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To: House Commerce Committee

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Subject: **SB 366** – Supporting Legislation to Protect Kansas Property Owners by Prohibiting Cities and Counties from Adopting Price Control Mandates on the Purchase or Sale of Private Property

Chairman Hutton and members of the House Commerce Committee, thank you for the opportunity to provide testimony today on behalf of the Kansas Association of REALTORS® in support of **SB 366**, which would protect Kansas private property owners by prohibiting cities and counties from adopting price control mandates on the purchase or sale of privately-owned property. Through the comments provided in our testimony, we hope to provide some additional legal and public policy content on this issue.

KAR is the state's largest professional trade association, representing nearly 8,500 members involved in both residential and commercial real estate and advocating on behalf of the state's 700,000 property owners for over 95 years. REALTORS® serve an important role in the state's economy and are dedicated to working with our elected officials to create better communities by supporting economic development, a high quality of life and providing affordable housing opportunities while protecting the rights of private property owners.

#### Community Activists Pushing for the Adoption of Price Control Mandates on Privately-Owned Housing

Over the past few years, a small group of community activists in the City of Lawrence have been pushing the city and county to adopt "inclusionary zoning" requirements on all new and infill single-family and multi-family housing developments. Inclusionary zoning mandates are extremely common in more liberal states such as California and Maryland, but are starting to spread to a few other states with pressure from affordable housing advocates and community activists. Inclusionary zoning ordinances are simply price control mandates with a fancy name, which is an attempt to disguise their true nature and make them more palatable to public officials.

Basically, inclusionary zoning requirements impose price control mandates on private property owners by limiting the rental amount or sales price that a private property owner can charge to rent or sell a property to a potential buyer or tenant. Once a property has been placed under a price control mandate, the property owner may only rent or sell the property to certain households designated by the city or county at below market-rate prices. These price controls typically last up to 15 to 20 years and severely limit the fair market value of the property.

For example, the developer of a neighborhood of 50 single-family homes approaches a city and requests that the city approve a plat for the new subdivision. The land is already zoned for single-family residential use and nothing in the developer's plans contradicts the land use for the property that has been designated in the city's comprehensive plan. Under normal circumstances and without price control mandates, the approval of the subdivision by the city would be nearly automatic.

If the city has adopted price control mandates, before the city would approve the plat for the subdivision, the city would impose an additional restriction and require the developer to agree that 15 of the homes to be constructed in the neighborhood (30 percent) would be subject to price control mandates that would require the homes to be sold for below market-rate amounts (basically at a loss or severe discount). If the developer does not agree to the price control mandates, the city would not allow the neighborhood to be built (even though it meets all the land use and zoning requirements established by the city).

In many cases, cities or counties give property owners the right to “buy their way out” of the requirement to impose price control mandates by making a substantial up-front cash payment to the city, a non-profit designed by the city or an affordable housing trust fund maintained by the city. Basically, the developer is required to pay the city or county for the right to construct homes in the neighborhood, which is already allowed under the land use and zoning regulations adopted by the city or county. By any other measure and if this were being done in the private sector, this would be known as blackmail or extortion.

#### “Inclusionary Zoning” Really Means a Backdoor Tax Increase on Home Buyers and Renters

Common sense and basic economics tell us that price control mandates basically turn into a backdoor tax increase on families who rent or purchase a market-rate apartment or home. By imposing an arbitrary cap on the rental or sales price that can be charged by the property owner, the city or county will in effect be forcing the property owner to rent or sell the property at a substantial discount or loss compared to the market rate.

Although the families that reside in the price-controlled housing units will receive a subsidy on the rental or purchase of the property, the property owner will be forced to recoup this loss by increasing the rental amount or sales price on all other housing units in the apartment complex or subdivision. Housing development does not occur in a vacuum and a city or county cannot just arbitrarily order a developer or home builder to lower the price of housing units. Developers and home builders have construction loans to pay off, subcontractors to pay and infrastructure improvements to prepare the land for development.

As a result, the property owner will ultimately be forced to pass along the substantial loss on the price-controlled housing units to the families who will be renting or purchasing market-rate units. As a result, this forced redistribution will force families who are renting or purchasing market-rate housing units to pick up the tab for the subsidy provided to the families renting or purchasing the price-controlled housing units.

This is the classic definition of a tax and would be a policy supported under socialism. The additional rental amount or sales price that most families would be required to pay for a market-rate housing unit is a “forced contribution” that will pay for a benefit conferred upon another group of preferred taxpayers.

