Submitted to Committee of the Whole 7/1/04

13

Request for City Council Committee Action From the Department of Community Planning & Economic Development

Date: June 22, 2004

To: Council Member Lisa Goodman, Community Development Cmte

Prepared by: Edie Oliveto-Oates, Phone 612-673-5229

Presenter in Committee: Community Development Committee

Approved by: Chuck Lutz, Deputy CPED Director
Lee Pao Xiong, Director, Housing

Subject: Implementation of the Workforce Ownership Housing Development Program (Amended based on the June 22, 2004 Community Development Committee) *

RECOMMENDATION: The Director recommends that the City Council approve the guidelines for and implementation of the Workforce Ownership Housing Development Program.

Previous Directives: January 20, 2004 the Community Development Committee reviewed the Housing Policy Agenda. At that time staff was directed to prepare guidelines and criteria for the Workforce Ownership Housing Development Program.

Financial Impact (Check those that apply)

_X_ No financial impact - or - Action is within current department budget.
(If checked, go directly to next box)
___ Action requires an appropriation increase to the Capital Budget
___ Action requires an appropriation increase to the Operating Budget
___ Action provides increased revenue for appropriation increase
___ Action requires use of contingency or reserves
___ Other financial impact (Explain):
___ Request provided to the Budget Office when provided to the Committee Coordinator

Community Impact (Summarize below)

Ward: City Wide

Neighborhood Notification: 45 day notice was sent to all of the neighborhood groups and interested parties on March 22, 2004 with comments due back by May 11, 2004.

City Goals: Foster the development and preservation of a mix of quality housing types that is available, affordable, meets current needs, and promotes future growth

Comprehensive Plan: Increase the City's population and tax base by developing and supporting housing choices city-wide through preservation of existing housing and new construction.

Zoning Code: N/A

Living Wage/Job Linkage: N/A

Background/Supporting Information

In the 2004 budget process the City Council approved $500,000 of unspecified funds to create affordability home ownership opportunities from Levy funds designated to create ownership opportunities for buyers at or below 50% of median income and an additional $500,000 of Levy funds were allocated for other Ownership housing to create ownership opportunities for buyers at or below 80% of median income. Since that approval staff has worked to develop a program to meet the goals the Council set. One of the goals that was consistent throughout the budget process was the priority of not only creating affordable home ownership opportunities for low income purchasers but also to ensure that this housing remained affordable on a perpetual or long term basis. In recognition of this priority, it is anticipated that all funds used for this program will be repaid at the point that the home is sold to an owner who is not income qualified. In the case of homes that are placed in a land trust, repayment of the funds would be required if the property is removed from the land trust or the land trust no longer required buyers to be income qualified.

In accordance with the second mortgage strategy adopted by the city council in November of 2002 (report attached) staff will be requiring loan documents that meet the intent of that strategy. The terms outlined in that report were specific to a particular project. Staff believes that the following terms that were included in that report are appropriate for this program.

- Interest rate: 2% fixed, simple interest (was amended in a future report).
- Assumption: the loan is assumable only if the new purchaser is a qualified low-income buyer and owner occupant, in which case the accrued interest is forgiven.
- Amount: equal to the affordability gap, based on the buyer's first mortgage capacity (using non-aggressive underwriting criteria that do not put buyer at the absolute loan maximum) subtracted from the sales price (market value). CPED will establish a maximum second mortgage amount for each project.

In March 2004, staff sent draft guidelines for the "Workforce Ownership Housing Development Program" out for neighborhood review and comment. In addition, program guidelines for the Lot Redevelopment Program and the Corridor Housing Program were transmitted at the same time. Comments were received from LISC and the City of Lakes Community Land Trust (CLCLT) (see attached). No comments were received from any of the neighborhood groups. Staff has incorporated several of the suggestions received into the program guidelines.

