum Subdivision Size (1998 - 2002) (assuming no minimum number of market rate units)

	10 to 34 units	**20 to 34 units**
Number of Subdivisions	34	15
Number of MPDUs assuming:		
No Density Bonus	83	47
Maximum Density Bonus	99	56

As mentioned, when it lowered the minimum subdivision size to 35 units, the Council limited the requirement to subdivisions that could achieve the maximum density bonus without compromising neighborhood compatibility and environmental standards. Moreover, the MPDU formula for subdivisions of between 35 and 49 units was adjusted to guarantee at least one bonus market rate unit in addition to the number that would have been achieved without the MPDU requirement.

For subdivisions below 35 units, the MPDU requirement and density bonus formulae would almost never produce even one bonus market rate unit without further reducing the number of required MPDUs. No subdivision with 31 or fewer units could ever achieve a net increase of market rate units (even under the maximum density bonus) through application of the current formula. The only cases in which application of the formula would produce a net increase of one market rate unit would be for subdivisions of 32 or 33 units under the maximum 22 percent density bonus.

If the minimum subdivision size had been lowered in 1998 to ten units with a guaranteed bonus market rate unit, the 34 subdivisions would have produced up to 57 new MPDUs, assuming all subdivision achieved the maximum density bonus. If the minimum subdivision size had been lowered to 20 units, then the 15 subdivisions would have produced up to 40 new MPDUs. In either case, no MPDUs would have been produced in any subdivision that could not receive the maximum density bonus.

Number of MPDUs That Would Have Been Produced With Reduced Minimum Subdivision Size (1998 - 2002) (assuming guarantee of at least one bonus market rate unit)

	10 to 34 units	20 to 34 units
Number of Subdivisions	34	15
Number of MPDUs assuming:		
No Density Bonus	0	0
Maximum Density Bonus	57	40

5. What was the effect of reducing the minimum subdivision size from 50 to 35 units?

In the year since the Council reduced the minimum subdivision size to 35 units, the Planning Board has not reviewed any new project between 35 and 49 units.

6. What effect does the minimum subdivision size have on geographic dispersal of affordable housing?

As mentioned in Chapter 3, a primary purpose of the MPDU program is to achieve economic integration through geographical dispersal of affordable housing. The law establishes a link between the geographic location of new housing development and the location of affordable housing. However, this link exists only in subdivisions large enough to be subject to the MPDU law. As the County moves closer to build-out, large new single-family subdivisions will primarily locate in the few areas of the County with large remaining tracts of undeveloped land. Large multi-family developments will be increasingly concentrated in central business districts and transit centers. In addition, in-fill development likely will become more prevalent than occurs today. How many new MPDUs are created in parts of the County that likely will experience primarily small in-fill development will depend on whether the County reduces the minimum subdivision size for the MPDU requirement.

7. *What are the minimum subdivision sizes in other jurisdictions with inclusionary zoning requirements?*

The table below displays the minimum subdivision size for inclusionary zoning programs around the country. As the table shows, the minimum subdivision size in Montgomery County (35 units) is higher than in almost every other community with an inclusionary zoning program. However, many of the jurisdictions with minimum subdivision sizes of 10 or fewer units are smaller communities (mostly in California) which have density bonuses greater than the 22 percent allowed in the County.

The three largest jurisdictions in the Washington metropolitan area (other than Montgomery County) with inclusionary zoning programs each have a minimum subdivision size requirement greater than the County's. The City of Rockville, as well as Fairfax and Loudoun Counties, Virginia, each have a minimum subdivision size of 50 units. Last year, Frederick County approved an inclusionary zoning program with a minimum subdivision size of 25 units. The Frederick County program has yet to produce its first unit.

MINIMUM SUBDIVISION SIZE AT WHICH INCLUSIONARY ZONING APPLIES

		Under 10 Units (78 Communities)		
Alameda Co CA	East Palo Alto CA	Monterey Co CA	Ripon CA	Santa Fe NM
Arlington MA	Fairfax CA	Morgan Hill CA	Rohnert Park CA	Santa Monica CA
Arroyo Grande CA	Fremont CA	Morro Bay CA	Roseville CA	Santa Rosa CA
Berkeley CA	Gonzales CA	Napa Co CA	San Benito Co CA	Sebastapol CA
Boulder CO	Heraldsburg CA	Newton MA	San Carlos CA	Solana Beach CA
Brookline MA	Irvine CA	Novato CA	San Clemente CA	Somerville MA
Burlington VT	Laguna Beach CA	Palo Alto CA	San Diego CA	Sonoma CA
Calistoga CA	Long Beach CA	Patterson CA	San Juan Bautista	S. San Francisco
Carlsbad CA	Longmont CO	Petaluma CA	S. Juan Capistrano	Tiburon CA
Carlsbad CA	Los Altos CA	Pismo Beach CA	S. Luis Obispo CA	Union City CA
Colma Bart CA	Los Gatos CA	Pleasant Hill CA	San Marcos CA	Vista CA
Contra Costa CA	Mammoth Lks. CA	Pleasanton CA	San Mateo Co CA	W.Hollywood CA
Coronado CA	Menlo Park CA	Portola Valley CA	Santa Barbara CA	Winters CA
Cotati CA	Mill Valley CA	Poway CA	Santa Cruz CA	Yountville CA

MINIMUM SUBDIVISION SIZE AT WHICH INCLUSIONARY ZONING APPLIES				
		10 Units (35 Communities)		
Agoura Hills CA	Half Moon Bay CA	Mill Valley CA	Portland OR	San Mateo CA
Agoura Hills CA	Larkspur CA	Monterey CA	Richmond CA	San Rafael CA
Boston MA	Lexington MA	Napa CA	Sacramento CA	Santa Clara CA
Cambridge MA	Livermore CA	Oceanside CA	Salinas CA	Sunnyvale CA
Clayton CA	Lompoc CA	Oxnard CA	San Anselmo CA	Sutter Co CA
Corte Madera CA	Marin Co CA	Pasadena CA	San Carlos CA	Woodland CA
Del Mar CA	Menlo Park CA	Port Hueneme CA	San Francisco CA	Yolo Co CA
Encinitas CA				
		20 Units (5 Communities)		
Brea CA	Davis CA	Dublin CA	Nevada Co CA	San Leandro CA
		30 Units (3 Communities)		
	Daly City CA	Denver CO	Emeryville CA	
		35 Units (1 Community)		
		Montgomery Co MD		
		50 or More Units (4 Communities)		
Fairfax Co VA	Loudoun Co VA	Rio Vista CA	Rockville MD	

Source: David Rusk

C. Policy Alternatives

Staff has identified the following policy alternatives for the Council to consider. The first four choices represent alternatives from which only one may be selected. The next three options may be combined with any of the alternatives.

Alternative Choices

1. *Retain current minimum subdivision size requirement*: The Council could retain the current requirement applying the MPDU law to subdivisions of 35 or more units, with special conditions including the "one bonus market rate unit" provision in effect for developments of 35 to 49 units.

2. *Retain current minimum subdivision size without a guaranteed bonus market rate unit*: The Council could retain the current requirement applying the MPDU law to subdivisions of 35 or more units, but could repeal the guarantee of at least one bonus market rate unit for subdivisions of 35 to 49 units. In this option, the MPDU requirement would not depend on a development achieving a 20 percent density bonus. The Planning Board could reduce or eliminate the MPDU requirement if it finds that building the MPDUs

would conflict with environmental standards or significantly affect neighborhood compatibility.

3. *Reduce the minimum size with special conditions for small subdivisions:* The Council could reduce the minimum subdivision size (to 20 or 10 units) and could apply special conditions similar to those that now apply to subdivisions of 49 or fewer units.

4. *Reduce the minimum size without a guaranteed bonus market rate unit:* The Council could reduce the minimum subdivision size (to 20 or 10 units) without any special conditions for small subdivisions other than that the Planning Board could reduce or eliminate the MPDU requirement if it finds that providing the MPDUs would conflict with environmental standards or significantly affect neighborhood compatibility.

Additional Options

A. *Reduce the minimum size in certain zones*: The Council could establish a lower minimum subdivision size in certain zones (such as townhouse zones) which may be better suited than other zones to accommodate MPDUs in smaller subdivisions.

B. *Allow "pooling" of small subdivisions*: Multiple small subdivisions could share a common MPDU requirement. One of the pooled developments would host the MPDUs, with financial contributions from other projects being developed at about the same time in the same geographic area.

C. *Allow buyouts for small subdivisions with site constraints*: Along with reducing the minimum subdivision size, the Council could amend the law's buyout provision to allow a cash payment to the Housing Initiative Fund as a substitute for providing MPDUs in small subdivisions with severe environmental or compatibility constraints.

D. Council Staff Recommendations

Staff recommends Alternative 4: reduce the minimum subdivision size to 20 units <u>without</u> a guaranteed bonus market rate unit, but giving the Planning Board having the authority to reduce or eliminate the MPDU requirement to preserve environmental standards or neighborhood compatibility. Staff also supports a pooling option for small subdivisions, but believes pooling opportunities will be infrequent.

As the County moves toward build-out, fewer opportunities will exist to generate new MPDUs as part of large subdivisions. Recognizing that future County development patterns will differ significantly from prevailing patterns when the program was conceived, Staff recommends that the MPDU requirement be applied to smaller subdivisions.

As detailed in Chapter 2, the Zoning Ordinance's MPDU development standards provide substantial benefits which usually compensate a developer for providing MPDUs. In Staff's assessment, subdivisions as small as 20 units should benefit from the flexible development standards and bonus densities which apply to subdivisions of any size. In fact, each of the 16 projects that voluntarily accepted the MPDU requirement was a subdivision of between 21 and 49 units.

Staff finds that there is no legal or policy requirement to guarantee bonus densities. The MPDU program is a valid exercise of the County's police power to regulate housing development in the public interest. The legal issue of regulatory takings does not come into play because the legislative actions at issue – limits on the prices and rents that can be charged for some new housing units, and reserving them for eligible buyers and renters during priority marketing periods – have a substantial nexus to valid legislative purposes and have not been shown to deprive any developer of all economically viable use of any property. The County compensates developers for producing MPDUs by providing flexible development standards as well the opportunity to achieve bonus densities.

Reducing the minimum subdivision size may not result in a large increase in MPDU production but would advance the goal of dispersing affordable housing to all developing or redeveloping areas of the County. Staff understands that, because of their relatively small size, some 20 to 49 unit subdivisions may encounter site specific environmental or neighborhood compatibility challenges. The MPDU law should allow the Planning Board to reduce the MPDU requirement when these situations arise.

Staff recommends reducing the minimum subdivision size to 20 units. The flexible MPDU development standards offer sufficient benefit to the developer to accommodate the MPDU requirement while retaining a reasonable prospect of realizing a profit. Therefore, Staff believes that the County does not need to guarantee a bonus market rate unit for each small subdivision. In cases where the limited size of a property may present environmental or neighborhood compatibility challenges, Staff would let the Planning Board reduce or eliminate the MPDU requirement. Finally, Staff would not require small subdivisions to achieve a high density bonus before the MPDU requirement applies.

The Council could also amend the law to allow MPDU "pooling" for small subdivisions. Multiple developments could share a common MPDU requirement, with one subdivision hosting MPDUs for other subdivision. For this option to work, multiple small subdivisions in close geographic proximity would have to proceed through the development process during the same general time period. Staff recognizes that suitable conditions for the successful pooling of subdivisions may not occur often.

CHAPTER 10
NUMBER OF MPDUs REQUIRED

POLICY QUESTION: ***How many MPDUs should be required in a subdivision and what density bonus should be provided in return for additional MPDUs?***

A. Current Law

The MPDU law requires each subdivision with 35 or more units to include an amount of MPDUs that is at least 12.5 percent of the total number of units in the subdivision. The law allows increased density in exchange for increased production of MPDUs on-site. The Planning Board may approve a subdivision or site plan that includes a density bonus as high as 22 percent more than the base zone density in exchange for an increase in MPDUs up to 15 percent of the total number of units in the subdivision. The table below shows the MPDU requirement associated with density bonuses ranging from zero to 22 percent.

Achieved Density Bonus	***MPDUs Required***		***Achieved Density Bonus***	***MPDUs Required***
Zero	12.5%		Up to 11%	13.6%
Up to 1%	12.6%		Up to 12%	13.7%
Up to 2%	12.7%		Up to 13%	13.8%
Up to 3%	12.8%		Up to 14%	13.9%
Up to 4%	12.9%		Up to 15%	14.0%
Up to 5%	13.0%		Up to 16%	14.1%
Up to 6%	13.1%		Up to 17%	14.2%
Up to 7%	13.2%		Up to 18%	14.3%
Up to 8%	13.3%		Up to 19%	14.4%
Up to 9%	13.4%		Up to 20%	14.5%
Up to 10%	13.5%		Up to 22%	15.0%

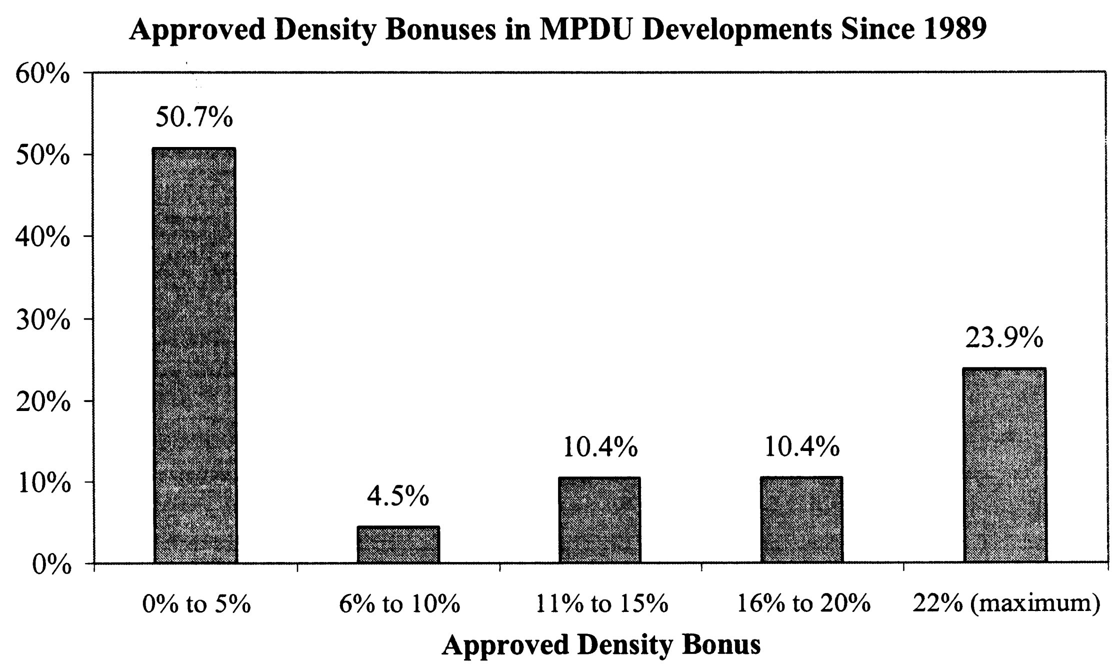
As detailed in the previous chapter, if the Planning Board finds that a development of at least 35 but no more than 49 units may accommodate MPDUs, the number of MPDUs required must be adjusted if necessary to allow a minimum of one bonus market rate unit in addition to the number allowed under the base zoning.

B. Policy Considerations

The MPDU program has produced more than 11,000 affordable housing units without a single dollar of direct public sector funding. Rather, the County uses its land use and zoning authority to require developers to produce a minimum of 12.5 percent of residential subdivision units as MPDUs. Independent observers of the County's program and developers have concluded that the success of the MPDU program is largely a result of the balance achieved between the number of MPDUs required and the opportunity for developers to realize a reasonable profit. The continued success of the County MPDU program rests to a great extent on maintaining this balance.

1. *To what extent do developers build more than the minimum 12.5 percent MPDUs in exchange for a density bonus?*

Since 1989, the Planning Board has approved 67 site plans for developments with MPDUs. Over half of the approved site plans were for development with no or extremely minimal density bonuses, as shown in the chart below. At the other end of the spectrum, over a third of all developments were approved with density bonuses of more than 15 percent, with nearly a quarter achieving the maximum density bonus of 22 percent.



Source: Department of Park and Planning

2. *What factors influence whether a subdivision includes more than the minimum amount of MPDUs and achieves a density bonus?*

Several factors determine whether a subdivision includes more than the minimum number of MPDUs, with a corresponding density bonus. Acreage and physical characteristics (such as environment constraints) coupled with zoning requirements influence how many units a given site can accommodate. Density also may be limited by policy decisions, such as height limits imposed in a master or sector plan. Equally important, a developer may choose not to seek a density bonus in order to build a product that better responds to market preferences for lot size and housing type.

The Zoning Ordinance includes development standards that allow variations in unit types and lot dimensional requirements. The flexibility of these standards often lets a developer fit more units on a site than would be allowed by the base zone. Site plans approved by the Planning Board during the past five years that included little or no MPDU density bonuses generally achieved actual densities up to 40 percent greater than similarly zoned subdivisions without MPDUs. MPDU development standards, however, may be less useful for smaller sites with significant environmental constraints. Moreover, the Zoning Ordinance does not authorize special MPDU development standards for certain zones, most notably Optional Method development in the Central Business District (CBD) Zones (see Chapter 12).

3. *How do MPDU density bonuses relate to other density bonuses, such as those achievable through optional method development?*

Several zones offer two methods of development. Under the Standard Method, a development must comply with a set of development standards and specific uses defined in the Zoning Ordinance. Under the Optional Method, increased flexibility and densities are authorized in return for certain public facilities and amenities. As discussed in Chapter 12, affordable housing has not been listed as an amenity for the purpose of Optional Method development.

The Zoning Ordinance allows densities in CBD Zones (under either the Standard or the Optional Method) to be increased to accommodate MPDUs. The Zoning Ordinance explicitly states that for residential development in the CBD Zones "the number of moderately priced dwelling units must be at least 12.5 percent of the total number of dwelling units in accordance with Chapter 25A [the MPDU law]."

Originally, the Optional Method density bonus in CBD zones was considered sufficient to require the maximum 15 percent MPDUs with no additional bonus. The Council amended the MPDU law and the Zoning Ordinance in 2001 to permit the same density bonus structure available in other zones. These amendments responded to an increased recognition of the high cost of building high rise housing.

4. *What affordable unit production requirements apply in other jurisdictions with inclusionary zoning programs?*

The table on the following page shows the affordable unit production requirements for inclusionary zoning programs around the country. The County's MPDU requirement (12.5 percent) is near the middle of the range, compared to other inclusionary zoning programs. Most of the larger jurisdictions with inclusionary zoning programs require MPDUs to be between ten and 20 percent of a subdivision's units. Many communities with higher MPDU requirements also offer larger density bonuses.