Ironically, price control mandates are enacted with the stated purpose of creating affordable housing. Common sense and basic economics theory show that these programs actually will have the reverse result of increasing the cost of housing for families that buy or rent market-rate housing units, which defeats the intended purpose of the programs. Some families would be forced to pay higher costs for housing in order to subsidize lower cost housing for other families, which makes some families winners and others losers.

#### Studies Demonstrate that Price Control Mandates Lead to Less Affordable Housing

Unfortunately, research shows that price control mandates actually lead to an increase in the cost of housing for families and a reduction in the number of market-rate housing units that are constructed. Numerous studies and examples from other communities with inclusionary zoning programs support these conclusions and demonstrate that inclusionary zoning is an awful idea that must be stopped.

**Madison, Wisconsin:** In February 2004, the City of Madison enacted an inclusionary zoning program that had the stated purpose of furthering the “availability of the full range of housing choices for families of all income levels in all areas of the City of Madison.” The ordinance required a development with ten or more rental dwelling units to provide no less than 15 percent of its total number of dwelling units as price-controlled dwelling units when the development “requires a zoning map amendment, subdivision or land division.”

An “inclusionary dwelling unit” was defined as a “dwelling unit for rent to a family with an annual median income at or below sixty percent of the Area Median Income.” Under the ordinance, the monthly rental price for rental inclusionary dwelling units “shall include rent and utility costs and shall be no more than thirty percent of the monthly income for the applicable Area Median Income.”

Prior to the enactment of the inclusionary zoning requirements from 2001 to 2003, contractors and developers in Madison had constructed 3,257 housing units. Following the enactment of the requirements from 2004 to 2006, developers constructed only 1,954 housing units. As a result, there was a 40 percent reduction in the number of housing units constructed in Madison following the enactment of the inclusionary zoning requirements. In effect, the inclusionary zoning requirements deterred contractors and developers from constructing housing units.

In 2006, the City of Madison issued only 143 permits for market-rate apartment units, which compared to the 660 market-rate apartment unit permits issued in 2003 (a 78 percent reduction). According to one study on the Madison inclusionary zoning requirements, the drastic downturn in new housing construction caused vacancy rates to decline in existing rental units and led to an increase in rental prices, which achieved the exact opposite effect of what the city had intended in enacting the requirements. “How Inclusionary Zoning Backfired on Madison,” Terrence Wall, *Madison Isthmus Weekly*, March 15, 2007.

Following a court’s decision that the ordinance violated the state’s rent control prohibitions (discussed later in this testimony), the City of Madison decided not to renew the inclusionary zoning requirements when they came up for renewal in 2009. The statistics quoted in the study basically prove that the enactment of the inclusionary zoning requirements had the effect of decreasing the supply and affordability of housing.

**California Study Conducted by San Jose State University Economists:** Another study conducted by economists at San Jose State University found that inclusionary zoning programs in California led to a 20 percent increase in prices for market-rate housing units and a seven percent decrease in the number of market-rate housing units constructed between 1990 and 2000. Although the introduction of inclusionary zoning does lead to an increase in the construction of below market rate housing units, at the same time it leads to a decrease in the number of market-rate housing units constructed and an increase in the cost of market-rate housing units. “*Unintended or Intended Consequences? The Effect of Below-Market Housing Mandates on Housing Markets in California.*” Means and Stringham, *Journal of Public Finance and Public Choice*, Vol. XXX, 1-3/2012.

**Boston and San Francisco Study Conducted by New York University Economists:** An additional study conducted by economists at New York University (NYU) found that inclusionary zoning requirements in Boston and San Francisco “constrain new development, particularly during periods of regional price appreciation.” Moreover, “there is also strong evidence that implementation of region-wide inclusionary zoning put upward pressure on single-family home prices in the Boston-area suburbs between 1987 and 2008.” “*Silver Bullet or Trojan Horse: The Effects of Inclusionary Zoning on Local Housing Markets in the United States,*” Schuetz, Meitzer and Been, Furman Center, New York University, June 2010.

#### Kansas Already Prohibit Cities and Counties from Imposing Price Control Mandates on Rental Housing

During the 2001 Legislative Session, KAR was instrumental in helping to pass legislation (**SB 146**), which became K.S.A. 12-16,120 in the statute books. Under K.S.A. 12-16,120, no political subdivision of the state (which includes all cities and counties) “shall enact, maintain or enforce any ordinance or resolution that would have the effect of controlling the amount of rent charged for leasing private residential or commercial property.” This is generally known as a prohibition on “rent control.”