Staff believes that it is appropriate to proceed with approval of the guidelines for the Workforce Ownership Housing Development Program and immediately issue a Request for Proposal to identify projects. Staff is anticipating the following timeline for development proposals:

July 16, 2004	Issue Request for Proposal
August 20, 2004	Proposals Due
August 27, 2004	Begin 45 day neighborhood review
October 11, 2004	Neighborhood comments due
October 26, 2004	Community Development Committee Review
November 5, 2004	City Council Approval

Guidelines and Criteria:
Workforce Ownership Housing Development Program
(approximately $1M local funds)

Primary Objective: Maxfield Research predicts the need for 6,300 ownership workforce housing units (defined as "housing that is affordable to the typical worker earning $20,000-$45,000 per year", which roughly translates to 30-60% of MMI) in the Twin Cities in the next five years. In order to meet this demand, there is clearly a great need for additional gap funding for owner-occupied workforce housing development in Minneapolis. Development of affordable ownership housing creates the potential for both a development cost gap and a buyer affordability gap. Gap funding resources for ownership housing are scarce and extremely competitive. **Long term affordability is considered to be more than 30 years.**

Eligible Costs: The proposed Workforce Ownership Housing Development Program would provide up to half of the total project gap funding. Funds may be used for both development cost gap and/or buyer affordability gap. In no case shall the total combined gap exceed $80,000 per unit (maximum CPED assistance of $40,000 per unit) for units at <=50% MMI and $70,000 per unit (maximum CPED assistance of $35,000 per unit) for units at <=60% MMI. CPED staff will undertake sufficient financial analysis of the projects to determine the appropriate amount of CPED assistance. Half of the CPED funds will assist units at <=50% MMI and half will assist units at <=60% MMI.

Development cost gap shall mean financing that is needed for the difference between the cost of the improvement/construction of a property (including acquisition, demolition, rehabilitation, and construction), and the market value of the property upon sale.

Buyer affordability gap shall mean financing that is needed for the difference between the market value of the property upon sale and the amount the actual homebuyer qualifies to purchase based on ratios similar to the City Living Program criteria of 33/38 if conventional and a 29/41 ratio if FHA.

Eligible projects will include both single family and multifamily development, and both new construction and acquisition/substantial rehabilitation/resale. Land trust models, i.e. the City of Lakes Community Land Trust, are encouraged to apply. Applicants may be for-profit or non-profit developers. An acceptable form of site control is required at the time of application. Developers must also submit appraisals and/or market studies to support proposed sales pricing.

The city's Affordable Housing Policy requirements (20% at <50% MMI) will apply to all projects with 10+ units (scattered site or contiguous).

Pursuant to the second mortgage strategy adopted by the city council in November of 2002, CPED second mortgage affordability loan documents will be required for all projects. (see attached)

All homebuyers will be required to participate in pre-purchase and post-purchase homebuyer workshops.

Process: RFP

Selection Criteria:

- Proximity to jobs and transit (projects that demonstrate transit access and are oriented to primary commercial and community corridors) (up to 10 points)
- Contributions from area employer(s) (up to 15 points)
- Private leverage (up to 10 points)
- Other public leverage (over and above the required match) (up to 10 points)
- Long term affordability/land trust models (up to 100 points)
- Addresses the housing needs of underserved populations (individuals and/or households of color, single female heads of households with minor children and households with disabled individuals) (up to 25 points)
- Mixed-income (for multi-unit developments only) (up to 10 points)
- Developer experience and capacity (up to 15 points)
- Financial feasibility and readiness (up to 15 points)
- Non-impacted area (up to 20 points)
- Density appropriate to the location (up to 10 points)
- Treatment of blighted property (up to 5 points)
- Zero displacement (up to 10 points)
- Integration with broader city revitalization efforts (up to 10 points)
- Neighborhood support and financial contribution (up to 15 points)
- Linkage to City of Minneapolis employee needs (up to 15 points)

LISC

May 11, 2004

Mr. Elfric Porte
Ms. Cynthia Lee
CPED
105 5th Ave S, Ste 200
Minneapolis, MN 55401