AFFORDABLE UNIT PRODUCTION REQUIREMENT

Up to and Including 10 Percent (60 Communities)

Arroyo Grande CA	Irvine CA	Morro Bay CA	Ranchos Palos Verdes	San Rafael CA
Benicia CA	Larkspur CA	Mountain View CA	Richmond CA	Santa Clara CA
Boston MA	Livermore CA	Napa CA	Rio Vista CA	Santa Monica CA
Brea CA	Lompoc CA	Napa Co CA	Ripon CA	Solana Beach CA
Calistoga CA	Longmont CO	Nevada Co CA	Roseville CA	Sonoma CA
Corte Madera CA	Los Altos CA	Novato CA	San Anselmo CA	Sunnyvale CA
Danville CA	Los Gatos CA	Oceanside CA	Santa Barbara CA	Sutter Co CA
Del Mar CA	Loudoun Co VA	Oxnard CA	San Carlos CA	Tiburon CA
Denver CO	Mammoth Lks CA	Palo Alto CA	San Clemente CA	Vista CA
Encinitas CA	Menlo Park CA	Patterson CA	San Francisco CA	West Hollywood CA
Hercules CA	Monterey Co CA	Pismo Beach CA	San Leandro CA	Woodland CA
Huntington Bch CA	Morgan Hill CA	Pleasant Hill CA	San Mateo CA	Yolo County CA

11 to 15 Percent (10 Communities)

Burlington VT	Fairfax Co VA	Montgomery Co MD	Rockville MD	Santa Fe NM
Dublin CA	Mill Valley CA	Petaluma CA	Salinas CA	Somerville MA

15 to 19 Percent (39 Communities)

Agoura Hills CA	Danville CA	Monterey CA	Richmond CA	Santo Cruz CA
Arlington MA	Fremont CA	Monterey Co CA	Rohnert Park CA	Santa Cruz Co CA
Brookline MA	Healdsburg CA	Novato CA	Sacremento CA	Santa Rosa CA
Cambridge MA	Irvine CA	Pasadena CA	San Clemente CA	Union City CA
Carlsbad CA	Isleton CA	Petaluma CA	San Francisco CA	Vista CA
Contra Costa CA	Larkspur CA	Pleasanton CA	San Juan Bautista	Winters CA
Cotati CA	Marin Co CA	Portola Valley CA	San Luis Obispo CA	Yountville CA
Cupertino CA	Menlo Park CA	Poway CA	San Marcos CA	

20 Percent (20 Communities)

Boulder CO	East Palo Alto CA	Monrovia CA	San Diego CA	S. San Francisco CA
Berkeley CA	Emeryville CA	Palo Alto CA	San Mateo Co CA	Watsonville CA
Colma Bart CA	Half Moon Bay CA	Pleasanton CA	Santa Monica CA	West Hollywood CA
Coronado CA	Los Altos CA	San Benito Co CA	Sebastapol CA	Woodland CA

25 Percent and Above (11 Communities)

Burlington VT	Davis CA	Laguna Beach CA	Pleasant Hill CA	S. Juan Capistrano CA
Contra Costa CA	Del Mar CA	Newton MA	Port Hueneme CA	Santa Monica CA
Danville CA				

Source: David Rusk

C. Policy Alternatives

Staff has identified the following policy options for the Council to consider. The first five choices represent alternatives from which only one may be selected.

Alternative Choices

1. *Retain current requirements:* The Council could endorse the current minimum requirement of 12.5 percent MPDUs, with density bonuses for a development that provides up to 15 percent MPDUs.

2. *Increase the minimum MPDU requirement*: The Council could set an alternative minimum MPDU requirement above 12.5 percent.

3. *Retain the minimum requirement but increase density bonuses:* The Council could increase density bonuses for any subdivision that includes more than the minimum number of MPDUs.

4. *Modify both the minimum MPDU requirement and the density bonuses:* The Council could both raise the minimum MPDU requirement above 12.5 percent and increase density bonuses for any subdivision that includes more than the minimum number of MPDUs.

5. *Apply a density bonus for all MPDU percentage requirements:* Some members of the building industry suggested that the amount of MPDUs required should be a subset of a density bonus added to the density that would have been achieved through the base zoning without the MPDU law. To implement this alternative, the Council would have to amend the MPDU law to apply a density bonus for the minimum and all other MPDU percentage requirements. The density bonus would exceed the MPDU requirement in all cases. For example, a 12.5 percent MPDU requirement would be coupled with a density bonus of 13 percent or higher.

Additional Options

Chapter 12 discusses two options related to the amount of MPDUs required in high-rise developments. When reviewing the issue of MPDUs in high rises, the Council may decide whether to establish unique MPDU percentage requirements for height restricted high-rise developments and whether to allow developers to build additional MPDUs to offset some Optional Method amenity requirements.

D. Council Staff Recommendations

Staff recommends Alternative 1 that holds the minimum MPDU requirement at 12.5 percent and retains the existing schedule of MPDUs required at different density levels.

The success of the MPDU program largely is a result of the balance achieved between the number of MPDUs required and the opportunity for developers to realize a reasonable profit. The minimum MPDU requirement of 12.5 percent, along with the density bonus schedule, the MPDU development standards, and the MPDU pricing formulae have combined to achieve a balance in which the private sector profitably produced more than 11,000 affordable units -- an accomplishment unmatched anywhere else. Staff is hesitant to suggest major changes that could upset this equilibrium. While slight adjustments to the MPDU percentage requirements may be possible without disrupting the program, minor adjustments would at best yield minor improvements. Moreover, a change in the MPDU requirement could impact other policy decisions, such as the density limits established in approved master plans.

In Staff's assessment, the MPDU percentage requirements are a case of "if it's not broke, don't try to fix it." **Staff recommends retaining both the 12.5 percent minimum MPDU requirement and the existing bonus density schedule.**

CHAPTER 11
TYPE of UNITS REQUIRED

POLICY QUESTION: What type of MPDUs should be required in a subdivision?

A. Current Law

The type of structure (detached, attached, piggyback, etc.) for single family MPDUs is approved by the Planning Board through site plan review, in accordance with County zoning standards. The MPDU law mandates that each single family MPDU must have at least two bedrooms. The actual number of bedrooms in a single family MPDU is decided in a legally required MPDU agreement between the developer and DHCA.

In multi-family developments, the law requires that the percentage of MPDUs that are efficiencies and one-bedroom units must not exceed the percentage of market-rate units that are efficiencies and one-bedroom units, respectively. The actual number of bedrooms in each multi-family MPDU is decided in a legally required MPDU agreement between the developer and DHCA.

The MPDU law requires a subdivision's rental-to-sale ratio to be identical for both market rate units and MPDUs. In 2002, the Council amended the law to allow a higher proportion of rental MPDUs in a multi-family subdivision under certain conditions (as detailed below).

B. Policy Considerations

The size and type of an MPDU often determines how desirable that unit is for certain moderate income households. The structure type and number of bedrooms in an MPDU greatly influences the demand by households of differing family size. Some MPDU-eligible residents may prefer a sale unit that lets them build wealth through equity. Others may prefer a rental unit that does not require a down payment or long-term financial commitment. In addition, rental units generally are more affordable to households with limited income.

1. Do MPDU-eligible households want the types of units produced by the MPDU program?

MPDUs generally have very low vacancy rates. Demand is high for MPDUs and units typically are sold or rented soon after a vacancy occurs. DHCA maintains a waiting list for sale MPDUs and holds a lottery to determine who may buy an available MPDU. Similarly, rental property managers maintain waiting lists for rental MPDUs and rarely report extended vacancies. The on-going demand for MPDUs indicates that the type of product available meets the needs of at least a portion of the MPDU-eligible population.

2. How does the type and location of a single family MPDU affect demand for the unit?

As with any homebuyer, an MPDU-eligible household looks for certain features in selecting a home to buy. Notwithstanding the affordable price, some MPDUs may be unattractive for certain households. Occasionally, an MPDU will elicit limited interest. Two types of units at times have taken longer than others to occupy – condominiums in multi-family buildings and one-bedroom MPDUs.

Condominiums in multi-family buildings often require occupants to pay condominium fees that may make the unit unaffordable to MPDU eligible households. The Council addressed this problem by approving an exception process for the law's "rental-to-sale proportionality" requirement (see below).

One-bedroom MPDUs, particularly those sold as garden condominiums, at times also have attracted limited interest. Families with children are unlikely to want a one-bedroom MPDU. The Housing Opportunities Commission (HOC) and the Montgomery Housing Partnership have indicated that the majority of their clients need two or more bedrooms.

Piggyback and back-to-back townhouses with limited ground level access and storage space may be less attractive to families with children. In addition, these unit designs often are perceived as less visually attractive, noisier, and potentially costlier to maintain. HOC at times declines an opportunity to acquire certain units because of the difficulty in marketing them to moderate- and low-income households. Units located in relatively remote areas of a subdivision that are distant from transit, shopping, and public services may be less attractive to HOC and other non-profits that rent units to low-income households with limited transportation options. While the Planning Board has established MPDU site plan guidelines, no mechanism exists to adjust these guidelines to meet changing needs.

3. What variations should be permitted to the law's sale-to-rental ratio requirement?

Before 2002, the MPDU law mandated that every subdivision's rental-to-sale ratio must be identical for both market rate units and MPDUs. In 2002, the Council reviewed whether MPDU eligible households will have difficulty remaining in sale units with high condominium fees. In response, the Council amended the MPDU law to let developers meet the MPDU requirement in for-sale multi-family developments by providing rental units with 20-year price controls if the DHCA Director finds that offering more rental MPDUs would advance County policies and plans, be consistent with local housing market conditions, and make units more affordable by avoiding high condominium fees. DHCA reports that it has received no requests to date to approve an alternative MPDU rental-to-sale ratio.

4. Should the County relax the standards on the number of bedrooms in an MPDU to improve the economic viability of some housing developments?

In some instances, DHCA has approved buyout agreements (see Chapters 12 and 13) that have allowed developers to produce multi-family MPDUs with fewer bedrooms than the law requires. In several cases, the approved buyout allowed the developer to build all one-bedroom

MPDUs in buildings where most market rate units have two or three bedrooms. DHCA believes that reducing the cost of MPDU production (by permitting a greater percentage of efficiencies and one-bedrooms) is necessary in some cases to make a multi-family residential project economically viable.

The MPDU law does not authorize a reduction in the number of bedrooms in an MPDU. Moreover, HOC has expressed disinterest in acquiring efficiencies and one-bedrooms because most of their clients are families too large for these small units.

C. Policy Alternatives

Staff has identified two policy alternatives regarding the number of bedrooms required for single family units, and two policy alternatives regarding the number of bedrooms required for multi-family units. Each pair of choices represents alternatives from which only one may be selected. The additional option listed at the end may be combined with any of the policy alternatives.

Alternative Choices – Single Family Units

1. *Retain current number of bedrooms requirement*: The Council could retain the current two- bedroom minimum requirement for single family MPDUs.

2. *Increase the number of bedrooms required for single family units*: The Council could require that single family developments include two-bedroom units in same proportion as market rate units, with the remaining units having at least three bedrooms.

Alternative Choices – Multi-Family Units

1. *Retain current ration for number of bedrooms*: The Council could retain the current requirement for multi-family developments which links the percentage of MPDUs that are efficiencies and one-bedroom units to the percentage of market-rate units that are efficiencies and one-bedroom units, respectively.

2. *Increase the number of bedrooms required for multi-family units*: The Council could require that multi-family developments include efficiencies, one-bedroom, and two-bedroom units in same proportion as market rate units, with the remaining units having at least three bedrooms.

Additional Option

A. *Improve communication regarding demand for different MPDU types and sizes*: The Council could direct DHCA and HOC to advise the Planning Board periodically about the types and sizes of units that are in greatest demand. The Planning Board could continue to encourage DHCA and HOC to participate in the site plan review process for major projects which include MPDUs.

D. Council Staff Recommendations

For single family developments, Staff recommends Alternative 2: require two-bedroom MPDUs in no greater proportion than for market rate units with the remaining units having at least three bedrooms.

For multi-family developments, Staff recommends Alternative 1: retain the current MPDU requirement. Staff believes that the County should not approve buyout agreements that deviate from the legally required minimum number of bedrooms in MPDUs.

Staff encourages more regular communication among DHCA, HOC, and the Planning Board about current trends in the demand for different housing types and sizes.

In determining the appropriate standard for the minimum number of bedrooms in an MPDU, the Council must consider both the needs of the residents who will occupy the unit as well as the costs incurred by the developer who builds the unit. Data compiled by DHCA in 2000 revealed that approximately 70 to 80 percent of MPDU households include children. Families with children require more bedrooms than singles or couples without children; however, adding bedrooms to a unit raises its cost of production.

Staff suggests that the solution to this policy trade-off lies in looking at the market forces that shape demand for non-MPDU units. Nearly all single-family units produced in the County include at least three bedrooms. As minimum demand exists for a two-bedroom townhouse, for example, developers generally do not build this type of product. **Therefore, Staff recommends that the default size for single family MPDUs be set at three bedrooms. The law could allow a developer to produce units with fewer bedrooms up to the proportion of market rate units that have a similar number of bedrooms.**

In multi-family developments, the predominant practice is to build mostly one- or two-bedroom units. Although the County may experience increased demand for multi-family units by families with children, Staff believes that it is not reasonable to require the building community to provide MPDUs with more bedrooms than the number generally built for market rate units. **Therefore, Staff recommends retaining the current standard that multi-family developments include efficiencies and one-bedroom units up to the respective proportion of the market rate units of those sizes, with the remaining MPDUs having two bedrooms. Staff believes that the County should discontinue the practice of signing buyout agreements that reduce number of bedrooms in MPDUs.** Allowing developers to produce only one-bedroom and efficiency MPDUs effectively shuts out families with children.

Finally, Staff encourages improved communication among DHCA, HOC, and the Planning Board regarding demand for units of different types and sizes. DHCA and HOC should advise the Planning Board periodically about the unit types and sizes (whether MPDU or market rate) that are in greatest demand. This information may be valuable to the Planning Board when it reviews site plans. In addition, Staff suggests that DHCA and HOC more routinely participate in the site plan review process for major projects which include MPDUs.

CHAPTER 12
MPDUs and the ECONOMICS of HIGH-RISE DEVELOPMENT

POLICY QUESTION: ***What economic factors affect the implementation of the MPDU program in high-rise development? Should the County provide buyouts to assist a developer to obtain financing for certain high-rise residential development? Should the implementation of the MPDU program in high-rise developments operate under separate and distinct requirements and standards?***

A. Current Law

The MPDU law has no special provisions for high-rise development. All MPDU requirements that apply to single family or garden apartment projects apply also to high rise buildings. In addition, the Zoning Ordinance does not establish any special development standards for high-rise buildings that include MPDUs (except a reduced parking requirement for MPDUs).

DHCA has approved MPDU alternative agreements (commonly referred to as "buyouts") to address the economic challenges facing certain developments. These agreements most often have been approved for high-rise projects. The MPDU law authorizes DHCA to approve agreements under which a developer may make a payment or another alternative arrangement instead of providing MPDUs on-site. The law states that these buyouts should apply only in exceptional cases. Under the buyout provision, the DHCA Director may approve an agreement wherein, instead of building the required number of MPDUs on-site, the developer would:

(A) build significantly more MPDUs at one or more other sites in the same or an adjoining planning area;

(B) convey land in the same or an adjoining planning area that is suitable in size, location, and physical condition for significantly more MPDUs;

(C) contribute to the Housing Initiative Fund an amount that will produce significantly more MPDUs; or

(D) do any combination of these alternatives that will result in building significantly more MPDUs.

As currently written, the MPDU law limits buyouts to "exceptional cases" involving developments with high mandatory fees. The law does not mention the use of buyouts for any other purpose.

B. Policy Considerations

The MPDU law was written at a time when the County featured predominantly suburban style development. In recent years, the County has experienced more urban style development. The Council should consider whether MPDU rules that have worked successfully for suburban development need to be modified to be implemented in urban settings.

1. *How do the economics of providing MPDUs differ between single family and high-rise developments?*

The economics of high-rise development – particularly high land and construction costs – are very different from single family or garden multi-family development. High-rise development often involves high fixed costs, stemming from the price of land in densely developed areas and the cost of building multi-storied structures served by elevators and underground parking. The economic viability of a high-rise project is related to the developer's ability to spread land and construction costs among the total number of units in the structure. High-rise construction also involves more risk since units cannot be built incrementally in response to market demand.

In a single family development, MPDUs may be constructed at significantly lower cost than a market rate unit. Compared to the market rate units in a single family development, MPDUs generally are smaller units built on smaller lots with fewer built-in amenities. Although the law limits the revenue that may be achieved through the sale or rental of an MPDU, a developer may adjust the cost of producing a single family unit to offset some of the reduced revenue. In contrast, the cost of constructing a high-rise unit does not substantially differ whether or not it is offered as an MPDU, despite the fact that designating a unit as an MPDU has a considerable effect on revenue generation from the unit. MPDU price controls have a greater net impact on high-rise development than on single family development because the cost of producing a high-rise unit cannot be adjusted to compensate for the reduced rental or sale income associated with an MPDU.

In some cases, the cost of building a high-rise MPDU is more than the income that may be realized through rental or sale of the unit. In such as case, income from the rent or sale of market rate units must help cover the cost of producing the MPDU.

Nonetheless, many factors other than the number of MPDUs required affect the economic viability of a high-rise development. Certain market conditions may allow developers to secure financing and have more than "a reasonable prospect of realizing a profit" even when providing all MPDUs on-site. The viability of a housing development is a function of many market factors, including housing demand, the cost of borrowing, land prices, and the cost of labor.

2. *What other County policies and practices affect the economics of high-rise development?*

Several County policies and practices other than the MPDU law affect the economics of high-rise development.

Zoning Requirements: The Zoning Ordinance specifies certain requirements that regulate the density of development. The Ordinance sets standards for floor area ratio, setbacks, on-site parking, and other factors that together determine the amount of units in a development. In certain zones, an Optional Method of development allows the Planning Board to modify development standards.

Under the Optional Method, the Planning Board may require the developer to provide certain public amenities in exchange for increased density. The Zoning Ordinance requires that a public amenity provide an appropriate environment or satisfy public needs resulting from the development of a particular project. The Ordinance cites examples of amenities including green areas, streetscaping, cultural arts centers, community rooms, and recreation areas. The amenity requirement has long been interpreted as not including additional affordable housing above what the MPDU law requires.

Sector Plan Height Limits: In addition to the zoning applied to particular parcels through sectional map amendments, some Central Business District sector plans also impose (by reference in the Zoning Ordinance) maximum building heights for development. Sector plans employ height limits to achieve compatibility of development with surrounding land uses. In some cases, sector plan height restrictions effectively prevent a development from achieving much of the density bonus that otherwise would be possible under Optional Method development.

Payment in Lieu of Taxes Agreements: State law authorizes Counties to negotiate agreements with property owners for payments in lieu of taxes (PILOT) to enable and encourage the development of low- and moderate-income housing. PILOT agreements support affordable housing by reducing a project's operating costs to allow below-market rents or sale prices. Generally, an agreement to waive property tax payments requires only a nominal payment by the property owner. In practice, PILOT agreements function as a tax abatement. Recently, DHCA has negotiated PILOT agreements for high-rise residential projects. DHCA negotiates a tax abatement as deemed necessary to allow the project to acquire private financing while retaining some or all MPDUs on site. Several projects have received both a buyout and a PILOT tax abatement.

3. *How has DHCA used buyouts to assist high-rise residential and other residential projects?*

The MPDU law authorizes buyouts whereby under certain conditions a developer may make a payment instead of building MPDUs on-site. To date, DHCA has entered into 19 buyout agreements. A list of approved alternative agreements appears in Appendix D. DHCA has approved two principal types of buyout agreements:

a. buyouts for developments with high mandatory homeowner association, condominium, or service fees; and

b. buyouts for select high-rise residential developments with high construction costs, unusual site conditions, and sector plan height restrictions.

Over the past five years, DHCA has approved two buyouts for developments with high mandatory fees. The majority of buyouts approved by DHCA in the past five years have been for high-rise residential developments. Over the past four years, DHCA has entered into six buyout agreements for high-rise rental developments. Each of these developments was subject to sector plan height restrictions. In each case, the developer committed to build some MPDUs on-site and made a payment to the Housing Initiative Fund for the required MPDUs not built on site.

The use of buyouts for this purpose may help the County achieve housing and redevelopment objectives, but is not authorized by current law. As mentioned previously, the MPDU law only allows buyouts in "exceptional cases" where high mandatory fees would make the MPDUs "effectively unaffordable by eligible households." Indeed, the Zoning Ordinance explicitly states that for residential developments in the CBD zones, "the number of moderately priced dwelling units must be at least 12.5 percent of the total number of dwelling units in accordance with Chapter 25A [the MPDU law]."

4. *What effect does an MPDU buyout have on the economic viability of a high-rise residential project?*

DHCA has entered into buyout agreements to help developers of high-rise projects obtain financing. Lending institutions evaluate a project's risk exposure when determining whether to provide financing. A buyout allows the conversion of a unit that otherwise would have been an MPDU into a market rate unit. The value of a buyout is a function of the difference in revenue generation between a market rate unit and an MPDU. Given the economics of high rise development, market rate units generate a significantly greater return on investment that do MPDUs. The table below shows the value of being able to rent a unit at market rather than at MPDU rates.

Per Unit Value of Buyout
Based on Difference in Expected Market Rate and MPDU Rents

Monthly Rent Differential (Market Rate Above MPDU)	Present Value Differential (Over 20 Years)*
$200	$33,000
$400	$66,000
$600	$99,000
$800	$132,000
$1,000	$165,000
$1,200	$197,000

* assumes 7.0% annual discount rate and 2.5% annual rent increases for both market rate units and MPDUs

As detailed in Chapter 13, recent high rise buyouts agreements raised expected income generation by well over $100,000 per unit bought out. By reducing the MPDU requirement, a buyout agreement raises the expected revenue generation for a project, reduces the risk, and improves the expected rate of return.