At the time, numerous cities and counties were considering placing explicit limitations on the amount of rent that could be charged by the owners of private property. In order to stop these efforts in their tracks, the Kansas Legislature preemptively passed this legislation to permanently prohibit cities and counties from regulating the amount of rent that could be charged on privately-owned commercial or residential property.

The logic behind prohibiting cities from placing artificial limits on the amount of rent that could be charged on privately-owned property applies equally to the sale of privately-owned property. Both restrictions increase the cost and decrease the supply of market-rate housing, which is horrible public policy.

Since no Kansas cities or counties have enacted inclusionary zoning requirements at this time, this statute has never been tested in a Kansas court to determine whether it prohibits a city or county from enacting inclusionary zoning requirements. Having said that, the state of Wisconsin has a rent control statute that is extremely similar to the Kansas rent control statute. Under Wisconsin statute §66.1015, “no city, village, town or county may regulate the amount of rent or fees charged for the use of a residential dwelling unit.”

After the enactment of the inclusionary zoning ordinance by the City of Madison in 2004, the Apartment Association of South Central Wisconsin filed litigation against the City of Madison alleging that the provision limiting the rental price for inclusionary dwelling units sought to regulate the amount of rent charged for rental units and thus violated the provisions of Wisconsin statute §66.1015.

In the *Apartment Association of South Central Wisconsin v. City of Madison*, 722 N.W.2d 614 (Wis.App. 2006), the Wisconsin Court of Appeals sided with the plaintiffs and invalidated the ordinance as an illegal rent control prohibition under the Wisconsin state statute. In doing so, the court held that “the legislature has expressly withdrawn the power of the City to enact the ordinance because this ordinance provision regulates the amount of rent that property owners in the specified circumstances may charge for rental dwelling units.” *Apartment Association of South Central Wisconsin* at 625. Later that year, the Wisconsin Supreme Court declined a petition to review the appellate court’s ruling and the ruling was basically affirmed.

Again, no Kansas courts have examined this statute since no Kansas cities or counties have enacted inclusionary zoning requirements at this time. However, we believe that the court opinion from Wisconsin would be highly persuasive authority on this issue and we are hopeful that a Kansas court would hold that any efforts by a city or county to place rent controls on rental dwelling units through the enactment of inclusionary zoning requirements would be struck down under K.S.A. 12-16,120.

#### Existing “Rent Control” Statute Does Not Prohibit Price Control Mandates on the Sale of Property

Unfortunately, the state’s existing prohibition on “rent controls” found in K.S.A. 12-16,120 does not prohibit a city or county from adopting or enforcing any ordinances or resolutions that would impose price control mandates on the purchase or sale of privately-owned residential or commercial property. As a result, even though the existing statute would most likely prohibit a city or county from adopting inclusionary zoning requirements on rental property, this same prohibition would not apply to owner-occupied property.

#### Nothing in **SB 366** Prohibits a Property Owner from Voluntarily Agreeing to Price Controls in Return for Grants or Incentives Provided by a City or County

Not surprisingly, those community activists and public officials who would like to impose price control mandates on privately-owned properties have mobilized against **SB 366**. While some attempt to argue that they have no plans to impose mandatory price control mandates on privately-owned property, they are nevertheless pulling out all the stops in an attempt to defeat this legislation.

As currently drafted, nothing in **SB 366** would prohibit a private property owner from voluntarily agreeing to price control requirements on certain units in return for grants or incentives provided to the property owner by a city or county. In order to provide further assurances that it is not the intent of **SB 366** to prohibit voluntary agreements between a city or county and a private property owner, we would recommend that the House Commerce Committee adopt the balloon amendment found on page six of this testimony.

In subsection (c) of the proposed balloon amendment, we have made it clear that “this section shall not impair the right of any owner of privately-owned property to enter into a voluntary agreement with a political subdivision to agree to requirements that would have the effect of controlling the amount of rent charged or purchase price agreed upon between the parties to the transaction for the lease or purchase of privately-owned property in return for grants or incentives provided by the political subdivision to the owner of privately-owned property.” This makes it abundantly clear that any private property owner would have the right to voluntarily agree to price controls in return for grants or incentives provided by the city or county.

Once the proposed balloon amendment is adopted, the opponents to **SB 366** should have no further grounds to oppose the legislation. Unless their intent really is to subject private property owners to involuntary price control mandates, then the amended language found in **SB 366** would have no effect on any voluntary affordable housing programs negotiated between cities or counties and private property owners.