Dear Elfric and Cynthia:

Thank you for the opportunity to submit comments regarding the proposed program guidelines for the new "CPED and NRP Lot Redevelopment" and the "Workforce Ownership Housing Development" programs. We applaud CPED's efforts to leverage additional resources for affordable housing development in this complex and increasingly constrained funding environment. We do, however, have several concerns that we'd like to share with you. Before jumping into some of these specific issues, I wanted to first comment on some broader overarching policy issues related to the City's housing direction:

- First, we at LISC believe that the City should be focusing its scarce housing resources principally on affordable rental housing for those households at or below 50% of the area median income (AMI). While we do not believe that cities should make this type of rental housing their sole focus, we do believe it should be the City's primary priority. There continues to be a demonstrated affordability crisis for rental units serving residents at or below 50% AMI. This crisis also continues to worsen for households at or below 30% AMI, as is revealed in the City's own 2004 draft Comprehensive Housing Affordability Strategy that notes a shortage of 6,849 units of affordable rental housing for households at or below 30% of area median income and persistent cost burdens for 42% of renters and 32% of homeowners in the 31%-50% AMI range;

- Our second point relates to homeownership strategies as a whole. Given the rebound of property values in most, if not all, core city neighborhoods, and historically low interest rates that have made homeownership possible for many working families, we believe that, if the City is going to support homeownership, its dollars should be focused on those households not being served by the private market (again, typically households at or below 50% AMI). The dramatic gap in homeownership rates between the white community and that of several communities of color would be an area of further targeting. In our opinion, the recent shift of $1 million from the Affordable Housing Trust Fund into homeownership strategies and the guidelines accompanying the Lot Redevelopment and Workforce Ownership Housing programs stray too far from these critical priorities.

CPED & NRP Lot Redevelopment Program Guidelines

Overall, we applaud the effort to link CPED's resources to NRP resources through the 1:1 NRP match. This represents a creative approach to maximizing community resources. Given the magnitude of NRP resources, we believe it is appropriate for neighborhoods to play a role in the development process. However, we believe the proposed process swings too far in this direction and minimizes the critical role that developers can and should play in the development process, particularly the site acquisition process. We also believe that the proposed process has the potential to raise acquisition prices by adding potentially arduous and costly steps. If the aim of the City is timely and beneficial lot redevelopment, there are much more efficient ways to meet this goal. We would make the following recommendations:

1. **Streamline the steps needed to move through the redevelopment process.** The proposed process is extremely complicated and could add 6 months to a year to the redevelopment process, thereby significantly driving up costs. For example, identifying developers early in the process would reduce costs while maximizing the benefits a developer brings to the table, such as providing valuable advice on feasibility of redevelopment on particular lots. Additionally, it may be more efficient to have developers acquire the lots identified by neighborhoods directly rather than having CPED buy and then resell the lots. This is particularly important when negotiating the sale of privately owned properties (i.e. the "problem properties" or "eyesores" that neighborhoods often want redeveloped).

2. **Construction should be monitored by the developer & CPED.** The role of a developer is to monitor construction on a site. Though CPED plays a role in monitoring/inspecting work, requiring developers to consult with the neighborhood on every change order, as appears to be proposed, would not be cost effective. Most nonprofit and for-profit developers possess these capabilities. Duplicating this skill set within neighborhood citizen participation organizations would not make sense.

3. **Revisit how the developer is selected.** Developer selection should occur using objective criteria and neighborhood involvement. There should be one approval at the City Council level, typically when the developer and development concept has been approved at the neighborhood level and the neighborhood's NRP resources have been allocated to the project. Adding more levels of approval, again, adds undue costs to the developer and ultimately the project. The City's resources could then act primarily as a match to the neighborhood allocation.