5. *Where have recent buyouts occurred?*

Most recent buyout agreements approved by DHCA have been for projects in higher density areas zoned for high-rise development. The table on the below shows the geographic distribution of MPDUs that were "bought out" since 2000.

Location of MPDUs Bought Out: 2000 - 2003

Sector/Master Plan Area	Units Foregone
Bethesda/Chevy Chase	36
Bethesda CBD	63
North Bethesda	102
Silver Spring	5
Wheaton	25
TOTAL	231

C. Policy Alternatives

Three general policy approaches exist to address the issue of MPDUs in high-rise development. In deciding how the MPDU program should apply to high rise buildings, the Council could:

1. **Require all MPDUs to be built on-site under current rules;**

2. **Relax the MPDU requirement for high rise development; or**

3. **Eliminate the need for buyouts.**

Each of these approaches generates a distinct series of specific policy options. For each approach, Staff has identified the following policy options for the Council to consider.

Require All MPDUs to be Built On-Site under Current Rules

This approach does not recognize any need to adjust program requirements for high rise projects and would have these projects adhere to the same MPDU requirements as other types of development in the County. Staff presents the following policy option consistent with this approach.

1. *Require high-rise development to meet the MPDU requirement on site*: The Council could direct DHCA to enforce the current law without allowing buyouts

for future high-rise developments. This approach undoubtedly would have an effect on market conditions and could: (a) increase in market rate rents in the development; (b) lower profit margins for the developer; (c) put downward pressure on land costs; and/or (d) delay or preclude project development.

Relax the MPDU requirement for high rise development

This approach recognizes the special economic challenges that arise from applying the MPDU requirement to high-rise development and seeks to relieve the economic burden associated with providing MPDUs. Staff presents the following three policy alternatives consistent with this approach.

2a. *Allow buyouts when necessary for project financing*: The Council could amend the MPDU law to allow buyouts when necessary to improve the economic viability of Central Business District and Transit Station projects. DHCA could then continue to negotiate buyouts on a case-by-case basis.

2b. *Allow buyouts for all high-rise developments*: The MPDU law requires that buyouts be employed only in exceptional cases. Under the current law, buyouts are intended as a last resort, to be used only when on-site MPDUs are exceptionally difficult to provide. The Council could amend the MPDU law to permit cash payments instead of building MPDUs on-site for any high-rise development.

2c. *Exempt high-rise development from the MPDU requirement*: Fairfax County, Virginia and some other communities with inclusionary zoning programs have addressed the issue of high-rise economics by exempting these projects from their affordable housing requirement. Similarly, the Council could remove the MPDU requirement from high-rise development.

Eliminate the need for buyouts

This approach recognizes the special economic challenges of high-rise development and would reduce the cost and risk of these projects so that MPDUs can be built in high density areas without resorting to buyouts. Staff presents the following seven policy options consistent with this approach. These options are not mutually exclusive and may be combined.

3a. *Adopt specific MPDU development standards for high-rise buildings*: As mentioned previously, the Zoning Ordinance contains special development standards for single family subdivisions that include MPDUs but which do not generally apply in Central Business District and Transit Station Zones. Currently, a lower parking requirement is the only special provision for high-rise MPDUs. The Council could amend the Zoning Ordinance to insert unique standards for high-rise developments that include MPDUs. These standards could allow the Planning Board to modify lot coverage, public use space, and amenity requirements.

3b. *Reduce the MPDU requirement for high-rise developments*: The Council could acknowledge that the economics of high-rise development differs significantly from single family or garden multi-family development and could reduce the MPDU requirement to less than the 12.5 percent minimum required for other types of development.

3c. *Allow higher rent levels for high-rise units:* In April 2003, the Council approved a regulation that established maximum rents for MPDUs in garden apartments using a formula based on median income levels. DHCA is developing a regulation to establish maximum rents for MPDUs in high-rise buildings. The Council could approve slightly higher rents for high-rise MPDUs to help recoup unit construction costs.

3d. *Allow affordable housing to offset required amenities:* As previously mentioned, the Zoning Ordinance public amenity requirement has long been interpreted to exclude additional affordable housing as a public benefit sufficient to balance increased project density under the Optional Method. The Council could amend the Central Business District Zones to recognize additional affordable housing beyond what is required under the MPDU law as an offset to the amenities required for the Optional Method.

3e. *Establish a tiered program*: The Council could modify the MPDU program to establish a higher tier for income eligibility and maximum rents in high cost structures such as high-rises. Instead of capping eligibility at 65 percent of area median income, the second MPDU tier could be open to households with higher incomes (perhaps in the range of 75 to 90 percent of area median income). DHCA could propose regulations establishing second tier maximum rent levels for high cost structures that would be considerably higher (perhaps 15 to 30 percent) than the rents for standard MPDUs. The revenue from higher rents would offset some of the cost of building high-rise units.

3f. *Allow high-rise developments to provide MPDUs in the immediate vicinity:* The Council could modify the MPDU law to allow developers of high rise projects to build some or all of required MPDUs at another site in the immediate vicinity (such as within a half-mile radius of the high rise site).

3g. *Allow increased building heights to accommodate MPDUs*: As already mentioned, all high-rise buyouts approved by DHCA have been for properties where the applicable sector plan limits building height. The Council could increase permitted building heights to accommodate MPDUs through either of two approaches. A zoning text amendment could allow developments with MPDUs to exceed sector plan height limits. Alternatively, the Council could direct the Planning Board to prepare a limited amendment to applicable master and sector plans to raise height limits as necessary to produce more MPDUs.

For each of these options, the Council should consider whether to apply them to all high-rise structures or only those subject to height restrictions imposed by an applicable master or sector plan.

D. Council Staff Recommendations

Staff concludes that the economics of high-rise development warrants establishing special rules for the MPDU program in zones that allow high-rise buildings such as Central Business District and Transit Station zones. In cases where land and construction costs are spread over a limited number of units, the MPDU requirement – under current rules – will sometimes affect the financial viability of a project because the cost of producing high-rise units cannot easily be adjusted to compensate for the reduced income generated by MPDUs. When it created the MPDU program, the Council recognized the need generally to align the cost of producing an MPDU with the revenue generated by the unit. As stated in the 1973 law that established the program, an original policy goal is to:

> *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.*

Staff finds that in certain cases where a sector plan imposes height or density limits, the current rules of the program may not provide sufficient development options to accommodate MPDUs without affecting project viability. DHCA has used buyouts to reduce the cost and risk of providing MPDUs in height restricted projects in Central Business Districts and Transit Station areas. Alternative policies and practices other than buyouts may achieve similar outcomes. **Staff prefers a policy approach that addresses the economic challenges of high-rise development without resorting to buyouts.** In adherence to the objective of geographic dispersal of affordable housing, Staff believes that County policies should encourage the construction of as many MPDUs as possible in Central Business Districts and Transit Station areas.

Staff divides these recommendations into two groups -- those that apply exclusively to projects with sector plan height restrictions, and others that apply to all high-rise developments. In addition, Staff offers a recommendation if the Council chooses to revisit the issue of sector plan height limits and their effect on housing production.

Recommendations for Sector Plan Height-Restricted Projects

For height-limited high rise developments, Staff recommends Alternative 3a, adopting special MPDU development standards. In addition, Staff recommends Alternative 3b, establishing slightly lower MPDU percentage requirements for height-limited high rise developments.

In contrast to single family zones, special MPDU development standards are not available in Central Business District and Transit Station zones. **Staff recommends that the Council direct the Planning Board to prepare a Zoning Text Amendment to authorize unique MPDU development standards for height-restricted high-rise developments.** These special standards should include modified lot coverage, public use space, and amenity requirements. More flexible development standards might increase the unit yield even in height restricted structures and allow fixed construction costs to be spread over a greater number of units.

Recognizing that the economics of high-rise development differs significantly from single family or garden multi-family development, **Staff recommends that the Council adopt a slightly lower MPDU requirement for height-restricted high-rises.** Staff suggests that the requirement should be set between ten and 12 percent, but the decision about the exact percentage should be made concurrent with the Council's review of the new MPDU development standards.

Buyouts are intended to produce an acceptable rate of return for a project that would justify the level of financial risk undertaken by investors. The expected rate of return for a development is influenced by a series of factors, and may be adjusted by techniques other than buyouts. Staff believes that the combination of special MPDU development standards, a lower MPDU percentage requirement, and slightly increased MPDU rents (explained below) may sufficiently alter the economics of building within height restrictions to reduce project risk and thereby eliminate any justification for approving buyouts.

The model on the following page calculates the annual return on equity and the internal rate of return for a hypothetical 160-unit residential project in a Central Business District. The model includes three scenarios:

1. <u>a base case with no buyout</u>: assumes that the project would meet its full MPDU requirement without a buyout.

2. <u>a base case with a 50 percent buyout</u>: assumes that the project would make a payment to cut its on-site MPDU requirement in half.

3. <u>an alternative case</u>: assumes that the project would meet its full MPDU requirement without a buyout, but with development standards that allow the building to achieve 5 percent more units, a 10 percent MPDU requirement, and rents set at 5 percent above minimum levels.

In this example, the internal rate of return for the alternative case is similar to that for the base case with a 50 percent buyout. This analysis suggests that alternative strategies other than buyouts may succeed in addressing the financial challenge of providing MPDUs in height restricted high-rise developments. As discussed in the next chapter, the County may also use tax abatements and other incentives to promote development in targeted areas.

INTERNAL RATE OF RETURN COMPARISONS
Hypthetical Example: Height-Limited High-Rise with 160 Units
(outcomes may varying depending on assumptions)

ASSUMPTIONS	
Market Rent for High Rise Unit	$2,000
MPDU Rent	$980
Vacancy and Collection Loss	5%
Annual Operating Expenses Per Unit	. $6,500
Development Cost Per Unit (Excl. Land)	$145,000
Property Land Cost	$4,000,000
Buyout Payment Per Unit	$50,000
Debt Service Interest Rate (30 Years)	7%
Capital Structure - Percent Equity	25%

ALTERNATIVE CASE ASSUMPTIONS	
Add't'l Unit Yield from Development Standards	5.0%
Percent of Units Reqiured to be MPDUs	10.0%
MPDU High Rise Rent Differential	5.0%

	Base Case No Buyout	Base Case Half Buyout	Alternative Case
Total Units	160	160	168
MPDUs By Formula	20	20	17
MPDUs Bought Out	0	10	0
MPDUs Provided On Site	20	10	17
Development Cost	$23,200,000	$23,200,000	$24,360,000
Land Cost	$4,000,000	$4,000,000	$4,000,000
Buyout Payment	$0	$500,000	$0
Total Project Cost	$27,200,000	$27,700,000	$28,360,000
Initial Capital Debt	$20,400,000	$20,775,000	$21,270,000
Annual Total Rent Potential	$3,595,200	$3,717,600	$3,836,246
Annual Vacancy/Collection Los	($179,760)	($185,880)	($191,812)
Annual Operating Expenses	($1,040,000)	($1,040,000)	($1,092,000)
Annual Debt Service Payment	($1,643,963)	($1,674,183)	($1,714,073)
Annual Revenue	$731,477	$817,537	$838,361
Initial Equity Payment	$6,800,000	$6,925,000	$7,090,000
Annual Return on Equity	10.76%	11.81%	11.82%
Internal Rate of Return*	12.26%	13.76%	13.79%

* Internal rate of return calculation assumes 9% capitalization rate; 2% transaction costs; 2% annual revenue increases; and sale of the building after 10 years.

Recommendations for all High-Rise Developments

> **For all high rise developments, Staff recommends Alternative 3c: authorize maximum rents that are slightly higher than those for garden apartments. Staff also recommends Alternative 3d: consider additional affordable housing beyond the minimum required by law as an offset to an amenity requirement. Staff further recommends allowing developers to provide MPDUs at another site within roughly one-half mile of the project.**

MPDU residents may benefit from the location, features, and services of a high-rise apartment building. High rise developments usually are located near transit centers and often include building features and tenant services typically not offered in garden apartments. Staff believes that it is reasonable to ask MPDU residents in high rises to pay a slightly higher rent than MPDU residents living in garden apartments. In addition, higher rents for high-rise MPDUs would help close the gap between unit construction costs and revenue generation. **Staff recommends that the Council approve a regulation allowing the maximum rent for high rise MPDUs to exceed the maximum rent for garden apartments. Specifically, high-rise maximum rents should be between three to five percent higher than would be allowed for households at 65 percent of area median income.** Rent premiums higher than five percent may make high rise units unaffordable to many MPDU eligible households.

As an incentive to increase the supply of affordable housing, **Staff recommends that Council approve a Zoning Text Amendment for the Central Business District and Transit Station zones to allow developers to provide additional affordable housing beyond what is required by the MPDU law as an offset to some or all amenities required under the Optional Method.**

The goal of dispersing affordable housing is rooted in the desire to achieve economic integration throughout the County. As urban neighborhoods comprise multiple subdivisions, Staff believes that integration of households of various incomes can be achieved beyond the immediate confines of a single development project. **Staff recommends that the Council modify the MPDU law to allow developers of high rise projects to meet their requirement either by building MPDUs on-site or by providing the required MPDUs at another site in the immediate vicinity of the project.** Staff suggests that the term "immediate vicinity" be defined as within roughly a half-mile of the project. While acknowledging that the half-mile requirement will limit the usefulness of the off-site option, Staff believes that allowing substitute MPDUs further from a project would run counter to the economic integration goal.

Recommendation Regarding Sector Plan Height Limits

> **If the Council wishes to consider increasing building heights to accommodate MPDUs, Staff recommends doing so through the master plan process.**

The previous Staff recommendations address the economics of building MPDUs in high-rise developments, including those building subject to sector plan height limits. Staff's purpose was to provide strategies to allow the MPDU program to achieve its goals under different circumstances. The Staff recommendations are intended to establish policies that let the MPDU law work in high rise developments both with and without height restrictions.

This report does not address whether sector plans should include height limits and, if so, what those limits should be. Staff believes that these decisions should be addressed in a comprehensive manner, looking at related housing, land use, and public facility policies. **If the Council wishes to consider increasing building heights to accommodate MPDUs, Staff recommends using the master plan process for this review.** Staff prefers the master plan process instead of the Zoning Text Amendment process to review height restrictions because the master plan process is better suited for a comprehensive policy review which addresses site-specific concerns. The Council could direct the Planning Board to prepare a limited amendment to applicable master and sector plans to raise height limits where appropriate to produce more MPDUs.

If a decision to allow additional building height is predicated on the desire to maximize MPDU production, Staff suggests that building heights should be raised only to the amount necessary to accommodate the maximum (22 percent) MPDU density bonus. The chart below illustrates this calculation for a hypothetical 160-unit building that is limited to ten stories by an applicable sector plan.

Effect on Building Height and Density of Height Increase to Accommodate MPDUs

	Building Constructed within Height Limit	Bldg. Height Raised to Accommodate MPDUs
Number of Stories	10	12
Total Number of Units	160	192
Number of MPDUs	20	29
Number Market Rate Units	140	163

This comparison shows that adjusting the height limit to accommodate the maximum MPDU density bonus would raise the height of a ten-story building by two additional stories. The taller building would include 32 more units (including 9 additional MPDUs) than a building restricted to ten stories by a sector plan height limit.

CHAPTER 13
BUYOUT CONDITIONS

***POLICY QUESTION:* Under what conditions, if any, should a developer be allowed to enter into an alternative agreement (a.k.a. buyout) instead of providing the required MPDUs on-site?**

A. Current Law

As currently written, the MPDU law limits alternative agreements (a.k.a. buyouts) to "exceptional cases" involving developments with high mandatory fees. The MPDU law does not authorize the use of buyouts for any other purpose.

B. Policy Considerations

Most buyouts have addressed either high mandatory fees for residents or the financial feasibility of the project. Several buyouts have supported projects in priority redevelopment areas. Reducing the MPDU requirement improves the potential rate of return of a development and improves a project's economic viability. Use of buyouts for this purpose may help the County achieve some development objectives but is not authorized under the MPDU law.

1. What outcomes result from the County entering into buyout agreements?

As discussed in the previous chapter, DHCA has also approved buyouts in certain cases to address the special economic challenges of high rise developments. DHCA's policy has been to approve buyout agreements for select projects that, in DHCA's view, would not be built without a reduction in the MPDU requirement. Given the County's overall housing shortage, DHCA attempts to use tools such as buyouts to try to increase the supply of all types of housing. In the case of developments with high mandatory homeowner association or service fees, buyouts prevent the production of MPDUs with total housing costs beyond the means of MPDU-eligible households.

When the County approves a buyout agreement, a development includes fewer on-site MPDUs than would have been required in a similarly sized project without an agreement. While buyouts may be justified under certain conditions, excusing a developer from providing MPDUs on-site necessarily compromises one of the central objectives of the program, geographic dispersal of affordable housing. While the MPDU program generally provides affordable housing in all geographic areas where new housing development occurs, the approval of buyouts limits that result in certain areas, particularly in Central Business Districts and Transit Station areas. In affluent areas with high homeowner association fees, accepting developer payment instead of MPDUs would result in further economic segregation.

Buyouts generate resources for the Housing Initiative Fund that is used to create or retain affordable housing units at other locations. Buyout contributions to the Housing Initiative Fund may support the production or retention of affordable housing at a nearby location, but no direct linkage is required by the MPDU law. The provision that lets developers reduce their MPDU requirement by building MPDUs at other sites or by conveying land has been used infrequently.

2. *What has been the effect of buyouts on MPDU production?*

During the past four years, MPDU production has averaged more than 200 new units annually. The table below shows the number of MPDUs produced in each of the last four years. In the table, the year of MPDU production represents the date that the units were ready for initial occupancy.

MPDU Production
(by year of initial occupancy)

	2000	2001	2002	2003
Sale Units				
Single Family Detached	33	21	0	0
Single Family Attached	88	108	100	63
Multi-Family	0	13	28	10
Rental Units				
Garden Apartments	65	71	70	133
High-Rise Apartments	0	0	10	66
TOTAL	186	213	208	272

Source: DHCA

Since 2000, DHCA has approved buyout agreements to accept payment instead of producing more than 230 MPDUs. The table below shows data from the nine developments that received buyout agreements during the past four years including the number of MPDUs required on-site and the number of MPDUs foregone in exchange for developer payments. Units are listed in the year that the alternative agreement was approved. Occupancy of the on-site MPDUs occurs at a later date.

MPDU Approvals for Projects with Alternative Agreements
(occupancy of on-site unit to occur at later date)

	2000	2001	2002	2003
Payment in Lieu of On-Site Units				
Single Family Attached	0	0	10	0
High-Rise Multi-Family	22	0	115	28
Senior Apartments	0	0	36	0
Mid-Rise Multi-Family	0	0	15	5
TOTAL	22	0	176	33
Units Provided On Site				
High-Rise Multi-Family	10	0	71	35
Mid-Rise Multi-Family	0	0	15	10
TOTAL	10	0	86	45

Source: DHCA

The two tables on the previous page illustrate the high year-to-year variability for MPDU production and buyout activity. Nonetheless, an examination of the four-year averages reveals the effect of buyouts on MPDU production. Since 2000, a total of 879 new MPDUs have been produced. During the same four-year period, buyout agreements allowed developers to make payments in place of building 231 future MPDUs. Payments to the Housing Initiative Fund may help produce or retain other affordable housing units, partially offsetting the loss of MPDUs.

A list of all approved buyout agreements appears in Appendix D.

3. *What types of mandatory fees are charged in addition to housing costs? How do these fees affect affordability?*

Mandatory fees may exist in both sale and rental communities. In sale communities, homeowner association or condominium fees generally are mandatory. Revenues from these fees pay for items such as common area maintenance, trash collection, and other shared expenses. Some homeowner association or condominium fees cover the cost of recreational facilities that are reserved for the exclusive use of the community residents.

In a rental environment, rent generally pays for common community costs. However, some specialized communities may require payment of mandatory fees in addition to rent. Some senior housing facilities, for example, require all residents to pay mandatory meal, housekeeping, or activities fees for services not covered by rent revenues.