As an alternative to mandatory inclusionary zoning requirements, we have urged the City of Lawrence and any other local governments that are considering the enactment of price control mandates to instead look at voluntary programs that would incentivize private property owners to construct more affordable housing that is integrated into market-rate housing developments. Private property owners are interested in building more affordable housing, but land costs and city and county land use, subdivision and zoning regulations have made it more difficult for private property owners to build affordable housing.

For example, if a private property owner would voluntarily agree to include a certain number of price-controlled housing units in a planned neighborhood, the city or county could allow the property owner to recoup the losses on the price-controlled units by either allowing greater density in the neighborhood (which would allow the property owner to build more units) or through the elimination or reduction of building permit fees, infrastructure costs or system development charges (fees for sewer and water hookups). These grants or incentives would offset the loss that the private property owner would suffer on the price-controlled housing units and mitigate the increases that the private property owner would have to pass on to the buyers or renters of market-rate housing units.

#### Language Must Ensure that “Voluntary” Agreements to Price Control Requirements Are Truly “Voluntary”

Having said that, additional language is needed in the balloon amendment to ensure that any “voluntary” agreement by a private property owner to agree to price control requirements imposed by a city or county is truly a “voluntary” agreement. Under subsection (d) of the proposed balloon amendment, “no political subdivision shall require any owner of privately-owned property to agree to any requirements that would have the effect of controlling the amount of rent charged or the purchase price agreed upon between the parties to the transaction for the lease or purchase of privately-owned property as a condition for consideration or approval of any building permit or plat.”

Several years ago, the Kansas Legislature passed legislation that prohibited cities or counties from requiring any private property owner to install a fire sprinkler system in a residential structure. One city attempted to subvert the legislative intent behind the law and attempted to require property owners to “voluntarily” agree to install fire sprinkler systems in new residential structures. If the property owner did not “voluntarily” agree to install the fire sprinkler system, then the city would deny the building permit or plat.

Unfortunately, we have similar fears that overzealous cities or counties may attempt to again subvert the legislative intent behind **SB 366** by essentially requiring a private property owner to “voluntarily” agree to price control mandates by holding the approval of a building permit or plat hostage. As a result, this is really not a “voluntary” agreement at all and instead the private property owner has been forced to adhere to the price control mandates against their will.

Thankfully, the language in subsection (d) of the proposed balloon amendment would prevent any city or county from requiring any private property owner to “voluntarily” agree to price control mandates as a condition for consideration or approval of any building permit or plat. If a private property owner is going to agree to be bound by price control mandates, then we must ensure that agreement is truly “voluntary.”

#### Conclusion

Even though no cities or counties have enacted price control mandates at this time, we strongly believe that now is the time for the Kansas Legislature to protect consumer choice in the housing market and private property rights by passing **SB 366** to ban price control mandates on the amount of rent that can be charged or purchase price agreed upon between the parties to the transaction on privately-owned property.

## **Suggested Amendment to SB 366 to Clarify that Property Owners May Voluntarily Agree to Price Controls**

AN ACT relating to economic development; concerning price controls on the purchase or sale of private residential or commercial property; amending K.S.A. 12-16,120 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 12-16,120 is hereby amended to read as follows: 12-16,120. (a) No political subdivision of this state, including, but not limited to, a county, municipality or township, shall enact, maintain or enforce any ordinance or resolution that would have the effect of controlling the amount of rent charged *or purchase price agreed upon between the parties to the transaction for leasing private the lease or purchase of privately-owned* residential or commercial property.

(b) This section shall not impair the right of any ~~local unit of government~~ *political subdivision* to manage and control *commercial* or residential property in which such ~~local unit of government~~ *political subdivision* has ~~a property~~ *an ownership* interest.

*(c) This section shall not impair the right of any owner of privately-owned property to enter into a voluntary agreement with a political subdivision to agree to requirements that would have the effect of controlling the amount of rent charged or the purchase price agreed upon between the parties to the transaction for the lease or purchase of privately-owned property in return for grants or incentives provided by the political subdivision to the owner of privately-owned property.*

*(d) No political subdivision shall require any owner of privately-owned property to agree to any requirements that would have the effect of controlling the amount of rent charged or the purchase price agreed upon between the parties to the transaction for the lease or purchase of privately-owned property as a condition for consideration or approval of any building permit or plat.*

Sec. 2. K.S.A. 12-16,120 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.