4. **Eliminate funding preference for acquisition at 50% AMI in non-impacted areas.** The city should maintain its preference for projects at or below 50%AMI. However, this preference needs to be disconnected from the preference for development in non-impacted areas. Meeting neighborhood needs, enhancing homeownership strategies, and increasing affordable housing throughout the city should all be considerations in the selection process. This will give the City greater flexibility in meeting its housing goals.

Workforce Ownership Housing Development Program

As noted above, we believe the City's scarce housing resources, if used for homeownership strategies, should be targeted to households at or below 50% AMI. With interest rates at such low levels and with the supply of moderate and upper income ownership housing increasing, the need for City stimulus at the 80% AMI level is minimal. In fact, many families at the 70-80% AMI are achieving ownership within the private market. If the City were to focus its homeownership efforts at the 50% AMI or below level, our experience indicates that the Habitat for Humanity, the community land trust and cooperative ownership housing models represent some of the best strategies for meeting these longer term affordability goals. In terms of this program's design, we would suggest the following:

- **Clarify the selection criteria.** Several of the selection preferences seem vague and appear to work at cross-purposes. For example, how does the private leverage criteria relate to the employer contribution criteria? The program design states that appropriate site control is required but the selection criteria assesses the quality of that site control. Wouldn't having site control as a requirement be enough? The criteria should be narrowed to focus on the goals the City would like to accomplish. In its current listing and pointing system, theoretically two projects could score similarly, yet serve very different populations.

- **Tie the level of subsidy per unit to long term affordability.** With the increasing need for higher of levels of subsidy increasing in response to greater affordability gaps, the City's resources should be directed toward projects that retain the longest term of affordability. There are points for the long term affordability criteria but it is unclear what the scale would be (e.g. 15 years, 30 years, perpetual?). Public resources for both affordability and construction subsidies are scarce. We believe the prudent policy would be to retain those subsidies with the unit to ensure that future families can be served.

As we looked at both the Lot Redevelopment and Workforce Ownership Housing program designs, it became clear to us that both of these programs should complement one another to achieve the City's housing goals. While we understand that each of these programs has been created to "stand alone," we feel that CPED would be better served in meeting the City's affordable housing goals if each of the program's criteria reinforced the City priorities. A more careful review of the selection criteria and pointing system would help distinguish these priorities in the selection process.

We appreciate the opportunity to comment on these programs and the City's broader approach to homeownership. We commend the City for its efforts to leverage significant additional resources for its housing efforts and understand the challenge of pulling these programs together. What is evident to us is that a clarifying and focusing of the City's priorities (particularly as it relates to income targeting) and a simplifying of the City's approach to implementing these programs will help ensure that these programs are effective.

If you have questions or would like further clarification on any of the issues we've raised, please do not hesitate to call me or my staff. We can be reached at (651) 649-1109. I look forward to continuing our work with you in making affordable housing happen across the city.

Sincerely,

Paul D. Williams
Senior Program Director

May 10, 2004

Elfric Porte, II
CPED
105 5th Avenue South, Suite 200
Minneapolis, MN 55401

Dear Elfric:

I would like to take a moment to respond to the CPED/NRP Lot Redevelopment Program and the Workforce Ownership Housing Development Program request for comments. Overall, I would like to commend CPED's commitment to creating programs that best take limited resources, leverage them with other sources, and strive toward bettering our city while assisting residents that otherwise wouldn't be able to obtain affordable housing.

CPED/NRP Lot Redevelopment Program

Comments on this program are limited and are more subjective in nature, but thoughts nonetheless. I have had the opportunity to meet with several neighborhood boards and housing committees over the past two months and the CPED/NRP Lot Redevelopment Program has surfaced as a topic or as an agenda item in the majority of those meetings. There continues to be a large misunderstanding about what is being proposed and which NRP funds would be used as a match. Generally, I sense that there still is considerable confusion and understanding of the proposed program from neighborhoods and neighborhood groups. These misunderstandings can easily be overcome with education and outreach, but the complexity of the program and proposed involvement of neighborhoods may still be problematic moving forward. This is especially true as many of our Minneapolis neighborhoods and neighborhood organizations are cutting back staff and scopes of services. I would generally encourage a more active role of the developer in the process, in partnership, rather than subservient to the city and neighborhoods.