The MPDU law allows DHCA to approve buyouts when development with "an indivisible package of resident services and facilities" that must be paid by all households "would cost the occupants of MPDUs so much that it is likely to make the MPDU effectively unaffordable by eligible households." In fact, condominium fees and other mandatory fees may add several hundred dollars to a household's monthly housing budget. For most MPDU-eligible households, these additional costs indeed would render a unit "effectively unaffordable." However, the cost of these services and facilities do not necessarily have to be bundled into an indivisible package. In the case of MPDUs in the Avenel development in Potomac, the mandatory homeowner fees cover only the cost of yard, home exterior, and common area maintenance. Additional services, such as access to recreation facilities, are covered by an optional fee.

4. *How has DHCA used buyouts to encourage development of residential units in priority redevelopment areas?*

DHCA has assisted non-high-rise projects in priority redevelopment areas by accepting payment instead of the developer building the full amount of MPDUs on-site. In 1998, DHCA first approved a buyout in a priority redevelopment area, the Cameron Hill townhouse community in the Silver Spring Central Business District. In 2002, DHCA approved a buyout for a townhouse and mid-rise development adjacent to the Wheaton Metro Station. In 2003, DHCA signed a buyout agreement for a mid-rise condominium project in South Silver Spring. While these projects did not face the same economic challenges associated with high-rise construction, DHCA concluded that buyouts were appropriate because of the financial risk involved in being a pioneer project in a redeveloping area.

5. *What other tools are available to support residential redevelopment projects in priority areas?*

Several tools, other than buyouts, are available to support the development of new residential projects in targeted areas of the County. At the most basic level, the County may revise an area's zoning and build public facilities to encourage private investment in targeted areas. The County can reduce the cost of development in a variety of ways. The County may approve property tax abatements for low- and moderate-income housing. The County may also assist projects to secure grants and loans from Federal, State, and private sources. For example, to support the rehabilitation of the Gramax Building in South Silver Spring, the County put together a package of HOC bonds, State low income housing tax credits, deferral of development fees, and loans from the Housing Initiative Fund to make the project more financially feasible.

C. Policy Alternatives

Staff has identified five policy alternatives for the Council to consider. The next six options may be combined with the second through sixth alternative.

Alternative Choices

1. *Eliminate all buyouts*: The Council could amend the law to repeal all authority to accept any payment in place of building required MPDUs.

2. *Retain current limited buyout authority*: The Council could retain the current provision of law that limits buyouts to projects with costly "indivisible" homeowner or service fees. The Council could also expressly direct DHCA to make no exceptions for projects financial or other considerations not resulting from high and indivisible mandatory fees.

3. *Allow buyouts only for elderly and special needs housing*: The Council could limit the use of buyouts to senior and special needs housing projects with costly indivisible service fees. Other projects with high homeowner or condominium fees would not be eligible for buyouts.

4. *Allow buyouts to improve the economics of important redevelopment projects:* The Council could allow buyouts when necessary to improve the economic viability of projects in important redevelopment areas, such as Central Business Districts and Transit Station areas. The law would continue to authorize buyouts for developments with costly mandatory homeowner or service fees.

5. *Give DHCA discretionary buyout approval authority*: The Council could authorize the DHCA Director to approve buyouts for any purpose. This

amendment would provide flexibility for DHCA to respond to varying project needs.

Additional Options

A. *Establish approval criteria for buyouts*: The Council could amend the MPDU law to include specific criteria that must be met for a development to be eligible for a buyout. Some criteria already exist in the law for buyouts resulting from high mandatory fees; these could be revised and expanded. The current MPDU law does not authorize the use of buyouts for any other purpose. If the Council amends the law to permit buyouts for other purposes, then approval criteria could also be incorporated into the law.

B. *Allow only partial buyouts*: The Council could amend the MPDU law to limit buyouts to no more than 25 percent (or another fraction) of the total number of MPDUs that otherwise would have been required. This option might be suitable for buyouts to assist project financing, but not for those resulting from high mandatory fees.

C. *Require multi-agency approval of buyouts*: The current MPDU law authorizes the DHCA Director to approve buyout agreements. The Council could amend the law to require approval from additional agencies, such as the Housing Opportunities Commission or the Planning Board.

D. *Accept only off-site units or land to replace on-site units*: At present, the MPDU law lets a developer build off-site MPDUs, convey land, or make a payment to the Housing Initiative Fund in return for reducing the on-site MPDU requirement. The Council could delete the option to pay cash to the Housing Initiative Fund. As a possible alternative to providing new off-site units or land, the County could require a developer to buy threatened existing affordable housing or existing MPDUs and donate those units to HOC or a non-profit housing provider.

E. *Unbundle mandatory fees*: The current MPDU law only allows buyouts for subdivisions with high mandatory fees for an indivisible package of services. The law could require unbundling of fees, so that mandatory fees include essential common ownership maintenance and upkeep but not optional services such as access to recreational facilities. This could

F. *Provide other financial assistance to projects in priority redevelopment areas:* MPDU buyouts have been used to reduce the financial risk of residential development in priority redevelopment areas. Other alternative policies and practices may achieve a similar outcome. The Council could adopt a policy to use tax abatements and other forms of financial assistance other than buyouts to promote redevelopment in priority areas.

D. Council Staff Recommendations

Staff recommends Alternative 3, approving buyouts only for elderly and special needs housing. Staff also recommends Option E, unbundling fees for mandatory services, and Option F, using financial incentives other than buyouts to promote development in priority areas.

Staff believes that MPDU buyouts should be reserved for the most exceptional circumstances. As the County has expanded the use of buyouts for additional purposes beyond that specified in the law, it has become more difficult to define a buyout as an exceptional occurrence. Staff fears that increasing use of buyouts will only raise expectations by developers that most future projects should also deserve buyouts. In our view, the expanded use of buyouts under cuts the goal of geographically dispersing affordable housing throughout the County.

Staff recommends amending the MPDU law to allow buyouts only for elderly and special needs housing with costly indivisible service fees. Elderly and special needs housing are more likely to have mandatory service fees related to resident care that are not easily unbundled. **For all other types of housing, Staff recommends that the County require unbundling of fees so that mandatory fees cover only the costs of essential common ownership maintenance and upkeep.** This could be accomplished through the MPDU agreement each residential developer submits to DHCA before construction begins. Unbundling of fees would preserve the affordability of MPDUs and negate the justification for most buyouts.

Expensive packages of bundled services are most likely to occur in affluent areas. Allowing buyouts for affluent developments solely because of amenity and recreational packages fosters exclusionary zoning. Under no circumstances should the County approve a buyout for an expensive package of amenities or recreation services.

Staff recommends using incentives other than buyouts to promote development in priority redevelopment areas. The County can help projects secure grants and loans from Federal, State, and private sources. In addition, tax abatements and State tax credits can reduce the financial risk of development in priority redevelopment areas. These strategies promote targeted economic development without forgoing the creation of affordable housing.

(As discussed in Chapter 9, the Council could consider limited use of buyouts as a substitute for providing MPDUs in small subdivisions with site constraints.)

CHAPTER 14
BUYOUT PAYMENT AMOUNT

POLICY QUESTION: When buyouts are allowed, how should the buyout amount be determined? How should the buyout payments be used?

A. Current Law

Where MPDU buyouts are allowed (see Chapters 12 and 13), the law gives no guidance on how to determine the payment amount for a buyout, other than stating that the buyout amount must produce "significantly more" units elsewhere. The law specifies that buyout payments be made to the Housing Initiative Fund.

B. Policy Considerations

The law does not define the term "significantly more," nor does it include any standard for measuring whether a buyout agreement achieves the "significantly more" standard. Payments to the Housing Initiative Fund provide funding to acquire, build, or rehabilitate affordable and special needs housing. Spending from the Housing Initiative Funds generally serves households with incomes too low to live in an MPDU.

1. *How much have developers paid to buyout an MPDU? How has DHCA interpreted the "significantly more" standard?*

DHCA approved eight buyout agreements from 2002 through 2003. Six of the eight agreements involved high-rise developments, with payments of $21,000 per unit for each MPDU not built. The other agreements involved payments of $18,000 per unit (for a mid-rise near the Wheaton Metro), $20,400 (for townhouses near the Wheaton Metro), and $31,700 (for a mid-rise condominium in South Silver Spring). In each case, the developer built some MPDUs on-site and made a payment to the Housing Initiative Fund for the required MPDUs not built on-site.

As detailed in a March 13, 2003, memorandum from the DHCA Director, the Department set the buyout payment amounts based on three calculations (see Appendix E).

- the per-unit land value for residential high-rises;
- the typical per-unit costs for Housing Initiative Fund projects (assuming that every dollar contributed by the County will leverage $7.50 of contributions from other sources); and
- the cost to buy down rents of existing apartments to MPDU levels for 20 years.

DHCA set recent buyout amounts based on a finding that each of these calculations converged near the level of $21,000 per unit. According to the DHCA Director, the payment amounts approved will produce "significantly more units for low income residents." This conclusion was based on the County's ability to leverage funds, rather than on the full cost of producing a new unit.

2. *What is the economic value of a buyout?*

The current MPDU law links buyout payments to the cost to produce "significantly more" replacement MPDUs at another site. This standard is rooted entirely in the cost of off-site housing production, and is independent of the economic value of the buyout itself. That is, it does not recognize the economic benefit the developer receives by replacing an MPDU with a market rate unit as a factor in calculating the buyout amount.

A buyout allows the conversion of a unit that otherwise would have been an MPDU into a market rate unit. The value of a buyout to the developer is a function of the difference in revenue generation between a market rate unit and an MPDU.

Most high-rise residential developments recently built in the County have been marketed as luxury units. For example, a development in the Bethesda CBD that received a buyout in 2000 is currently marketing one-bedroom units at $1,710 per month. Identically sized one-bedroom MPDUs in the same building rent for $900 per month. Using the assumptions in the table below, a one-bedroom market rate unit in the development has a present value of about $133,000 more than a one-bedroom MPDU. The table below shows the value of being able to rent a unit at market rather than MPDU rates.

Monthly Rent Differential (Market Rate Over MPDU)	**Present Value Differential (Over 20 Years)***
$200	$33,000
$400	$66,000
$600	$99,000
$800	$132,000
$1,000	$165,000
$1,200	$197,000

* assumes 7.0% annual discount rate and 2.5% annual rent increases for both market rate units and MPDUs

The production cost of a market rate unit may be higher than that of an MPDU since the market rate unit may be larger or include additional features than the MPDU. Nonetheless, land and building construction costs are by far the greatest component of high-rise production costs, and they do not differ based on whether a unit is rented at market or MPDU rates. Thus, the additional cost of producing a market rate unit has a minimal effect on the net benefit of a buyout.

When approving a buyout, DHCA must try to project future rents. DHCA cannot know what market conditions will prevail in two to three years. Similarly, one cannot guarantee that current market rents will be sustainable into the future. Nonetheless, based on current market conditions, it appears that the value of the Bethesda buyout was many times greater than the $16,000 per unit amount the County received in 2000.

If the purpose of a buyout is to assist a development that may be unable to proceed without economic relief, then the buyout amount must be less than the full value of converting an MPDU into a market rate unit. If a project is "non-finance-able" without any MPDU relief, it would be equally "non-finance-able" if the developer were required to pay 100 percent of the buyout value. Rather, if the goal of a buyout is to address the economic disadvantage of building MPDUs in certain locations, then the buyout amount optimally would be set at the maximum level possible that would allow a project to obtain financing.

3. *For what purpose should MPDU buyout payments be used?*

The current MPDU law requires that buyout contributions to the Housing Initiative Fund must be in an amount "that will produce significantly more MPDUs." This language may be interpreted to mean that buyout payments to the Housing Initiative Fund must be used only to build MPDUs at other locations. This reading of the law may create a conflict because Housing Initiative Fund resources are used primarily to provide housing for low income (rather than moderate income) households.

Alternatively, the law may be understood to apply only to the calculation of the buyout amount, without necessarily implying that buyout contributions must be used only for MPDU production. This interpretation is supported by section 25A-5(e)(2)(B) of the law that allows buyouts to "achieve significantly more MPDUs or units which low- and moderate-income households can more easily afford." In practice, DHCA does not maintain a separate Housing Initiative Fund account funded by buyout payments and used exclusively to produce MPDUs.

4. *What should be the relationship between buyout payments and General Fund contributions to the Housing Initiative Fund?*

In March 2003, the Council approved Resolution 15-110, which established a dedicated funding level for the Housing Initiative Fund.

> *The County Executive will recommend and the Council will approve, in future fiscal years beginning with FY04, an allocation from the General Fund to the Montgomery Housing Initiative Fund of an amount sufficient to ensure the availability in the MHI Fund of $16.1 million or the equivalent of 2.5 percent of actual General Fund property taxes from two years prior to the upcoming fiscal year, whichever is greater, for the purpose of maintaining and expanding the supply of affordable housing in Montgomery County.*

The resolution states that the Executive and Council will make an allocation from the General Fund "sufficient to ensure the availability" of a designated annual funding level. The practical implication of this clause is that the annual General Fund contribution to HIF equals the amount necessary to raise the end-of-fiscal-year fund balance to the designated level. Thus, any buyout payments added to the fund simply reduce the General Fund contribution at the start of the following fiscal year. As a result, while buyout payments do go to the Housing Initiative Fund, they do not increase the total amount earmarked for affordable housing.

C. Policy Alternatives

Staff has identified the following policy choices for the Council to consider if the law continues to allow MPDU buyouts. The first four choices represent alternatives from which only one may be selected. The next two options may be combined with any one of the first four alternatives.

Alternative Choices

1. *Retain current policy*: The Council could retain the current policy which gives DHCA the discretion to set buyout payment amounts consistent with the current "significantly more" standard.

2. *Set fixed buyout payment amounts:* The Council could amend the law to set a fixed per unit payment amount for buyouts. The per unit amount could be linked to the current cost to the County of creating a new affordable housing unit (either assuming or not assuming the leveraging of non-County resources). In addition, the fixed amount could be the product of a defined multiplier that quantifies the "significantly more" standard. (For example, "significantly more" could be defined as 1.2 times the number of MPDUs not provided on-site.) The fixed dollar amount could be adjusted periodically to respond to changes in the cost of affordable housing production or indexed to inflation.

3. *Use formula-based buyout payment amounts*: Similar to the previous option, buyout amounts could be linked to the cost of creating new affordable housing. However, the formula could consider factors such as the location of the development, the amount of MPDUs provided on-site, and the type and location of replacement affordable housing.

4. *Link buyout payments to actual realized project revenues:* The Council could amend the MPDU law to link buyout payments to actual realized project income. The buyout payment for the sale of a condominium could be based on the difference between actual market and MPDU sale prices. Payments for rental units could be based on the difference between actual annual rental income for market rate units and MPDUs for a defined number of years (such as 20 years).

Additional Options

A. *Establish separate fund for buyout payments*: The Council could direct the Office of Management and Budget to set up a separate account for buyout payments that does not reduce the annual General Fund contribution to the Housing Initiative Fund.

B. *Clarify use of buyout payments:* The Council could amend the MPDU law to state explicitly that buyout payments may be used for any Housing Initiative Fund purpose.

D. Council Staff Recommendations

As recommended in Chapter 13, Staff believes that the County should avoid buyouts in all but the most exceptional cases. If the Council retains MPDU buyouts under certain circumstances, Staff recommends Alternative 3: link buyout payments to actual realized project revenues.

For senior and special needs housing, Staff recommends that the payment amount equal the full cost of providing a replacement unit.

To the extent buyouts are approved in the future, Staff recommends establishing a separate account for buyout payments that does not reduce the annual General Fund contribution to the Housing Initiative Fund. Staff also recommends amending the law to state explicitly that buyout payments may be used for any Housing Initiative Fund purpose.

To the extent buyouts are approved for future projects (other than for senior or special needs housing), **Staff recommends linking buyout payment amounts to actual realized revenues.** Buyout payments would be made when the developer or property owner receives sale or rent revenue for the market rate units that were substituted for MPDUs. The buyout payment for the sale of a condominium would equal the difference (or a percentage of the difference) between the actual sale price and the MPDU controlled price at the time of the sale. Buyout payments for rental units would be made over a 20-year period (corresponding to the current MPDU rent control period), based on the difference (or a percentage of the difference) between actual annual rental income and the annual MPDU maximum rental amount for each of the 20 years.

Linking the buyout to realized revenues would better capture the true value of the buyout, and would replace the need to project future market conditions or calculate the value of a replacement unit. Deferring payments until units generate revenue also reduces the uncertainty involved in a buyout for the developer, investors, and the County. If market rates fall to near MPDU rates, then the buyout amount would decrease. If the market continues to command high housing prices and rents, then the buyout payment would reflect that condition.

If a buyout is approved for senior and special needs housing, Staff recommends that the payment amount equal the cost of providing a replacement unit. The payment amount should reflect the full production cost of the units and should not be based on any leveraging of resources.

Staff recommends that the Office of Management and Budget set up a separate account for buyout payments that does not reduce the annual General Fund contribution to the Housing Initiative Fund. Staff recommends amending the MPDU law to state explicitly that buyout payments may be used for any Housing Initiative Fund purpose.

Appendix A

MPDU Law – Chapter 25A of the County Code

Chapter 25A. HOUSING, MODERATELY PRICED.*

Sec. 25A-1. Legislative findings.

The County Council hereby finds that a severe housing problem exists within the County with respect to the supply of housing relative to the need for housing for residents with low and moderate incomes. Specifically, the County Council finds that:

***Editor's note**—1989 L.M.C., ch. 27, § 1, amended ch. 25A to read as set out in §§ 25A-1--25A-12. In some cases, existing provisions were retained but were given different section numbers. In those cases, a complete history note has been retained, and a note giving the former section number has been included. Completely new material will carry reference only to 1989 L.M.C., ch. 27.

Cross references—Consumer protection, ch. 11; condominiums, ch. 11A; cooperative housing, ch. 11C; moderate-income multifamily residential housing facilities real property tax deferral, § 52-18B; residential real property tax deferral, § 52-18C.

(1) The County is experiencing a rapid increase in residents of or approaching retirement age, with consequent fixed or reduced incomes; young adults of modest means forming new households; government employees in moderate income ranges; and mercantile and service personnel needed to serve the expanding industrial base and population growth of the County;

(2) A rising influx of residents into higher priced housing in the County with resultant demands for public utilities, governmental services, and retail and service businesses has created an increased need for housing for persons of low and moderate income who are employed in the stated capacities;

(3) The supply of moderately priced housing was inadequate in the mid-1960's and has grown since then at a radically slower pace than the demand for such housing;

(4) The inadequate supply of housing in the County for persons of low and moderate income results in large-scale commuting from outside the County to places of employment within the County, thereby overtaxing existing roads and transportation facilities, significantly contributing to air and noise pollution, and engendering greater than normal personnel turnover in the businesses, industry and public agencies of the County, all adversely affecting the health, safety and welfare of and resulting in an added financial burden on the citizens of the County;

(5) A careful study of market demands shows that approximately one-third of the new labor force in the County for the foreseeable future will require moderately priced dwelling units;

(6) Demographic analyses indicate that public policies which permit exclusively high-priced housing development discriminate against young families, retired and elderly persons, single adults, female heads of households, and minority households; and such policies produce the undesirable and unacceptable effects of exclusionary zoning, thus failing to implement the Montgomery County housing policy and the housing goal of the general plan for the County;

(7) Experience indicates that the continuing high level of demand for more luxurious housing, with a higher profit potential, discourages developers from offering a more diversified range of housing; and the production of moderately priced housing is further deterred by the high cost of land, materials, and labor;

(8) Actual production experience in the County indicates that if land costs can be reduced, houses of more modest size and fewer amenities can be built to be sold at a profit in view of the existing ready market for such housing;

(9) Every indication is that, given the proper incentive, the private sector is best equipped and possesses the necessary resources and expertise required to provide the type of moderately priced housing needed in the County;

(10) Rapid regional growth and a strong housing demand have combined to make land and construction costs very high and to have an effect on the used housing market by causing a rise in the prices of those units;

(11) In past years efforts have been made to encourage moderately priced housing construction through zoning incentives permitting greater density and through relaxation of some building and subdivision regulations. Very little moderately priced housing had resulted; and

(12) In some instances existing housing for persons of low and moderate income is substandard and overcrowded. (1974 L.M.C., ch. 17, § 1; 1979 L.M.C., ch. 21, § 1; 1989 L.M.C., ch. 27, § 1.)

Sec. 25A-2. Declaration of public policy.

