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## OTTEN JOHNSON ALERT

# Colorado Legislature Passes Inclusionary Housing Bill; Amendments Will Encourage Zoning Reform

May 2021 • [Brian Connolly](#)

Last week, the Colorado legislature voted to approve HB21-1117, which will allow local governments to require rental housing developers to provide affordable units in new development projects. The bill, which supersedes a Colorado Supreme Court decision prohibiting these “inclusionary housing” practices, now awaits the governor’s signature. Although the bill will allow inclusionary housing, which can impose higher costs on multi-family housing development, the Senate’s amendments to the bill will require a local government that adopts such an ordinance to take measures to offset these costs and loosen zoning restrictions. Following enactment of the bill, local governments that wish to adopt inclusionary housing ordinances will now be required to design and implement their ordinances in a manner that comports with HB21-1117. We look forward to working with our clients to ensure that any locally-adopted regulations do not interfere with new housing development.

In its final form, HB21-1117 clarifies that inclusionary housing laws do not constitute rent control, which is prohibited in Colorado. The bill overrides the Colorado Supreme Court’s 2000 decision in *Town of Telluride v. Lot Thirty-Four Venture*, in which it held that an inclusionary housing law violated the state’s longstanding prohibition on rent control. Although local governments have been able to require developers to set aside affordable units in for-sale projects, the Telluride decision precluded them from doing so, except by voluntary agreement, in rental projects. Even before HB21-1117’s passage, some local governments such as Denver, Boulder, and others require rental

housing developers to pay linkage fees to support affordable housing development, with an option to provide affordable housing units in lieu of fees. The bill ensures that these and other practices are lawful.

The final bill requires any local government that adopts an inclusionary housing ordinance to allow for a range of options for landowners and developers, and to provide at least one alternative to on-site housing construction. Amendments to HB21-1117 that were passed in the Senate's State, Military, and Veterans Affairs Committee will require local governments that adopt an inclusionary housing ordinance to increase allowable housing density or incentivize the creation of affordable housing. For example, a local government could increase allowable density, expand mixed-use zoning, increase the number of housing units allowed on single-family lots, increase permitted household size, allow more transit-oriented development, reduce parking requirements, or take other, similar measures. The bill also allows a local government to comply by reducing utility connection or impact fees, expanding opportunities to use surplus government property for housing development, or adopting other measures that encourage the creation of more affordable forms of housing.

Once the bill is passed into law, local governments will be required to follow local codes in enacting inclusionary housing ordinances, and we expect such ordinances in Denver and other cities to be developed over the course of the next several months. The amendments to HB21-1117 will likely require local governments to reevaluate their approaches to inclusionary housing to ensure compliance with the amendments.

Inclusionary housing ordinances have proven controversial, and HB21-1117 was opposed by many real estate industry organizations. In other states that have experimented with them, inclusionary housing ordinances have often had a chilling effect on housing development, as the cost of compliance negates developers' willingness to build. Moreover, providing affordable housing in a portion of a development project has the potential to add costs—which are passed on to market-rate renters—in the remainder of the project. At the same time, because of a dearth of public funding to support the construction of much-needed affordable housing, local governments must look to developers to assist in providing these units.

Through our work with the [Colorado Housing Affordability Project](#) (CHAP), Otten Johnson was proud to have participated in the development of amendments to HB21-1117. While we would have preferred to see other concepts included in the final bill—such as requiring local governments to study and plan for affordable housing needs prior to adopting an inclusionary housing ordinance—we believe that the adopted amendments will reduce some of the far-reaching, potentially negative effects of HB21-1117. Most importantly, we believe that addressing Colorado's housing shortage is going to require a multi-pronged response, and the legislature should continue to explore other opportunities to reduce the regulatory burden on housing development to reduce housing development costs.

We look forward to working with our clients and friends to continue our efforts to promote sensible responses to our housing crisis. In particular, we look forward to participating at the local level in the development of reasonable inclusionary housing ordinances and, in the coming year, CHAP will continue its efforts to eliminate zoning barriers to housing development throughout Colorado. We look forward to hearing your ideas and working together on these challenging issues.

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