Workforce Ownership Housing Development Program

Buyer Affordability Gap

Buyer affordability-gap is currently proposed to be determined by taking the difference between the market value and maximum mortgage amount that the homebuyer qualifies for purchase. I would recommend that the city base the maximum affordability on a front-end affordability ratio such as 30% (sse next paragraph for rationale) to use to establish the maximum mortgageability of a buyer. In this way, developers could take 30% of a 50% or 80% MMI household's income at any given time (taking into account interest rates), and determine the responsible affordability gap needed for any unit. I would offer that we (the city and partners) need to be more responsible in setting buyers up for success over perhaps over extending them by requiring a maximum mortgage amount in the equation. Especially given the fact that the city is requiring pre- and post-purchase counseling (which, I think is great), we should also make sure we don't stack the deck against the chances for successful homeownership by overextending a household by taking too great of a mortgage.

Note on the 30%: Currently, FHA uses a front-end ratio of 29% and a back-end of 41% on the majority of their programs (29/41). Fannie Mae is generally using a 33% front-end ratio and a 38% back-end ratio (33/38). Some of the more aggressive affordable lending products available use formulas that include 40-43% front & back-end ratios. As I understand the CityLiving mortgage program available through the City of Minneapolis, they use a 33/38 ratio if conventional and a 29/41 ratio if FHA.

Community Land Trusts

I would like to recommend the following language in paragraph 5: Community Land Trusts or developments and/or developers including Community Land Trusts are encouraged to apply.
I would like to recommend the use of other perpetual affordability strategies such as Community Land Trusts to the 7th paragraph in addition to the use of 2nd mortgage strategies.

I would like to recommend that CPED city to define long-term affordability. Per comments from the CLCLT on the perpetual affordability pilot program to the city, I would recommend that the city be very clear on the long-term expectation. I would also like to urge CPED to consider awarding more points for greater long-term affordability (preferably defined as 30+ years). Specifically, in the case of the Community Land Trust model in an increasing housing market, the investment made today would grow over time eliminating the need for future subsidies.

Thank you for the opportunity to respond to these proposed programs. Please feel free to let me know if there are any additional questions. Thank you.

Sincerely,

Jeff Washburne
Director, CLCLT

progress
through
partnership

MCDA

Minneapolis Community Development Agency

Document No. 2002-257M
Request for City Council Action

Date: October 28, 2002

To: Council Member Lisa Goodman, Community Development Committee

Forward to: MCDA Board of Commissioners

Prepared by Cynthia Lee, Manager, Multi-Family Housing Division, Phone 673-5266

Approved by Chuck Lutz, MCDA Interim Executive Director ______________

SUBJECT: Proposed Second Mortgage Terms for Affordable Multifamily Ownership Housing Units

Previous Directives: None.

Ward: City-wide

Neighborhood Group Notification: Not applicable.

Consistency with *Building a City That Works:* Consistent with Goal 2, objective H, "Ensure that an array of housing choices exists to meet the needs of our current residents and attract new residents to the city; increase homeownership."

Comprehensive Plan Compliance: Complies.

Zoning Code Compliance: Not applicable.

Impact on MCDA Budget: No impact.

Living Wage / Business Subsidy: Not applicable.

Job Linkage: Not applicable.

Affirmative Action Compliance: Not applicable.

Recommendation:
City Council: Approval of second mortgage terms for affordable multifamily ownership housing units.

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MCDA Board of Commissioners: Approval of second mortgage terms for affordable multifamily ownership housing units.

Under the city's Affordable Housing Policy, ownership housing projects of 10 or more units must create a financing mechanism to make at least 20% of those units affordable at <50% of median income. A second mortgage strategy is needed for the affordability assistance for those units.