The County Council hereby declares it to be the public policy of the County 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 sizes;

(2) Provide for low- and moderate-income housing to meet existing and anticipated future employment needs in the County;

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

(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;

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

(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; and

(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. (1974 L.M.C., ch. 17, § 1; 1989 L.M.C., ch. 27, § 1; 2003 L.M.C., ch. 1, § 1.)

Sec. 25A-3. Definitions.

The following words and phrases, as used in this Chapter, have the following meanings:

(a) *Applicant* means any person, firm, partnership, association, joint venture, corporation, or any other entity or combination of entities, and any transferee of all or part of the land at one location.

(b) *At one location* means all adjacent land of the applicant if:

(1) The property lines are contiguous or nearly contiguous at any point; or

(2) The property lines are separated only by a public or private street, road, highway or utility right-of-way, or other public or private right-of-way at any point; or

(3) The property lines are separated only by other land of the applicant which is not subject to this Chapter at the time of any permit, site plan, development or subdivision application by the applicant.

(c) *Available for building development* means all land:

(1) Owned by, or under contract to, the applicant;

(2) Zoned for any type of residential development to which an optional density bonus provision applies;

(3) Which will use public water and sewerage; and

(4) Which is already subdivided or is ready to be subdivided for construction or development.

(d) *Closing costs* means statutory charges for transferring title, fees for obtaining necessary financing, title examination fees, title insurance premiums, house location survey charges and fees for preparation of loan documents and deed of conveyance.

(e) *Commission* means the Housing Opportunities Commission of Montgomery County.

(f) *Consumer Price Index* means the latest published version of the Consumer Price Index for All Urban Consumers (CPI-U) of the U.S. Department of Labor for the Washington metropolitan area, or any similar index selected by the County Executive.

(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 10 years for sale units and 20 years for rental units, and begins on the date of initial sale or rental. If a sale or rental MPDU is sold to an eligible person within 10 years after its initial sale or rental, 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.

(h) *Date of original sale* 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.

(j) *Department* means the Department of Housing and Community Affairs.

(k) *Director,* except as otherwise indicated, means the head of the Department of Housing and Community Affairs, or the Director's designee.

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

(m) *Eligible person* means a person or household whose income qualifies the person or household to participate 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) *Housing Initiative Fund* means a fund established by the County Executive to achieve the purposes of Section 25B-9.

(o) *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.

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

(q) *Moderately priced dwelling unit* or *MPDU* means a dwelling unit which is:

(1) offered for sale or rent to eligible persons 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 of low or moderate income, and designated by the Director as an MPDU.

(r) *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) *Planning Board* means the Montgomery County Planning Board.

(t) *Priority marketing period* is the period an MPDU must be offered exclusively for sale or rent to eligible persons, as provided in Section 25A-8. (1974 L.M.C., ch. 17, § 1; 1976 L.M.C., ch. 12, § 1; 1976 L.M.C., ch. 35, § 2; 1978 L.M.C., ch. 31, § 1; 1979 L.M.C., ch. 21, § 2; 1980 L.M.C., ch. 63, § 1; 1982 L.M.C., ch. 6, § 11; 1984 L.M.C., ch. 24, § 28; 1984 L.M.C., ch. 27, § 19; 1989 L.M.C., ch. 27, § 1; 1994 L.M.C., ch. 29; 1996 L.M.C., ch. 13, § 1; 1996 L.M.C., ch. 20, § 1; 1998 L.M.C., ch. 12, § 1; 2001 L.M.C., ch. 14, § 1; 2001 L.M.C., ch. 25, § 1; 2002 L.M.C., ch. 16, § 2; 2002 L.M.C., ch. 27, § 1.)

Editor's note—2002 L.M.C., ch. 27, § 2, states: Applicability. The requirements of Chapter 25A, as amended by Section 1 of this Act, do not apply to any subdivision with more than 34 but fewer than 50 units at one location if the applicant applied for a preliminary plan of subdivision before this Act took effect [January 9, 2003], unless the applicant agrees that the requirements of Chapter 25A as amended should apply to that subdivision.

Sec. 25A-4. Income and eligibility standards.

(a) The County Executive must establish standards of eligibility for the MPDU program in regulations adopted under method (1), and must revise the standards when changes in market conditions affect the ability of moderate-income households to buy or rent housing. These standards must establish moderate-income levels for varying sizes of households which will qualify a person or household to buy or rent an MPDU. The Executive may establish different income eligibility standards for buyers and renters.

(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) the term and interest rate that applies to the financing of MPDUs,

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

(4) family size and number of dependents.

(c) A person who rents an MPDU and lawfully occupies it when the unit is offered for sale may buy the unit, regardless of the person's income at the time of sale, if the person met all eligibility standards when the person first rented the unit.

(d) To be eligible to buy or rent an MPDU, a person and members of that person's household must not have owned any residential property during the previous 5 years. The Director may waive this restriction for good cause. (1989 L.M.C., ch. 27, § 1; 1994 L.M.C., ch. 29.)

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

(a) The requirements of this Chapter to provide MPDU's apply to any applicant who:

(1) submits for approval or extension of approval a preliminary plan of subdivision under Chapter 50 which proposes the development of a total of 35 or more dwelling units at one location in one or more subdivisions, parts of subdivisions, resubdivisions, or stages of development, regardless of whether any part of the land has been transferred to another party;

(2) submits to the Planning Board or to the Director of Permitting Services a plan of housing development for any type of site review or development approval required by law, which proposes construction or development of 35 or more dwelling units at one location; or

(3) with respect to land in a zone not subject to subdivision approval or site plan review, applies for a building permit to construct a total of 35 or more dwelling units at one location.

In calculating whether a development contains a total of 35 or more dwelling units for the purposes of this Chapter, the development includes all land at one location in the County available for building development under common ownership or control by an applicant, including land owned or controlled by separate corporations in which any stockholder or family of the stockholder owns 10 percent or more of the stock. An applicant must not avoid this Chapter by submitting piecemeal applications or approval requests for subdivision plats, site or development plans, or building permits. Any applicant may apply for a preliminary plan of subdivision, site or development plan, record plat or building permit for fewer than 35 dwelling units at any time; but the applicant must agree in writing that the applicant will comply with this Chapter when the total number of dwelling units at one location reaches 35 or more.

(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:

(1) a specific number of MPDUs must be constructed on an approved time schedule;

(2) in single-family dwelling unit subdivisions, each MPDU must have 2 or more bedrooms; and

(3) in multi-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.

(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. 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. The amount of density bonus achieved in the approved development determines the percentage of total units that must be MPDUs, as follows:

Achieved Density Bonus	*MPDUs Required*		*Achieved Density Bonus*	*MPDUs Required*
Zero	12.5%		Up to 11%	13.6%
Up to 1%	12.6%		Up to 12%	13.7%
Up to 2%	12.7%		Up to 13%	13.8%
Up to 3%	12.8%		Up to 14%	13.9%

Achieved Density Bonus	*MPDUs Required*		*Achieved Density Bonus*	*MPDUs Required*
Up to 4%	12.9%		Up to 15%	14.0%
Up to 5%	13.0%		Up to 16%	14.1%
Up to 6%	13.1%		Up to 17%	14.2%
Up to 7%	13.2%		Up to 18%	14.3%
Up to 8%	13.3%		Up to 19%	14.4%
Up to 9%	13.4%		Up to 20%	14.5%
Up to 10%	13.5%		Up to 22%	15.0%

(d) (1) Notwithstanding subsection (c), the requirements of this Chapter do not apply to a development with more than 34 but fewer than 50 units at one location if the Planning Board, in reviewing a subdivision or site plan submitted by the applicant and based on the lot size, product type, and other elements of the plan as submitted, finds that achieving a bonus density of 20 percent or more at that location:

(A) would not allow compliance with applicable environmental standards and other regulatory requirements, or

(B) would significantly reduce neighborhood compatibility.

(2) If the Planning Board approves a density bonus of at least 20 percent for a development which consists of more than 34 but fewer than 50 units at one location, the number of MPDU's required must be governed by subsection (c) unless the formula in subsection (c) would not allow the development to have one bonus market rate unit. In that case, the Board must reduce the required number of MPDU's by one unit and approve an additional market rate unit.

(e) (1) In exceptional cases, instead of building the required number of MPDUs, an applicant may offer to:

(A) Build significantly more MPDUs at one or more other sites in the same or an adjoining planning area;

(B) Convey land in the same or an adjoining planning area that is suitable in size, location and physical condition for significantly more MPDUs;

(C) Contribute to the Housing Initiative Fund an amount that will produce significantly more MPDUs; or

(D) Do any combination of these alternatives that will result in building significantly more MPDUs.

(2) If the Director finds that:

(A) In the project or subdivision originally proposed by the applicant, an indivisible package of resident services and facilities to be provided to all households would cost the occupants of the MPDUs so much that it is likely to make the MPDUs effectively unaffordable by eligible households; and

(B) An offer made by an applicant under subsection (e)(1) will achieve significantly more MPDUs or units which low- and moderate-income households can more easily afford; and

(C) These public benefits outweigh the benefit of constructing MPDUs in each subdivision throughout the County, and acceptance of the applicant's offer will achieve the objective of providing a broad range of housing opportunities throughout the County;

the Director must accept the offer made by the applicant instead of requiring the construction of MPDUs by the applicant. If the applicant can feasibly build significantly more MPDUs at another site, the Director must not approve any other alternative under subsection (e)(1).

(3) The procedures for considering and implementing alternative offers must be established by executive regulation. To implement an offer, the applicant must sign an agreement with the Director not later than a time provided in the regulations.

(f) (1) An applicant may satisfy this Section by obtaining approval from the Director to transfer land to the County before applying for a building permit. The applicant must sign a written land transfer agreement approved by the Director and by the County Attorney. For the Director to consider the request and take timely action, a written notice of the applicant's intent to submit an agreement should be served upon the Director at least 90 days before the application for a building permit is filed. The land transfer agreement must covenant that so much of the land, designated in the approved preliminary plan or site plan as land to which the optional zoning provisions for MPDUs apply, as is necessary in order to construct the number of MPDUs required by subsection (a) will be transferred, as finished lots, to Montgomery County or to the County's designee before the building permit is issued, so that the County might cause MPDUs to be constructed on the transferred land. After the submission of supporting documentation and review and approval by the County for the transfer of finished lots, the County must reimburse the applicant for the costs the applicant actually incurred, which are directly attributable to the finishing of the MPDU lots so transferred. Reimbursable costs include but are not limited to engineering costs; clearing, grading, and paving streets, including any required bonds and permits; installation of curbs, gutters and sidewalks; sodding of public right-of-way; erection of barricades and signs; installation of storm sewers and street lighting; and park and other open space and recreational development directly benefiting the MPDU lots transferred. The County must not reimburse an applicant for the cost or value of the transferred lots.

(2) If an applicant transfers land to the County under this subsection and no funds have been appropriated to reimburse the applicant for his finishing costs, the County may accept from the applicant undeveloped land rather than finished lots, or the applicant may transfer the finished lots to the County without requiring payment for finishing the lots.

(3) Notwithstanding any other provisions of the 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 Planning Board or the Director of Permitting Services in deciding whether to grant the applicant a waiver of this Chapter under Section 25A-7(b).

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

(g) The MPDU agreements must be signed by the applicant and all other parties whose signatures are required by law for the effective and binding execution of contracts conveying real property. The agreements must be executed in a manner that will enable them to be recorded in the land records of the County. If the applicant is a corporation, the agreements must be signed by the principal officers of the corporation individually and on behalf of the corporation. Partnerships, associations or corporations must not evade this Chapter through voluntary dissolution. The agreements may be assigned if the County approves, and if the assignees agree to fulfill the requirements of this Chapter.

(h) The Department of Permitting Services must not issue a building permit in any subdivision or housing development in which MPDUs are required until the applicant submits a valid MPDU agreement which applies to the entire subdivision or development. The applicant must also file with the first application for a building permit a statement of all land the applicant owns in the County that is available for building development. In later applications, the applicant need only show additions and deletions to the original landholdings available for building development.

(i) The MPDU agreement must include the number, type, location, and plan for staging construction of all dwelling units and such other information as the Department requires to determine the applicant's compliance with this Chapter. The MPDU staging plan must be consistent with any applicable land use plan, subdivision plan, or site plan. The staging plan included in the MPDU agreement for all dwelling units must be sequenced so that:

(1) MPDUs are built along with or before other dwelling units;

(2) no or few market rate dwelling units are built before any MPDUs are built;

(3) the pace of MPDU production must reasonably coincide with the construction of market rate units; and

(4) the last building built must not contain only MPDUs.

This subsection applies to all developments, including any development covered by multiple preliminary plans of subdivision.

(j) If an applicant does not build the MPDUs contained in the staging plan along with or before other dwelling units, the Director of Permitting Services must withhold any later building permit to that applicant until the MPDUs contained in the staging plan are built.

(k) *Recording of covenants*. The applicant must execute and record covenants assuring that:

(1) The restrictions of this Chapter run with the land for the entire period of control; and

(2) The covenants will bind the applicant, any assignee, mortgagee, or buyer, and all other parties that receive title to the property. These covenants must be senior to all instruments securing permanent financing.

(l) *Later deeds*. The grantor must state, in any deed or instrument conveying title to an MPDU, that the conveyed property is a MPDU and is subject to the restrictions contained in the covenants required under this Chapter during the control period until the restrictions are released.

(m) Nothing in this Chapter prohibits an applicant from voluntarily building MPDUs, as calculated under subsection (c), in a development with fewer than 35 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 35 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. Subsection (e) and Section 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. (1974 L.M.C., ch. 17, § 1; 1974 L.M.C., ch. 40, § 1; 1976 L.M.C., ch. 34, § 1; 1976 L.M.C., ch. 35, § 3; 1978 L.M.C., ch. 31, § 2; 1979 L.M.C., ch. 21, § 3; 1982 L.M.C., ch. 6, § 1; 1989 L.M.C., ch. 27, § 1; 1994 L.M.C., ch. 29; 1996 L.M.C., ch. 20, § 1; 1998 L.M.C., ch. 12, § 1; 2001 L.M.C., ch. 14, § 1; 2001 L.M.C., ch. 8, § 1; 2002 L.M.C., ch. 2, § 1; 2002 L.M.C., ch. 16, § 2; 2002 L.M.C., ch. 27, § 1; 2003 L.M.C., ch. 1, § 1.)

Editor's note—2002 L.M.C., ch. 27, § 2, states: Applicability. The requirements of Chapter 25A, as amended by Section 1 of this Act, do not apply to any subdivision with more than 34 but fewer than 50 units at one location if the applicant applied for a preliminary plan of subdivision before this Act took effect [January 9, 2003], unless the applicant agrees that the requirements of Chapter 25A as amended should apply to that subdivision.

The requirement of providing for moderately priced dwelling units contained in § 25A-5 is mentioned in connection with Montgomery County's growth policy in P. J. Tierney, Maryland's Growing Pains: The Need for State Regulation, 16 U. of Balt. L. Rev. 201 (1987) at pp. 236, 237.

Note—Formerly, § 25A-4.

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

(a) *Optional zoning provisions.* The County Council, sitting as a District Council for the Maryland-Washington Regional District within the County, to assist in providing moderately priced housing has enacted zoning standards in Chapter 59, establishing in certain zones optional density bonus provisions which increase the allowable residential density above the maximum base density of the zoning classification and permit alternative dwelling unit types other than those allowed under the standard method of development. Land upon which the applicant must build MPDUs may, at the applicant's election, be subject to optional zoning provisions. If the applicant elects the optional density provisions, permitting the construction of an increased number of dwelling units, the requisite percentage and number of MPDUs must apply to the total number of dwelling units as increased by application of the optional density provisions or by the approval of a special exception that increases the density above the otherwise permitted density of the zoning classification in which the property is situated.

(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 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 MPDU requirements. Any waiver must be strictly construed and limited. (1974 L.M.C., ch. 17, § 1; 1976 L.M.C., ch. 35, § 4; 1978 L.M.C., ch. 31, § 4; 1979 L.M.C., ch. 21, § 4; 1980 L.M.C., ch. 28, § 1; 1982 L.M.C., ch. 6, § 1; 1989 L.M.C., ch. 27, § 1; 1996 L.M.C., ch. 13, § 1; 1996 L.M.C., ch. 20, § 1; 1998 L.M.C., ch. 12, § 1; 2001 L.M.C., ch. 14, § 1; 2002 L.M.C., ch. 16, § 2.)

Note—Formerly, § 25A-5.

Sec. 25A-7. Maximum prices and rents of moderately priced dwelling units.

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, must not exceed an applicable maximum sale price established from time to time by the County Executive in regulations adopted under method (1).

(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) *Rental.*

(1) The rent, including parking but excluding utilities when they are paid by the tenant, for any MPDU must not exceed a maximum rent for the dwelling unit established by the County Executive in regulations adopted under method (1). Different rents must be established for units when utility costs are paid by the owner and included in the rent.

(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. (1989 L.M.C., ch. 27, § 1.)

Sec. 25A-8. Sale or rental of moderately priced dwelling units.

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

(1) 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 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. The notice must set forth 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 of moderate income and, in accordance with procedures established by the County Executive, must notify eligible persons of the offering.

(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 will be administered by lottery or by another method that will assure eligible persons an equitable opportunity to buy or rent a 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 was certified for the MPDU program. Each eligible person must be notified of the availability of any MPDU which would meet that person'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 are interested in buying or renting a unit.

(6) Moderately priced dwelling units, 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 must not exceed the proportion of market rate rental units to all market rate units.

(B) In a subdivision containing both single-family and multiple-family dwellings, the proportion of rental single-family MPDUs to all one-family MPDUs must not exceed the proportion of market rate rental single-family units to all market rate single-family units; and the proportion of rental multiple-family MPDUs to all multiple-family MPDUs must not exceed the proportion of market rate rental multiple-family units to all market rate multiple-family units.

(C) The Director may allow an applicant to offer a higher proportion of multiple-family MPDUs for rent in a subdivision if the Director finds that:

(i) offering more rental MPDUs in that subdivision would advance the purpose of the County housing policy and the objectives of any applicable land use plan, be consistent with local housing market conditions, and avoid excessive mandatory condominium or homeowners' association fees or other costs that would reduce the affordability of sale MPDUs; and

(ii) the applicant is qualified to manage rental housing and has submitted an effective management plan for the rental units in that subdivision.

Applicants must make a good-faith effort to enter into contracts with eligible persons during the priority marketing period and for an additional period necessary to negotiate with eligible persons 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 under the resale provisions of Section 25A-9.

(8) An owner of an MPDU, except the Commission or a housing agency or nonprofit corporation designated by the Director, must not rent the unit to another party unless the Director finds sufficient cause to allow temporary rental of the unit under applicable regulations, which may include maximum rental levels. Any MPDU owner who is allowed to rent a unit temporarily must agree to amend the applicable MPDU covenants to extend the control period for a time equal to the temporary rental period.

(9) Any rent obtained for an MPDU that is rented without the Director's authorization must be paid into the Housing Initiative Fund by the owner within 90 days after the Director notifies the owner of the rental violation. Any amount unpaid after 90 days is grounds for a lien against the unit, and the Director may obtain a judgment and record the lien.

(10) 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. 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 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.

(b) *Department of Housing and Community Affairs, Housing Opportunities Commission or other designated housing development agency or corporation.*

(1) In view of the critical, long-term public need for housing for families 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. The Department or Commission may buy or lease up to 33 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 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 corporation to demonstrate its ability to operate and maintain MPDUs satisfactorily on a long-term basis.

(2) The Department must notify the Commission or other designated agency or corporation promptly after receiving notice from the applicant under subsection

(a) of the availability of MPDUs. If the Department, the Commission, or any other designated agency or corporation exercises its option, it must submit to the applicant, within 21 calendar days after the Department notifies the Commission under subsection (b), a notice of intent to exercise its option for specific MPDUs covered by this option. Any MPDUs not bought or leased under this subsection must be sold or rented only to eligible persons under subsection (b) during the priority marketing period for eligible persons to buy or lease.

(3) In exercising this option, the Department, the Commission, and any designated agency or corporation must designate the units by reference to number, type, size and amenities of the units selected if the designation does not result in any type of unit exceeding by more than 40 percent the total units of that type which are sold or rented under this Section, unless the applicant agrees otherwise. The notice required under subsection (b)(2) must state which MPDUs are to be offered for sale and which are to be offered for rent, and the Department, the Commission, and any designated agency or corporation may buy only units which are offered for sale and may lease only units which are offered for rent. The Department, the Commission, and any designated agency or corporation must decide whether it will exercise its option within 45 days after it receives the original notice. (1974 L.M.C., ch. 17, § 1; 1976 L.M.C., ch. 35, § 4; 1978 L.M.C., ch. 31, § 4; 1979 L.M.C., ch. 21, § 4; 1980 L.M.C., ch. 28, § 1; 1982 L.M.C., ch. 6, § 1; 1984 L.M.C., ch. 24, § 28; 1989 L.M.C., ch. 27, § 1; 1994 L.M.C., ch. 29, 2001 L.M.C., ch. 25, § 1; 2002 L.M.C., ch. 27, § 1.)

Editor's note—2002 L.M.C., ch. 27, § 2, states: Applicability. The requirements of Chapter 25A, as amended by Section 1 of this Act, do not apply to any subdivision with more than 34 but fewer than 50 units at one location if the applicant applied for a preliminary plan of subdivision before this Act took effect [January 9, 2003], unless the applicant agrees that the requirements of Chapter 25A as amended should apply to that subdivision.

Formerly, § 25A-6.

Sec. 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 during the control period for a price greater than the original selling price plus:

(1) A percentage of the unit's original selling 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 of improvements made to the unit between the date of original sale 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.

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.

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

(1) Any MPDU offered for resale during the control period must first be offered exclusively for 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 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. The unit may be sold through either of the following methods:

(A) The Department may by lottery establish a priority order under which eligible persons who express interest in buying the unit may buy it at the approved resale price.

(B) The Department may notify the MPDU owner that the owner may sell the unit directly to any eligible person under the resale provisions of this Chapter.

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

(A) the priority marketing period expires; and

(B) all eligible persons 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:

(A) a copy of the proposed sales contract, including a list and the price of any personal property included in the sale;

(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.

(4) A transfer of an MPDU does not comply with this Chapter until all required documents and affidavits have been submitted to and approved by the Department.

(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 price over the sum of the following:

(A) The original selling price;

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

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

(D) A reasonable sales commission.

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 (A)--(D).

(2) 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) The Department and the Commission, in that order, may buy an MPDU the first time the MPDU is offered for sale after 10 years after the original sale or rental, and may resell the unit to an eligible person. A resale by the Department or Commission starts a new control period.

(4) 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 after 10 years after the original sale or rental.

(d) *Initial and subsequent rent controls.* Unless previously sold under subsection (c)(1), moderately priced dwelling units built or offered for rent under this Chapter must not be rented for 20 years after the original rental at a rent greater than that established by regulations adopted by the County Executive under method (1). Whenever any moderately priced dwelling unit (other than those built, sold or rented under any federal, state or local program offered by the Commission) is offered for rent during the 20-year control period, it must be offered exclusively for 60 days to eligible persons, as determined by the Department, for use as his or her own 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 regulations adopted by the County Executive under method (1).

(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:

(1) If the sale occurs during the first 10 years after the original sale or rental, any amount of the foreclosure sale price which exceeds the total of the approved resale price under subsection (a), reasonable foreclosure costs, and liens filed under the Maryland Contract Lien Act, must be paid to the Housing Initiative Fund. If the remaining balance under the original first deed of trust or mortgage exceeds the resale price under subsection (a), then the difference between the foreclosure sales price and the balance of the original first deed of trust (plus reasonable foreclosure costs) must be paid to the Fund.

(2) If the sale occurs after the first 10 years after the original sale or rental, and the unit was originally offered for sale or rent after March 20, 1989, the payment to the Fund must be calculated under subsection (c).

(3) If the MPDU is a rental unit, the resale price under subsections (a) and (c) must be calculated using the maximum sales price in effect when the unit was originally offered for rent.

(4) If the MPDU is sold subject to senior liens, the lien balances must be included in calculating the sale price.

All MPDU covenants must be released after the required payment is made into 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 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 20 years after the original rental or offering for sale if the buyer is bound by all covenants and controls on the MPDUs.

(h) *Compliance.* The County Executive must adopt regulations to promote compliance with this section and prevent practices that evade controls on rents and sales of MPDUs. (1974 L.M.C., ch. 17, § 1; 1978 L.M.C., ch. 31, § 5; 1979 L.M.C., ch. 21, § 5; 1982 L.M.C., ch. 6, § 1; 1984 L.M.C., ch. 24, § 28; 1989 L.M.C., ch. 27, § 1; 1990 L.M.C., ch. 46, § 1; 1994 L.M.C., ch. 29; 2001 L.M.C., ch. 25, § 1.)

Editor's Note—Section 25A-9(e) is interpreted in May Department Stores v. Montgomery County, 118 Md.App. 441, 702 A.2d 988 (1977), *affirmed*, 352 Md. 183, 721 A.2d 249 (1998), wherein this section is declared to be preempted by State law due to a conflict; the State provides for the priority of liens and the County may not change that priority.

Note—Formerly, § 25A-7.

Sec. 25A-10. Executive regulations; enforcement.

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

(b) This Chapter applies to all agents, successors and assigns of an applicant. A building permit must not be issued, and a preliminary plan of subdivision, development plan, or site plan must not be approved unless it meets the requirements of this Chapter. The Director of Permitting Services may deny, suspend or revoke any building or occupancy permit upon finding a violation of this Chapter. Any prior approval of a preliminary plan of subdivision, development plan or site plan may be suspended or revoked upon the failure to meet any requirement of this Chapter. An occupancy permit must not be issued for any building to any applicant, or a successor or assign of any applicant, for any construction which does not comply with this Chapter.

(c) Any violation of this Chapter or regulations adopted under it is a class A violation.

(d) The Director may take legal action to stop or cancel any transfer of an MPDU if any party to the transfer does not comply with all requirements of this Chapter. The Director may recover any funds improperly obtained from any sale or rental of an MPDU in violation of this Chapter.

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

(1) enjoin an MPDU owner who violates this Chapter, or any covenant signed or order issued under this Chapter, from continuing the violation; or

(2) require an owner to sell an MPDU owned or occupied in violation of this Chapter to an eligible buyer. (1974 L.M.C., ch. 17, § 1; 1980 L.M.C., ch. 28, § 1; 1983 L.M.C., ch. 22, § 30; 1984 L.M.C., ch. 24, § 28; 1989 L.M.C., ch. 27, § 1; 1994 L.M.C., ch. 29; 1996 L.M.C., ch. 20, § 1 1998 L.M.C., ch. 12, § 1; 2001 L.M.C., ch. 14, § 1; 2002 L.M.C., ch. 16, § 2.)

Note—Formerly, § 25A-8.

Sec. 25A-11. Appeals.

(a) Any person aggrieved by any denial, suspension or revocation of a building or occupancy permit or denial, suspension or revocation of approval of a preliminary plan of subdivision, development plan, or site plan may appeal to the official, agency, board, Commission or other entity designated by law to hear such appeal.

(b) Any person aggrieved by a final administrative action or decision under this Chapter may appeal to the Circuit Court for the County in accordance with the Maryland Rules of Procedure for a review of such action or decision. (1974 L.M.C., ch. 17; 1989 L.M.C., ch. 27, § 1.)

Note—Formerly, § 25A-9.

Sec. 25A-12. Applicability.

(a) This Chapter applies to all applicants and housing units developed by applicants, regardless of when an MPDU was originally offered for sale or rent, except as provided in subsections (b) and (c).

(b) Section 25A-9(c) does not apply to any MPDU originally offered for sale or rent on or before March 21, 1989.

(c) Section 25A-9(e) does not apply to any MPDU owned or transferred by the Commission directly or through a partnership and originally offered for sale or rent on or before March 21, 1989. (1982 L.M.C., ch. 6, § 1; 1984 L.M.C., ch. 24, § 28; 1984 L.M.C., ch. 27, § 19; 1989 L.M.C., ch. 27, § 1; 1994 L.M.C., ch. 29.)

Note—Formerly, § 25A-10.

Appendix B

Detailed history of major amendments to the MPDU Law

Enacted MPDU Bills

Bill 3-72
Introduced: March 21, 1972
Enacted: October 23, 1973

Bill 3-72, which created Chapter 25A of the County Code, was introduced in 1972, enacted in 1973 over the Executive's veto, and became effective in 1974. This bill defined a moderately priced dwelling unit (MPDU) as a unit that is subsidized by a government program to assist the construction of housing for families of low- or moderate-income. A developer applying for subdivision approval, site-plan approval, or a building permit for the construction of 50 or more dwelling units at one location is required to provide 15 percent of the units as MPDUs. This bill created a five-year control period for sale and rental units, and provided a waiver provision for the number of MPDUs required to be built on site, if exceptional topographical conditions or other extraordinary circumstances resulted in unusual practical difficulties or undue hardship to a developer.

This legislation gave the Montgomery County Housing Authority the option to purchase or lease up to one-third of all MPDUs constructed, and granted the Director of the Department of Environmental Protection the authority to deny, suspend, or revoke any building permit, or to deny an occupancy permit, when MPDU requirements were not met. The County may also institute injunction, mandamus, or another appropriate proceeding to enforce the MPDU requirements.

Bill 54-73
Introduced: November 6, 1973
Enacted: March 12, 1974

Bill 54-73 was enacted to provide developers with flexibility as they implemented the mandatory MPDU construction requirements. This bill allowed a developer of a subdivision, who was otherwise required to construct MPDUs, the option of transferring land as finished lots to the County or its designee, so the County could develop MPDUs on the transferred land. The amount of land transferred must equal the amount necessary to build the percentage of MPDUs originally required by the developer.

This bill provided that an applicant must give notice to the Director of Environmental Protection at least 90 days prior to filing an application for a building permit or a written notice of intent to submit a written agreement to transfer land in lieu of building MPDUs.

Bill 27-75
Introduced: June 10, 1975
Enacted: October 7, 1975

Bill 27-75 revised the definition of closing costs to include charges for surveys and fees for loan documents and deed preparation. The definition of moderate income was revised to delete reference to the continued occupancy limits for public housing. In addition, the bill added a provision that the level of gross income designated as moderate income by the Executive shall not exceed 200 percent of the level for very low-income families as established by the Department of Housing and Urban Development.

This bill revised the definition of housing to include closing costs as part of the price for housing sales.

Bill 1-76
Introduced: January 13, 1976
Enacted: March 16, 1976

Bill 1-76 decreased the number of MPDUs required in a Town Sector or Planned Neighborhood zone by changing the 20 percent requirement to not less than the increased units allowed by optional zoning provisions. The Council concluded that Town Sector zones should be treated the same as every other zone under the MPDU law. This change was made to correct the inequity between the required MPDU units and a density bonus in the Town Sector zone.

This bill clarified that the waiver provision should not be applied to the entire MPDU program, but instead should be applied to the number of housing units required and the specific location of the MPDUs.

Bill 3-76
Introduced: February 3, 1976
Enacted: March 16, 1976

In compliance with the 1974 Federal Housing and Community Development Act, Bill 3-76 tied the definition of low income to metropolitan area median income. This bill provided that HOC, or any other housing development agency or corporation designated by the Executive, has the option to purchase or lease up to one-third of all MPDUs that are sold or rented.

Bill 30-77
Introduced October 18, 1977
Enacted February 14, 1978

The Council approved Bill 30-77 to resolve issues that arose with the implementation of the MPDU program. Some developers were constructing standard units instead of typical MPDUs, renting these units for five years, and then selling these housing units for market price. This bill added the requirement that the percentage of MPDUs for sale may not be less than the percentage of all the sale units in the subdivision. This provision was added to deter the use of the rental option for MPDUs in projects that otherwise offered all market price units for sale. The bill also memorialized the five-year control period for subsequent sales and rentals of MPDUs.

Bill 30-77 allowed the Executive to waive certain technical requirements that conflicted with other government regulations. This amendment was added to deal with an interpretation by the Veterans Administration that the law's five-year price control requirement precluded the use of Veterans Administration financing, which reduced an applicant's down payment requirements and increased the marketability of MPDUs in developments where the balance of units were offered with the availability of Veterans Administration loan guarantees.

Another amendment was made to clearly define whether HOC is required to take housing units in the manner in which developers offered these units. This bill gave HOC the option to select the specific MPDUs it wanted to purchase or lease with reference to the number, type, size, and amenities offered.

Bill 30-77 revised the definition of MPDU to include a procedure for excluding utility costs, when such costs were paid by the occupant. Utility costs may not be added to the maximum established rent or sale price. In addition, adjustments can be made to the utility cost factor, so that the total rental cost for such a unit is equivalent to, or less than, the rental price for a comparable dwelling unit where the rental price includes utility costs. In addition, this bill authorized the Executive to draft regulations dealing with foreclosures.

Bill 40-78
Introduced August 15, 1978
Enacted October 31, 1978

Bill 40-78 required that the number of MPDUs be no less than the number of bonus units allowable under the optional zoning provisions for Town Sector or Planned Neighborhood zones. The Council originally approved this amendment in 1976 when it revised the MPDU requirements associated with the Town Sector zone. That amendment was inadvertently repealed.

This bill clarified restrictions on purchasers leasing MPDUs. Although the law required potential purchasers to certify that they were buying MPDUs as their primary residence, it did not specifically state that they may not lease or sub-lease their home during the five-year control period.

Bill 40-78 also reduced the time period that HOC had to exercise its option for one-third of the MPDUs from 60 to 45 days. This change was made to give the developer more notice about which units HOC selects and how many units remain available for MPDU applicants. This change lengthened the processing time available for applicants to secure financing before offering MPDUs to the general public.

This bill clarified the mechanism used for determining the resale price for MPDUs by selecting a single formula for calculating the resale price for MPDUs to include a cost of living increase and closing costs.

Bill 11-80
Introduced April 8, 1980
Enacted April 15, 1980

Bill 11-80 authorized the Executive to establish moderate-income limits based on the sale price of the housing unit and the cost of mortgage financing. This bill was enacted to keep pace with the changing housing market. The rapid rise in mortgage interest rates, as well as higher MPDU prices, meant that most households on the County's waiting list would not have qualified for mortgage financing under the existing law. MPDU income limits had to be increased to include households with incomes high enough to qualify for mortgage financing.

The Council determined that to establish moderate income levels, the Executive should consider the following factors: the price established for the sale or rental of dwelling units developed under Chapter 25A; the term, interest rate, and taxes applicable to financing; the estimated income levels necessary to finance the acquisition of MPDUs; and the family size and number of dependents.

This bill removed the link between Section 8 income limits and those of the MPDU program. Before Bill 11-80, MPDU limits could not exceed 200 percent of the Section 8 very low-income limits. This change guaranteed that the MPDU income limits would be revised at least every six months or more frequently if necessary.

Bill 12-80
Introduced April 15, 1980
Enacted July 21, 1981

Bill 12-80 was intended to reduce costs incurred by MPDU purchasers and developers and to increase the supply of MPDUs. At the time this bill was enacted, the resale prices of MPDUs had escalated rapidly because of their location. So while the density increase that made the MPDUs possible remained, the units were no longer affordable. As originally proposed, the bill provided that the control period for sale and rental units be increased to 99 years. As enacted, the control periods for MPDU sales and rentals was doubled from five to 10 years.

Bill 12-80 changed the law to apply a 12.5 percent MPDU requirement to the number of units originally planned for development at a particular location and not to the total number of dwelling units as increased by the application of the optional density provisions (i.e. before the density bonus instead of after). While it was thought that this would slightly reduce the number of MPDUs, this was a compromise for the building community, which at that time believed it was unreasonable to apply the 15 percent to the density bonus.

This bill provided a waiver of building permit fees for MPDUs and required the Executive to amend the MPDU prices every quarter to reflect changes in the prevailing interest rates.

Bill 25-88
Moderately Priced Dwelling Units
Introduced June 14, 1988
Enacted December 6, 1988

A group composed of developers, Planning Board staff, Housing Department staff, and Councilmembers recommended several substantive changes to the MPDU program, including: (1) increasing the bonus density to 22 percent and basing the MPDU requirement on a sliding scale ranging from 12.5 to 15 percent depending on the bonus density achieved; (2) increasing the rental control period to 20 years; (3) requiring that a portion of the appreciated resale price of an MPDU sold after the expiration of the price control period be paid into the Housing Initiative Fund (HIF); (4) permitting an increase in the MPDU sale price to enable builders to pay for improvements in the design of the MPDUs to make them more compatible with market rate housing; and (5) expanding the alternative methods of meeting the MPDU requirement.

1. MPDU Quantitative Requirement. DHCD proposed that the percentage of MPDU units in a subdivision should be increased from 12.5 to 14 percent. In 1974, the amount of MPDUs required was 15 percent, but was reduced to 12.5 percent in 1981. This bill contained a sliding scale proposed by the Suburban Maryland Building Industries Association and was based on the number of bonus units that would actually be achieved in the subdivision. The bill made the minimum MPDU requirement 12.5 percent; however, the scale escalated to 15 percent when the bonus units exceeded 20 percent. This scale was included in the bill with the understanding that the Council would also enact a zoning text amendment (ZTA) authorizing, but not requiring, a bonus density up to 22 percent instead of the 20 percent bonus.

2. Rental Units. This bill extended the control period for rental units from 10 to 20 years, which extended the affordability period to increase the supply of MPDUs. The Council believed that the 10-year period for rental units did not offer a public benefit that was equal to sale units. The purpose of the extension was to put rental housing producers on a comparable level with housing sale controls.

3. Sale Units. This bill provided for the recapture of part of the windfall profit on the sale of MPDUs after the control period. This was viewed as an alternative to having price control of resales in perpetuity. On the first sale of an MPDU after the initial 10-year control period, the seller must pay one-half of the amount of the sales price, which exceeded the resale price formula, which calculates inflation and adds capital

improvements and broker's commission, to HIF to increase the inventory of affordable housing. The Director must adjust the amount paid into the fund, so that the seller retained at least $10,000 of the excess of the resale price. This change was made to diminish the potentially large windfall profits that purchasers of MPDUs in Bethesda, Potomac, and other expensive areas received at the end of the 10-year control period.

This bill gave HOC a right of first refusal to purchase an MPDU after the initial 10-year control period. HOC was not required to pay any portion of the resale price to HIF. This provision enabled HOC to selectively augment its scattered-site inventory and created a mechanism that discouraged sellers from engaging in a subterfuge of undervaluing property for the purpose of diminishing the size of the contribution paid to HIF.

4. Architectural Compatibility Price Upgrade. This bill also provided authorization for DHCD to consider and grant an increase in the price that may be charged for an MPDU to reflect increased costs due to the need to improve external architectural features to mitigate excessive negative marketing impacts on market rate units. This increase must not exceed 10 percent of the allowable base price of the unit.

5. Clarification of the MPDU Requirement for Special Exceptions in CBD Zones and Optional Method Development. This bill provided that any increase in density above the permitted Euclidean zone base density was sufficient to mandate adherence to the MPDU requirements. This amendment was intended to clarify that optional method development and special exceptions, which yield or allow density increases, required the developer to meet MPDU requirements.

6. Limited Alternative Methods of Meeting MPDU Requirement. This amendment granted DHCD the authority to determine whether developers of certain projects were permitted to meet their MPDU obligation by making a contribution to HIF. DHCD had to determine that a cash contribution could achieve significantly more units or units that are more affordable to low- and moderate-income households. Standards for considering and implementing alternative offers were to be included in Executive regulations that would establish guidelines for allowing contributions in lieu of constructing MPDUs.

7. Waivers. The process for granting waivers to the MPDU requirement was modified as it relates to unbuildable portions of land that are used in computing density. The bill provided that the applicant's inability to use the optional density bonus provision is not in itself grounds for waiving the MPDU requirements.

8. Foreclosures. This bill also clarified the law as it regulates controls on sale and rental MPDUs undergoing foreclosures.

9. Amenities Control. The Director of DHCD was granted the authority to impose restrictions on the conditions or the amenity packages that would reduce the affordability of MPDUs.

10. Preferences and Priorities. Among the persons or households that meet the eligibility requirements, the bill authorized the Director of DHCD to establish notification and marketing priorities for individuals who live or work in the County. It also authorized priorities for marketing MPDUs containing three or more bedrooms to larger households.