MCDA has been working with a group of experienced housing professionals to design appropriate second mortgage terms for affordable multifamily ownership housing units. There are a number of ways to structure second mortgage assistance, depending on the goals that the city is trying to achieve. We understand that one of the city's primary goals is long-term affordability of the original housing unit. The working group spent quite a bit of time researching this issue and exploring other models used around the country. This group of has arrived at a solid, workable model that is intended to meet the city's primary goal, plus a secondary goal of simplicity of administration.

This model is intended as a preferred approach to structuring financing for affordable multifamily ownership projects. It is project-specific and site-specific at this time and will not necessarily replace existing second mortgage program guidelines such as those used for the GMHC Homeownership program. This approach will be used for multifamily affordable ownership projects, all of which have some defined source of affordability financing specifically for that project (TIF, MHFA, NRP, EZ, etc.). It will be used for all affordable units, not just the required units at <50%. The maximum loan amount (or amounts if there are different levels of affordability) will be determined on a project by project basis.

- Term: the loan will be structured with a 40-year term. At maturity, the loan principal is due but all accrued interest is forgiven as long as the property has continued to be owned and occupied by low-income buyers. The seller should not incur taxes on forgiven accrued interest as long as they have not deducted accruing interest over time.
- Interest rate: 3% fixed, simple interest.
- Assumption: the loan is assumable only if the new purchaser is a qualified low-income buyer and owner occupant, in which case the accrued interest is forgiven.
- Amount: equal to the affordability gap, based on the buyer's first mortgage capacity (using non-aggressive underwriting criteria that do not put buyer at the absolute loan maximum) subtracted from the sales price (market value). MCDA will establish a maximum second mortgage amount for each project.
- Lender: originally the developer will act as the lender, however loans will be assigned to a permanent lender entity (MCDA or, as suggested for our TIF loans, Family Housing Fund).

- Other: qualified low-income buyers will be sought from home buyer workshops and other similar sources.

This approach provides for long-term affordability by creating an incentive to sell to a new low-income buyer. If the unit does not sell to a low-income buyer, the lender recaptures the subsidy (plus interest) to apply to another affordable housing unit elsewhere. It also allows owners access to the same level of appreciation as any other owner. The 40 year term is structured to prevent the balloon payment hitting at the same time as the end of the first mortgage term. The loans are non-recourse so that repayment occurs only to the extent there are proceeds. The loans will be subordinate to first mortgage debt but not necessarily other soft debt, subject to individual circumstances. If the buyer later refinances the first mortgage, the subordination request would be subject to the existing MCDA subordination policy and procedure.

The working group explored the concept of equity-sharing as an alternative to fixed interest. Any model for a deferred second mortgage can create confusion for the borrower because of the difficulty of comprehending the accrual of interest. MCDA has, however, found that simple interest loans are more understandable to the borrower than the equity sharing loans and there is much less buyer resistance. The Family Housing Fund, in fact, used an equity-sharing model in the past, but they converted to 3% simple interest, primarily for the above reasons.

This approach should be fairly straightforward for buyers and future administrators and seems to address most of the city goals we initially identified. This model would be used for all MCDA TIF, NRP, EZ and MHFA second mortgage affordability loans according to a set of consistent loan documents. The Lofts on Arts Avenue project is expected to be the first to use this model.

This report was prepared by Cynthia Lee. For more information, call 612-673-5266.

Submitted to Committee of the Whole 7/1/04

CD6

13

Porte, Elfric

From: Acosta, Ruben J.

Sent: Thursday, July 01, 2004 8:48 AM

To: Oliveto-Oates, Edythe J.; Porte, Elfric

Cc: Heffern, Jay M; Ginder, Peter W; Newman, Nikki; Xiong, Lee Pao

Subject: Legal Issues Regarding Minority Preference for the City's Workforce Housing Program

I have been assigned to look at potential legal issues that might arise if the City were to provide a minority preference, by awarding extra points to minorities, in the ranking or scoring of applicants to receive benefits under a proposed City workforce housing program. I have looked at the Federal Fair Housing Act, Federal Equal Credit Opportunity Act, Minnesota Human Rights Act and several recent United States Supreme Court cases regarding minority preference programs.

The Fair Housing Act prohibits discrimination in residential real estate transactions, including the sale, lease or financing of real estate, based on race, color, religion, sex, handicap, familial status or national origin. The Fair Housing Act also prohibits the printing or publishing of any notice, statement or advertisement that indicates any preference, limitation or discrimination based on race, color, religion, sex, familial status or national origin. The Equal Credit Opportunity Act prohibits in any aspect of a credit transaction discrimination on the basis of sex, race, color, religion, national origin, marital status, age, public assistance and a good faith exercise of rights.

The Minnesota Human Rights Act grants, as a civil right, to persons in Minnesota, freedom from discrimination based on race, color, creed, religion, national origin, sex, marital status, disability and other specified classifications. The Act prohibits discrimination in the areas of employment, housing and real property, public accommodations, public services and education. The housing and real property discrimination prohibition applies to the sale, lease, financing and advertisement of limitations, specifications or discrimination in the sale, lease or financing of such real estate transactions. The Act also prohibits such discrimination in personal and commercial credit transactions. The Act further requires the Human Rights Department Commissioner to establish affirmative marketing regulations for housing developers, who receive more than $50,000 in state and local funds, to promote and encourage open housing policies by adopting an information distribution or marketing plan for actively informing minorities and other protected groups of available housing opportunities.

I have also reviewed six United States Supreme Court cases regarding minority preference programs. The cases were Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Wygant v. Jackson Board of Education, 476 U.S. 267 (1986); Johnson v. Transportation Agency, 480 U.S. 616 (1987); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); and Grutter v. Bollinger et al. 288 F.3d 732, affirmed (2003). The cases provide the following legal principles regarding minority preference programs:

- Any preferences, including quotas, set-asides and points, based on racial or ethnic considerations are inherently suspect and call for the most exacting judicial scrutiny.
- Simply to assume some specified percentage of a particular group because of its race or ethnic origin would be patently unconstitutional.
- Racial classification must be justified by a compelling governmental interest and any means to remedy or effectuate that interest must be narrowly tailored and limited in scope and duration.
- Societal discrimination or a generalized assertion of past discrimination are insufficient to justify a racial classification, there must be convincing evidence of prior discrimination by the governmental unit involved before allowing the limited use of a racially classified remedy.
- To be narrowly tailored a racially classified remedy must consider race or ethnicity only as a "plus" in a particular applicants file.
- Some of the elements of acceptable racially classified remedies include plans and programs that:
  - do not provide quotas, set-sides, points or a specific number of applicants to be placed or approved based on racial or ethnic criteria;
  - provided substantial evidence to justify a compelling governmental interest supporting the past discrimination and the racially classified remedy;
  - provided numerous criteria and factors for the evaluation of applicants for which racial and

ethnic diversity are but one factor among many to be considered;

- are flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes race or ethnicity the defining feature of the applicant approval criteria;
- do not unduly harm non-minority applicants by depriving them of their constitutional rights or create an absolute bar to their advancement;
- frequently accepts or qualifies non-minority applicants;
- considered other available race-neutral alternatives to increase minority participation before selecting a racially classified remedy; and
- set a limited duration for the racially classified remedy.

As U.S. Supreme Court Justice Anton Scalia concluded in *Adarand,* government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction.

To establish a minority preference program, the program would have to comply with the nondiscrimination provisions in the applicable laws and satisfy the requirements of U.S. Supreme Court opinions that do not favor minority preference programs that reserve or guarantee outcomes based on race or ethnic considerations. There are probably other race-neutral alternatives that could be effective towards achieving the City's goals, such as directly marketing to and working with applicants in the City's minority communities. If the City wants to pursue a minority preference program as discussed, I would advise that a thorough legal analysis be done and a legal opinion be obtained from the City Attorney's Office.

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