Bill 43-90
Moderately Priced Dwelling Units—Subsequent Sales
Introduced May 15, 1990
Enacted June 5, 1990

Bill 43-90 provided that if HOC acts as a general partner it does not have to pay into HIF when it sells a particular property at the end of the 10-year control period. Prior to this bill, HOC had been considered exempt from this payment when it was the sole property owner, but it was unclear if this payment was required when HOC was acting as a general partner in a partnership that owned a particular piece of property. This legislation was enacted to promote the formation of new partnerships for the purpose of purchasing low-income units and to clarify that the Internal Revenue Service would approve the full amount of applicable tax credits. This exemption also applied to existing partnerships to solidify their status.

Bill 21-94
Moderately Priced Dwelling Units—Revisions
Introduced July 12, 1994
Enacted November 1, 1994

Bill 21-94 was enacted to prevent abuses of the MPDU occupancy and resale requirements and to assist in the equitable marketing of MPDUs.

1. Owner Occupancy. This bill provided that the owner of an MPDU must occupy the unit during the 10-year control period and authorized the County to recover rents that may have been paid to an owner who illegally rented an MPDU.

2. Marketing Procedures. Bill 21-94 authorized DHCD to establish marketing procedures that grant priority standing to households based on family size, the length of time on the waiting list, and residency or employment in the County. In addition, the Executive may establish different income eligibility standards for buyers and renters.

3. Staging Plans. Bill 21-94 provided that an MPDU staging plan must be consistent with any applicable land use plan, subdivision plan, or site plan. The pace of MPDU production must reasonably coincide with the construction of market rate units, and the last building built must not contain only MPDUs. This bill stated that a specific number of MPDUs must be constructed on an approved time schedule.

In single-family dwelling unit subdivisions, each MPDU must have two or more bedrooms. In multi-family dwelling unit subdivisions, the number of efficiency and one-bedroom MPDUs must not exceed the ratio of market-rate efficiency and one-bedroom units respective to the total number of market-rate units in the subdivision.

Bill 31-01
Moderately Priced Dwelling Units—Amendments
Introduced September 11, 2001
Enacted November 6, 2001

Bill 31-01 restarted the price control period for sale MPDUs. If a MPDU is sold to an eligible person within 10 years after its initial sale, and if 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 begins on the date of the sale. The goal of this legislation was to help maintain and increase the availability of MPDUs that are sold during the initial control period.

This bill also clarified the order of priority for MPDU purchasers. The bill stated that any MPDU offered for resale during the control period must first be offered, exclusively for 60 days, to the Department and HOC, in that order. In addition, the Department and HOC may buy an MPDU the first time the MPDU is offered for sale 10 years after the original sale or rental, and may resell the unit to an eligible person. A resale by the Department or HOC starts a new control period.

Bill 10-01
Moderately Priced Dwelling Units—Requirements
Introduced February 27, 2001
Enacted April 24, 2001

Bill 10-01 amended Chapter 25A to make the law compatible with zoning changes made under ZTA 01-01. This bill decreased MPDU requirements in the Central Business District (CBD), Transit Station Residential (TSR), and Planned Development (PD) zones to 12.5 percent, and allowed the density bonus in the TSR zones to include market rate units as well as MPDUs. The bill also permitted a density bonus in the CBD zone under optional method development.

The Council recognized the additional market pressures and extra costs involved in building MPDUs in high-rise residential developments. The goal of this legislation was to improve the financial feasibility of providing MPDUs in these developments and to increase the number of units by equalizing the requirements for building MPDUs in the CBD and PD zones with other zones.

Before 1981, the law stipulated that developments with more than 50 units were required to provide at least 15 percent of the total units as MPDUs, with a bonus of 20 percent. In 1981, Chapter 25A was amended to reduce the required number of MPDUs from 15 to 12.5 percent, with the bonus density remaining at 20 percent. In 1988, the law was further amended to provide a sliding scale related to the number of MPDUs provided and the density bonus was increased to 22 percent.

Bill 39-01
Moderately Priced Dwelling Units—Applicable Zones
Introduced November 20, 2001
Enacted February 12, 2002

Bill 39-01 revised references to the zones where moderately priced dwelling units may be required to eliminate the implication that MPDUs can only be required in residential zones rather than in any zone where residential development is allowed. This change to the MPDU law leaves the decision as to which zones require MPDUs to the Zoning Code.

This change was made to ensure that some affordable units are included in residential developments that are in proximity to commercial centers where employment opportunities and services are available.

Bill 18-02
Moderately Priced Dwelling Units—Requirements
Introduced May 23, 2002
Enacted October 1, 2002

Bill 18-02 required MPDU construction in subdivisions with 35 or more dwelling units, unless the Planning Board finds that achieving a bonus density of 20 percent or more at that location would not allow compliance with applicable environmental standards or would significantly reduce neighborhood compatibility. The bill assured that a development with 35 to 49 units which provided MPDUs must be allowed at least one bonus market rate unit. The bill also allowed DHCA to approve a higher percentage of multi-family rental MPDUs in a development under certain conditions. Before this bill was enacted, the law required MPDU construction in subdivisions of 50 or more units.

Bill 38-02
Moderately Priced Dwelling Units—Optional Construction
Introduced December 3, 2002
Enacted February 4, 2003

Bill 38-02 clarified that the MPDU law does not prohibit a developer from voluntarily building MPDUs in a development with fewer than 35 dwelling units and using optional development standards. As provided in ZTA 15-02, special optional method standards apply in projects with fewer than 20 dwelling units.

Councilmembers initially questioned the need for this legislation because both Planning Board and Council staffs agreed that the MPDU law and the Zoning Code did not prohibit the use of MPDU development standards in developments that are smaller than 35 units; however, attorneys for neighbors of a proposed subdivision challenged the long-held assumption that a developer could build MPDUs in a development with fewer than the minimum number of dwelling units. The bill was ultimately passed because the Council believed that the law needed to be clarified.

Appendix C

Proposed Zoning Text Amendment 03-09, MPDUs in Large Lot Zones

Zoning Text Amendment No: 03-09
Concerning: MPDUs in RE-1, RE-2, RE-2C & RNC Zones
Draft No. & Date: 1 – 5/13/03
Introduced: May 13, 2003
Public Hearing: June 17, 2003; 7:30 PM
Adopted:
Effective:
Ordinance No:

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN MONTGOMERY COUNTY, MARYLAND

By: District Council at the request of the Planning Board

AN AMENDMENT to the Montgomery County Zoning Ordinance for the purpose of:

- establishing Moderately Priced Dwelling Unit (MPDU) requirements and optional development standards for the RE-1, RE-2, RE-2C and RNC Zones based on Master Plan recommendation for public sewer service.

By amending the following section of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

DIVISION 59-C-1	"RESIDENTIAL ZONES, ONE-FAMILY"
Section 59-C-1.32	"Development standards"
Section 59-C-1.6	"Development including moderately priced dwelling units"
DIVISION 59-C-9	"AGRICULTURAL ZONES"
Section 59-C-9.3	"Land uses"
Section 59-C-9.4	"Development Standards"
Section 59-C-9.57	Special regulations for development in the Rural Neighborhood Cluster zone."

EXPLANATION: ***Boldface*** *indicates a heading or a defined term.*
Underlining indicates text that is added to existing laws by the original text amendment.
[Single boldface brackets] indicate text that is deleted from existing law by the original text amendment.
Double underlining indicates text that is added to the text amendment by amendment.
[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.
* * * *indicates existing law unaffected by the text amendment.*

ORDINANCE

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:

Sec. 1. Division 59-C-1 is amended as follows:

DIVISION 59-C-1. RESIDENTIAL ZONES, ONE-FAMILY.

* * *

59-C-1.32. Development standards.

In addition to the following, the regulations in sections 59-C-1.34, 59-C-1.35 and 59-C-1.36 shall apply:

	RE-2[1]	RE-2C[1]	RE-1[1]	R-200	R-150[3]	R-90	R-60	R-40[2]	R-4 plex	RMH 200
* * *										
59-C-1.329. Additional Development Requirements										
* * *										
(b) In the zones indicated thus (*), moderately priced dwelling units are required in accordance with the provisions of chapter 25A and section 59-C-1.6.	*[8]	*[8]	*[8]	*	*	*	*	*	*	*
* * *										

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8 Required only for development that is served by public sewer service.

* * *

59-C-1.6. Development including moderately priced dwelling units.

* * *

59-C-1.62. Development standards. In the case of an RE-2 Zone served by public sewer service, moderately priced dwelling units must be included in the development in accordance with Chapter 25A of the County Code, as amended. The number of moderately priced dwelling units must be at least 12.5 percent of the total number of dwelling units in accordance with Chapter 25A. The standard method of development requirements of subsections 59-C-1.31 and 59-C-1.32 apply. In all other applicable zones, the following development standards apply.

	RE-2C[8]	RE-1[8]	R-200	R-150	R-90	R-60	R-40
59-C-1.621. Uses Permitted. No uses are permitted except as indicated by the letter "P" in the following schedule. Special exceptions may be authorized as indicated in section 59-C-1.31, title "Land Uses," subject to the provisions of article 5[8]9-G.							
Dwelling unit, one-family attached.[1]			P	P	P	P	P
Dwelling unit, one-family detached.	P	P	P	P	P	P	P
Dwelling unit, one-family semidetached.[1]	P	P	P	P	P	P	P
Townhouse.[1]			P	P	P	P	P
Mobile home, double-wide.[2]	P	P	P	P	P	P	P
Registered living unit.[3,5]	P	P	P	P	P	P	
Accessory apartment.[3]	SE	SE	SE	SE	SE	SE	
Bed-and-breakfast lodging with one or 2 guest rooms.[3,4]	P	P	P	P	P	SE	
Bed-and-breakfast lodging with 3, 4 or 5 guest rooms.[3,4]	SE	SE	SE	SE	SE	SE	
Accessory buildings and uses.	P	P	P	P	P	P	P
59-C-1.622. Density of development. The maximum number of dwelling units per acre of usable area, as defined in section 59-C-1.628(a), is	0.48	1.22	2.44	3.17	4.39	6.10	10.12
59-C-1.623. Setbacks from street (in feet).							
No detached dwelling must be nearer to any public street than:	35	35	25[7]	25[7]	25[7]	20	20
59-C-1.624. Yard requirements (in feet). For a side or rear yard that abuts a lot that is not developed under the provisions of this section 59-C-1.6, the setback must be at least equal to that required for the abutting lot, provided that no rear yard is less than							
	35	35	20	20	20	15	15
59-C-1.625. Lot area and width.							
(a) Minimum net lot area (in sq.ft.):							
(1) For a one-family detached dwelling unit	15,000	10,000	6,000[7]	6,000[7]	5,000[7]	4,000[7]	4,000
(2) For each one-family semidetached dwelling unit	7,500	5,000	3,500	3,500	3,500	3,500	3,500
(3) For a townhouse, unless a smaller lot size is approved by the planning board.[6]			1,500	1,500	1,500	1,500	1,500
(4) Where an individual lot for each dwelling unit is deemed to be infeasible because of the manner in which individual units are attached to each other the board may approve a site plan depicting more than one dwelling unit on a lot.							
(b) Minimum lot width for a one-family detached dwelling unit at existing or proposed street line (in feet):	25	25	25	25	25	25	25
59-C-1.626. Maximum Building Height (in Feet).							
(a) For a main building. The height must not exceed 3 stories or 40 feet. If the abutting lot is not developed under the provisions of this section 59-C-1.6, the yard abutting that lot must be increased by one foot for each 2 feet of height above 35 feet							
(b) For an accessory building. The height must not exceed 2 stories or 25 feet.							
59-C-1.627. Green area. Green area must be provided for each townhouse or one-family attached dwelling unit erected in the subdivision, at the rate, in square feet per unit, of			2,000	2,000	2,000	2,000	1,500

1 The maximum percentage of one-family attached or semidetached dwelling units, townhouses, or a combination thereof, in a subdivision is:

RE-2C and RE-1: 30%;
R-200 and R-150 Zones: 40%;
R-90 Zone: 50%;
R-60 Zone: 60%.

The balance must be one-family detached dwelling units. Except in the RE-1 and RE-2C Zones, [T]the [p]Planning [b]Board may[[, however,]] approve a development in which up to 100 percent of the total number of units consists of one-family attached dwelling units, one-family semidetached dwelling units, townhouses, or a combination thereof, upon a finding that a proposed development is (1) more desirable from an environmental perspective than development that would result from adherence to these percentage limits, and (2) compatible with adjacent existing and approved development.

* * *

8 Required only for development that is served by public sewer service.

Sec. 2. DIVISION 59-C-9 is amended as follows:

DIVISION 59-C-9. AGRICULTURAL ZONES.

* * *

59-C-9.3. Land uses.

No use is allowed except as indicated in the following table:

- **Permitted uses.** Uses designated by the letter "P" are permitted on any lot in the zones indicated, subject to all applicable regulations.

- **Special exception uses.** Uses designated by the letters "SE" may be authorized as special exceptions, in accordance with the provisions of Article 59-G.

	Rural	RC	LDRC	RDT	RS	RNC
* * *						
(e) Residential:[2]						
Dwelling, one-family detached	P	P	P	P	P	P
Dwelling, one-family semidetached*						P
* * *						

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* * *

* Permitted only as part of a moderately-priced dwelling unit development. The maximum percentage of one-family semi-detached dwelling units in a subdivision is 30%.

* * *

59-C-9.4. Development standards.

The following requirements apply in all cases, except as specified in the optional standards for cluster development set forth in sections 59-C-9.5 and 59-C-9.57 and the exemption provisions of section 59-C-9.7.

* * *

	Rural	RC	LDRC	RDT	RS	RNC
* * *						
59-C-9.48. Additional Development Requirements						
In the zones indicated thus (*), moderately priced dwelling units are required in accordance with the provisions of Chapter 25A and Section 59-C-9.57.						*[5]

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* * *

5 Required only for optional method of development that is served by public sewer service.

59-C-9.5. Cluster development--Option in Rural Cluster zone and Low Density Rural Cluster zone.

* * *

59-C-9.57. Special regulations for development in the Rural Neighborhood Cluster zone.

59-C-9.571. Purpose.

The cluster method of development required in this zone is intended to preserve large areas of rural open space consistent with the recommendations of the applicable master or sector plan. Cluster development is required under either the standard method of development or the optional method. Under the optional method of development the maximum development unit density allowed may be increased to accommodate the construction of Moderately Priced Dwelling Units in accordance with Chapter 25A.

The following classes of uses are not permitted in the rural open space area. The exceptions noted in subsections (d) and (f) are not excluded from this area; they are permitted by right or special exception, as stated in section 59-C-9.3:

* * *

(d) Residential, with the following exceptions:

- a one-family detached dwelling;
- accessory apartment;
- a farm tenant dwelling in existence prior to application of the Rural Neighborhood Cluster zone, or a structure converted to a farm tenant dwelling included as part of a historic site designated in the Historic Master Plan;

- a one family semidetached dwelling as part of a moderately-priced dwelling unit development;

* * *

59-C-9.573. Optional method of development.

The density of development, including the provision of Moderately Dwelling Units in accordance with Chapter 25A, [under the optional method] must not exceed [one] 1.22 dwelling units per gross acre. The density must conform to the recommendations and guidelines of the applicable master or sector plan. In such cases, the following development standards apply:

(a) Minimum area of development: 10 acres, except that the Planning Board may waive this requirement where the property abuts an existing property developed under the provisions of this section, and the resulting development is a logical extension of the existing development.

(b) Diversity of Lot Sizes: Under the optional method, a diversity of lot sizes is required for developments of 70 acres or more. Diversity of lot sizes is also encouraged in developments of less than 70 acres in order to provide for a range of housing opportunities. Where diversity of lots is provided, the Planning Board must consider the compatibility of the proposed development with existing development on adjoining properties.

(c) Development standards: The standard method requirements of section 59-C-9.4[2] do not apply:

(i) Minimum lot area-4,000 sq. ft. for one-family detached units; 3,500 sq. ft. for one-family semi-detached units.

(ii) Minimum setback from the street-15 feet.

(iii) Yard requirements (in feet). A side yard, if provided, must be at least 8 feet. For a side or rear yard that abuts a lot that is not developed under the optional method of this section, the setback must be at least equal to that required for the abutting lot, provided that no rear yard is less than 30 feet.

(iv) Minimum lot width for a one family detached dwelling unit at the existing or proposed street line-25 feet.

(v) Maximum building height-35 feet.

(vi) Maximum lot coverage for a one family detached dwelling unit-35 percent.

(vii) The rear and side yard setbacks for accessory structures [should] must be consistent with the requirements in the R-60 Zone, 5 feet for rear and side yard setbacks and 60 feet from the street.

Sec. 3. Effective date. This ordinance becomes effective 20 days after the date of Council adoption.

This is a correct copy of Council action.

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Mary A. Edgar, CMC
Clerk of the Council

Appendix D

List of approved alternative agreements ("buyouts")

Alternative MPDU Agreements

Date	Address	Developer	Unit Type	MPDU Requirement	Alternate Payment	Payment Per Unit	Notes
1989	8100 Connecticut Avenue Chevy Chase, MD	Forest City	HR Condo	N/A	$107,000	N/A	
1990	Madison Park Bethesda, MD	Madison Park LLC	HR Condo	8	$280,000	$35,000	Based on land price
1991	Beacon Hill Grosvenor Lane North Bethesda, MD	Richard Dubin	TH	10	$400,000	$40,000	Based on land price
1993	Fairmont Plaza Bethesda, MD	Nathan Landow	HR rental	12	None	None	Provided 18 units in The Seasons
1994	Chase Grove Gaithersburg, MD	Avalon Properties	Townhouse Condo	11	None	None	Provided 22 apartments in same development
1995	James Creek Olney, MD	Martin Alloy	SF Detached	1	$69,000	$69,000	Based on land price
1996	Sumner Gate @ Avenel Potomac, MD	Natelli Communities	SF Detached	2	$200,000	$100,000	Based on land price
1998	Cameron Hill Silver Spring, MD	Eakin/Youngentaub	Piggyback TH Condo	7	$97,634	$13,948	Based on land price
1998	Crescent Park Bethesda, MD	Nathan Landow	HR Rental	22	None	None	Provided 24 units in The Seasons
1999	Charrington Rockville, MD	Pulte Homes	TH	1	$75,000	$75,000	Based on land price
2000	7791 Wisconsin Avenue Bethesda, MD	Bethesda Theater, LLC	HR Rental	32	$355,000	$16,136	Provided 10 units on site

Date	Address	Developer	Unit Type	MPDU Requirement	Alternate Payment	Payment Per Unit	Notes
2002	Bethesda Air Rights Waverly Street *	Lowe Northwest	Highrise Rental	28	$294,000	$21,000	Provide 14 units on site
2002	Burning Tree & River Road Bethesda, MD	Marriot Senior Living	Elderly CCRC	36	$756,000	$21,000	
2002	White Flint Place *	White Flint Place LLC	Highrise Rental	124	$1,500,000	$21,000	40 units provided on site
2002	Wheaton CBD Metro Property (located in Enterprise Zone) *	Eakin-Youngentaub Buzzutto Construction	Piggyback townhouse midrise rental apartments	10 30	$245,000 $270,000	$20,434 $18,000	Price of unimproved lot for 12 lots Provide 15 units on site, 30 year controls
2002	Wisconsin Place Wisconsin & Western Chevy Chase, MD *	New England Development	High rise Rental	34	$357,000	$21,000	17 units provided on site
2003	Grovesnor Village North Bethesda *	Grosvenor Station Development	Highrise Rental	42	$378,000	$21,000	24 mpdus provided on site
2003	8045 Newell Street Silver Spring	Patriot Group	Midrise Condominium	15	$158,335	$31,667	10 mpdus provided on site. Payment based on land cost
2003	Rosedale Park Bethesda *	Magruder Corp	High rise Rental	21	$210,000	$21,000	11mpdus provided on site

Source: DHCA as of December 31, 2003

Note: * indicates development also has a payment in lie o/ taxes (PILOT) agreement which provides a declining reduction in the property tax payment over a seven (7) year period or over ten (10) years for projects located within a designated enterprise zone.

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Notes on MPDU Alternative Agreements

1. 1989 Forest City, Chevy Chase: This elderly condominium housing project was not affordable to MPDU eligible households due to the high fees associated with services in the property. MPDU's are oriented to first time homebuyers, which is difficult to find in the elderly population. Because of environmental constraints, no bonus density was obtained.

2. 1990 Madison Park High Rise condominium, Bethesda: The high condominium fees made this unaffordable to MPDU eligible households.

3. 1991 Beacon Hill, North Bethesda: The high homeowners association (HOA) fees made these units unaffordable as MPDU's.

4. 1993 Fairmont Plaza, Bethesda: The high-rise building included services and structured parking that required high fees making the units less affordable to MPDU tenants. The developer offered to provide more MPDU's than were required at a nearby building in the Bethesda CBD. Twelve (12) MPDUs required were required and 18 were provided, at lower rents which included utilities and parking.

5. 1994 Chase Grove at Washingtonian Center, Gaithersburg: Provided 11 additional MPDUs in a garden apartment portion of the development as an alternative to piggyback townhouse MPDUs with high condominium and HOA fees.

6. 1995 James Creek, Olney: This 10 unit subdivision was added to the project after all MPDUs were completed in the development. To design one detached MPDU would have unfairly burdened the development with architectural costs that are normally allocated over significantly more units.

7. 1996 Sumner Gate, Potomac: It was impossible to make the MPDU's compatible with the market priced units. This subdivision was added to the development after the MPDU requirement of 60 units was completed.

8. 1998 Cameron Hill, Silver Spring: High condominium fees in an 8 unit condominium section of this townhouse project would make these units unaffordable. The alternative payment was committed to the Manchester Manor apartments in the same planning area where 43 existing units in poor condition are being rehabed by HOC with lower rents than would have been provided in Cameron Hill.

9. 1998 Crescent Park, Bethesda: This high-rise building included service and structured parking that required high fees making the units less affordable to MPDU tenants. The developer offered to provide more MPDU's in a nearby building in the Bethesda CBD. Twenty-two MPDUs were required and 24 will be provided at lower rents that include utilities.

10. 1999 Charington, Rockville: The MPDU requirement was completed with piggyback townhouse units. The one additional MPDU would have had to have been a market priced townhouse. The HOA fees were high, and with the increased MPDU price for the larger unit, the MPDU would have been less affordable.

11. <u>2000 Bethesda Theater</u>: Ten (10) One (1) bedroom rental MPDUs will be provided in the highrise building. Because of high construction costs associated with preserving the theater and extensive amenities, MPDU rents required to support construction and operating costs exceed MPDU income limits.

12. <u>2002 Bethesda Air Rights</u>: Seven (7) efficiencies and seven (7) one bedroom units to be provided <u>on site</u> in the highrise building high construction cost associated with modifying and constructing over an existing parking garage and extensive amenities require very high rents to offset costs.

13. <u>Burning Tree Elderly, Potomac</u>: Continuing Care Retirement Community with very high service fees.

14. <u>White Flint Place, North Bethesda</u>: Forty (40) units evenly divided between efficiencies and one bedrooms will be provided on site in two buildings. Highrise construction costs and amenity package result in high rental rates to offset costs.

15. <u>Wheaton CBD</u>: Piggyback townhouse condominium and HOA fees reduce affordability. Project required renovation of office building and parking structure for apartments.

16. <u>Wisconsin Place, Friendship Heights</u>: Seventeen (17) efficiencies and one bedroom units provided in project. Highrise construction costs excessive.

17. <u>Grosvenor Village, North Bethesda</u>: Twenty four (24) MPDUs provided in the project, highrise construction costs excessive.

18. <u>8045 Newell Street, Silver Spring</u>: Ten (10) one bedroom condominiums provided on site, sale price and condominium fee for two bedroom unit limited affordability for MPDU certificate holders.

19. <u>Rosedale Park, Bethesda</u>: Eleven (11) efficiencies and one bedroom units provided on site. Highrise construction costs and amenities were extensive height limits and street ROW required two buildings

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Appendix E

DHCA memorandum on buyout payment amounts (March 13, 2003)

DEPARTMENT OF HOUSING AND COMMUNITY AFFAIRS

Douglas M. Duncan
County Executive

Elizabeth B. Davison
Director

MEMORANDUM

March 13, 2003

TO: Steven A. Silverman, Chair
Planning, Housing and Economic Development Committee

FROM: Elizabeth B. Davison, Director
Department of Housing and Community Affairs

SUBJECT: Alternative Agreements for MPDUs

ALTERNATIVE AGREEMENTS IN CHAPTER 25A

Chapter 25A of the Montgomery County Code, Moderately Priced Dwelling Unit Law, provides that the Director of the Department of Housing and Community Affairs (DHCA) negotiate an "Alternative Agreement" with the developer when the units cannot be provided on site under certain circumstances. The code allows for several options including:

"1. In exceptional cases, instead of building the required number of MPDUs, an applicant may offer to:
   a) Build significantly more MPDUs at one or more other sites in the same or an adjoining planning area;
   b) Convey land in the same or an adjoining planning area that is suitable in size, location and physical condition for significantly more MPDUs;
   c) Contribute to the Housing Initiative Fund an amount that will produce significantly more MPDUs; or
   d) Do any combination of these alternatives that will result in building significantly more MPDUs."

The law states that in cases where there are resident services and facilities that make it unaffordable to MPDU eligible households an offer is made by the applicant that will achieve more MPDUs or units which low and moderate income households can more easily afford, and the public benefits outweigh the benefit of constructing the MPDUs, the director must accept the offer made by the applicant. This portion of the law refers primarily to condominium and to elderly housing projects where condominium fees or other resident services such as housekeeping, meals, and recreation facilities would make the units unaffordable to MPDU certificate holders. In condominiums these fees can often be several hundred dollars, and in some elderly complexes can be up to several thousand dollars per month.

ALTERNATIVE AGREEMENTS IN PRACTICE

Since 1989 when the law was amended to add the alternative provisions, a total of 20 agreements have been signed. These include a range of conditions and types of properties (see Attachment). The Housing Initiative Fund has received $1,229,000 and an additional 19 units from these agreements. Payments totaling $4,135,000 are approved but not scheduled for payment until FY04 and 05.

There are several situations for which these agreements have been negotiated:

1. Condominiums or developments with high homeowner association fees.

2. High-rise developments which have a variety of conditions including:
   a. high construction costs;
   b. extraordinary or unusual site conditions which may include significant utility relocation, preservation of historic structures and substantial amenities;
   c. no bonus density was provided to the developer; therefore, MPDUs are substituted for market rate units, or the full density was not allowed in the zone because the master plan limited the height of buildings that would impact existing neighborhoods.

CONDOMINIUMS OR HOMEOWNER ASSOCIATION FEES TOO HIGH

In some situations while a MPDU qualified household could afford to buy a unit at the approved sales price, when the condominium or homeowner association (HOA) fees are added the unit becomes unaffordable. In many new buildings, the level of amenities is very high with health clubs, concierge service, structured parking, etc. which requires much higher fees. In the case of HOA fees, we have examples such as the MPDUs in the Avenel Subdivision, where numerous complaints were received over several years that the MPDU residents were being stretched very thin by the required homeowner fees for grass cutting, maintenance of parking lots, and other common community facilities.

In some cases, MPDU qualified residents have not chosen to buy in a development because of the high fees. When MPDUs are not sold during the 90 day priority marketing period, the developer may sell the unit at the MPDU price to anyone regardless of their income. In this scenario, an upper income person gets a windfall by being able to purchase a unit at below the market price; this does not provide any public purpose.

HIGH-RISE BUILDINGS

The market for high-rise developments near Metro stations in Friendship Heights, Bethesda and White Flint is very strong. The shortage of rental units (even with some current softening in the market) has led to very high rents which can cover the high construction costs. In many cases, the developer has not received a bonus density. In a few cases, there are situations where additional costs are required to deal with historic buildings or working with difficult sites resulting in extremely high development costs.

In these cases, the rents that can be charged for an MPDU do not cover the cost of debt service and operating costs for the unit. The losses are so great that the entire project is not feasible. In order to obtain financing on a building, typically a rate of return in the range of eight to nine percent is a minimum level for a low risk development. When the rate of return on the building is below this level, an investor, bank or financial institution will not provide financing for the development.

In these cases, we have taken the following approach:

1. Providing property tax abatement in the form of Payment in Lieu of Taxes (PILOT) agreements.

2. Provide half the MPDUs on-site and accept an alternative agreement in the form of a contribution to the Housing Initiative Fund (HIF) for the half of the MPDUs not included in the building.

The major public purposes served in these cases is to provide some MPDUs on-site, to contribute a substantial amount of money into the HIF which can produce a significantly more units for low income residents, and to have the project feasibility obtain a level where it can be financed, so that we can add to the housing stock in desired locations

AMOUNT OF THE PILOT

The PILOT agreements are negotiated after substantial information on construction and operating costs, unique circumstances and other conditions have been disclosed to DHCA. The PILOT is then negotiated to be in place over a seven year period with a declining amount in each year. The PILOT reduces the taxes which in turn reduces the operating costs for the building, thereby increasing the rate of return to the point where the building can be financed. The PILOT does not compensate for the entire amount of lost rent on the property due to the lower rent level of an MPDU compared with a market rate unit. Although PILOT agreements are typically for a seven year period, the control period for the MPDUs in a rental property is 20 years. In Enterprise Zones in Silver Spring and Wheaton these can be up to 10 years, like those for commercial buildings. These PILOTs have been discussed with the County Council in that context.

A fiscal impact analysis of the property is also prepared, which calculates the expected return in income taxes and future property taxes. The amount is a four to five times multiple of the amount of the PILOT because of the high incomes of the residents and the low level of public services that they require.

PAYMENT INTO THE HOUSING INITIATIVE FUND

The calculation of the payment into the Housing Initiative Fund is another topic for which there has been much discussion. In my experience, when there is not one individual compelling methodology or approach to a problem, it is useful to evaluate the problem from several perspectives to see if the answers cluster in a certain range.

This has been done in several ways:

1. **Land Value:** In most traditional MPDU agreements the developer provides the land for the units, so the value of the land on a per unit basis is examined. In the case of the projects that have been analyzed, land values per unit are in the range of $15,000 to $20,000. Currently, because of the shortage of sites, land prices have been bid up in certain parts of the County, and I expect these could well be higher in the future.

2. **Per Unit Cost for HIF Fund Projects:** Because the payments are made to the HIF, which is leveraged approximately $7.50 per dollar by other sources, a logical method of valuing what the cost would be to provide a unit based on an HIF contribution. Our analysis shows that the HIF typically contributes $8,000 to $15,000 per unit to provide a low- to moderate-income unit.

3. **Buy Down of Market Rents in Nearby Older Properties:** To provide a unit at MPDU rents another alternative is to buy down the rent of existing apartments over a period of 20 years. To calculate this, we have reviewed the market rates in the County based on Department's most recent Vacancy Survey, and compared that amount with MPDU rents. The spread recently has ranged from $150 to $250 per unit depending on the area of the County where the project is located. The calculation of how much payment is needed to generate $200 to $250 in rent over a twenty year period can be accomplished through a present value calculation which yields a number of approximately $20,000 to $32,000 in 2002. As rents change in the future, this number could also change as rents over the past ten years have shown both increases and decreases.

All of these numbers are dynamic over time, and we expect that they will be increasing, as conditions change.

CONCLUSION

The complexity of this problem is exacerbated by many competing public objectives, and many regulations under various County agencies which when viewed together are in conflict. There seems to be no perfect resolution of these issues, but we feel that our approach is working well at present. We have chosen an approach to this problem that does the following:

- Achieves some moderate priced units in virtually all new buildings;
- Allows new projects to be financially feasible and to get built;
- Achieves a supply of new housing in desirable locations
- Provides money into the Housing Initiative Fund which can provide more units in nearby locations for persons of lower income than the MPDU program provides
- Does not create a large hit on future tax revenues
- Creates an efficient and effective use of public funds;

EBD:sns
Attachment
R:\Director\Eliz\mpdu buyouts.doc

Appendix F

Bill 27-03, proposed amendments to extend MPDU control periods and to repeal MPDU buyout authority

Bill No.	27-03
Concerning:	Moderately Priced Dwelling Units – Amendments
Revised: 7-24-03	Draft No. 2
Introduced:	July 29, 2003
Expires	January 29, 2005
Enacted:	
Executive:	
Effective:	
Sunset Date:	None
Ch. _____, Laws of Mont. Co.	

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Perez and Andrews

AN ACT to:

(1) revise the requirements for building moderately priced dwelling units and repeal the authority of the Director of the Department of Housing and Community Affairs to accept certain alternative offers;

(2) extend the price and rent control periods for certain moderately priced dwelling units; and

(3) generally amend the law governing moderately priced dwelling units.

By amending

Montgomery County Code
Chapter 25A, Housing, Moderately Priced
Sections 25A-2, 25A-3, 25A-5, and 25A-9

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-5, and 25A-9 are amended as follows:

25A-2. Declaration of public policy.

The County Council hereby declares it to be the public policy of the County to:

* * *

(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[; and]

[(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].

25A-3. Definitions.

The following words and phrases, as used in this Chapter, have the following meanings:

* * *

(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 [10] <u>20</u> years for sale units and [20] <u>30</u> years for rental units, and begins on the date of initial sale or rental. If a sale or rental MPDU is sold to an eligible person within [10] <u>20</u> years after its initial sale or rental, 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.

* * *

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

* * *

[(e) (1) In exceptional cases, instead of building the required number of MPDUs, an applicant may offer to:

(A) Build significantly more MPDUs at one or more other sites in the same or an adjoining planning area;

(B) Convey land in the same or an adjoining planning area that is suitable in size, location and physical condition for significantly more MPDUs;

(C) Contribute to the Housing Initiative Fund an amount that will produce significantly more MPDUs; or

(D) Do any combination of these alternatives that will result in building significantly more MPDUs.

(2) If the Director finds that:

(A) In the project or subdivision originally proposed by the applicant, an indivisible package of resident services and facilities to be provided to all households would cost the occupants of the MPDUs so much that it is likely to make the MPDUs effectively unaffordable by eligible households; and

(B) An offer made by an applicant under subsection (e)(1) will achieve significantly more MPDUs or units which low-and moderate-income households can more easily afford; and

(C) These public benefits outweigh the benefit of constructing MPDUs in each subdivision throughout the County, and acceptance of the applicant's offer will achieve the objective of providing a broad range of housing opportunities throughout the County;

the Director must accept the offer made by the applicant instead of requiring the construction of MPDUs by the applicant. If the applicant can feasibly build significantly more MPDUs at another site, the Director must not approve any other alternative under subsection (e)(1).

(3) The procedures for considering and implementing alternative offers must be established by executive regulation. To implement an offer, the applicant must sign an agreement with the Director not later than a time provided in the regulations.] <u>Reserved</u>

* * *

(m) Nothing in this Chapter prohibits an applicant from voluntarily building MPDUs, as calculated under subsection (c), in a development with fewer than 35 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 35 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. [Subsection (e) and] Section 25A-6(b) [do] <u>does</u> 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-9. Control of rents and resale prices; foreclosures.

* * *

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

* * *

(3) The Department and the Commission, in that order, may buy an MPDU the first time the MPDU is offered for sale after [10] 20 years after the original sale or rental, and may resell the unit to an eligible person. A resale by the Department or Commission starts a new control period.

(4) 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 after [10] 20 years after the original sale or rental.

(d) *Initial and [subsequent]* later *rent controls.* Unless previously sold under subsection (c)(1), [moderately priced dwelling units] MPDUs built or offered for rent under this Chapter must not be rented for [20] 30 years after the original rental at a rent greater than that established by Executive regulations [adopted by the County Executive under method (1)]. [Whenever any moderately priced dwelling unit] Any MPDU (other than those built, sold, or rented under any federal, state, or local program offered by the Commission) [is] offered for rent during the [20] 30-year control period[, it] must be offered exclusively for 60 days to one or more eligible persons, as determined by the Department, for use as [his or her own] that person'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 [adopted by the County Executive under method (1)].

(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:

(1) If the sale occurs during the first [10] 20 years after the original sale or rental, any amount of the foreclosure sale price which exceeds the total of the approved resale price under subsection (a), reasonable foreclosure costs, and liens filed under the Maryland Contract Lien Act, must be paid to the Housing Initiative Fund. If the remaining balance under the original first deed of trust or mortgage exceeds the resale price under subsection (a), then the difference between the foreclosure sales price and the balance of the original first deed of trust (plus reasonable foreclosure costs) must be paid to the Fund.

(2) If the sale occurs after the first [10] 20 years after the original sale or rental, and the unit was originally offered for sale or rent after March 20, 1989, the payment to the Fund must be calculated under subsection (c).

(3) If the MPDU is a rental unit, the resale price under subsections (a) and (c) must be calculated using the maximum sales price in effect when the unit was originally offered for rent.

(4) If the MPDU is sold subject to senior liens, the lien balances must be included in calculating the sale price.

All MPDU covenants must be released after the required payment is made into the Housing Initiative Fund.

* * *

(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 [20] <u>30</u> years after the original rental or offering for sale if the buyer is bound by all covenants and controls on the MPDUs.

* * *

Sec. 2. Applicability.

The amendments to Chapter 25A made by Section 1 of this Act which extend the control period for sale and rental MPDUs do not apply to any MPDU that was originally offered for sale or rent before this Act takes effect.

Approved:

Michael L. Subin, President, County Council — Date

Approved:

Douglas M. Duncan, County Executive — Date

This is a correct copy of Council action.

Mary A. Edgar, CMC, Clerk of the Council — Date

Appendix G

Proposed Zoning Text Amendment 03-24
to authorize an increase in building heights to accommodate MPDUs

Zoning Text Amendment No: 03-24
Concerning: MPDU-Height limits in certain zones
Draft No. & Date: 1 – 7/28/03
Introduced: July 29, 2003
Public Hearing: 9/9/03; 7:30 p.m.
Adopted:
Effective:
Ordinance No:

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Floreen and Subin

AN AMENDMENT to the Montgomery County Zoning Ordinance for the purpose of:

- authorizing an increase in residential building height in certain zones to accommodate the construction of MPDUs

By amending the following section of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

DIVISION 59-C-6	"CENTRAL BUSINESS DISTRICT ZONES"
Section 59-C-6.23	"Development standards"
Add new section	
59-C-6.2355	"Special height standard for optional method projects involving MPDUs"
DIVISION 59-C-7	"PLANNED UNIT DEVELOPMENT ZONES"
Section 59-C-7.1	"P-D zone--planned development zone"
Section 59-C-7.15	"Compatibility"

EXPLANATION: ***Boldface*** *indicates a heading or a defined term.*
Underlining indicates text that is added to existing laws by the original text amendment.
[Single boldface brackets] indicate text that is deleted from existing law by the original text amendment.
Double underlining indicates text that is added to the text amendment by amendment.
[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.
** * * indicates existing law unaffected by the text amendment.*

ORDINANCE

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:

Sec. 1. Division 59-C-6 is amended as follows:

DIVISION 59-C-6. CENTRAL BUSINESS DISTRICT ZONES.

* * *

59-C-6.23. Development standards.

* * *

59-C-6.2355. Special height standard for optional method projects involving MPDUs.

Not withstanding any building height limit in this Chapter or any master or sector plan, the Planning Board during site plan review may approve an increased residential building height in any CBD zone to the extent necessary to accommodate the construction of MPDUs.

Sec. 2. Division 59-C-7 is amended as follows:

DIVISION 59-C-7. PLANNED UNIT DEVELOPMENT ZONES.

* * *

59-C-7.1. P-D ZONE—Planned development zone.

* * *

59-C-7.15 Compatibility.

* * *

(b) In order to assist in accomplishing compatibility for sites that are not within, or in close proximity to a central business district or transit station development area, the following requirements apply where a planned development zone adjoins land for which the area master plan recommends a one-family detached zone:

(1) No building other than a one-family detached residence can be constructed within 100 feet of such adjoining land; and

(2) No building can be constructed to a height greater than its distance from such adjoining land.

(d) A waiver of [the provisions of] subsection (b) [above] may be permitted where the site is within or in close proximity to a central business district or transit station development area and reduced setbacks are recommended by the master or sector plan, and the Planning Board finds that the reduced setbacks are compatible with existing or proposed development in the adjoining or confronting one-family detached zones. The maximum building height under [the] this waiver must not exceed 50 feet. However, the Board in its site plan review may approve an increase over the maximum height limit of any residential building under subsection (b), or as shown in any sector or master plan, to the extent necessary to accommodate the construction of MPDUs.

* * *

Sec. 2. Effective date. This ordinance becomes effective 20 days after the date of Council adoption.

This is a correct copy of Council action.

____

Mary A. Edgar, CMC

Clerk of the Council