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HB21-1117 Aims to Allow Inclusionary Housing in Colorado

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Colorado's population has increased by nearly 1.5 million people in the past two decades, growing at a rate faster than most of the United States. This influx in population, particularly along the Front Range, has not been without growing pains, particularly in the housing market. As more people move-in, and Colorado's housing supply is further squeezed, for-sale and rental prices have skyrocketed, creating the need for more low- to moderate-income affordable housing units than ever before. HB21-1117, which passed in the Colorado House of Representatives and was recently introduced in the Senate, seeks to address this need, by permitting local governments to adopt inclusionary housing laws aimed to generate affordable rental housing in their respective communities.

Under state law, Colorado local governments have long been prohibited from enacting any ordinance or resolution that would control rent on private residential units. In 2000, in the case of *Town of Telluride, Colorado v. Lot Thirty-Four Venture LLC*, 3 P.3d 30 (Colo. 2000), the Colorado Supreme Court took a broad view of Colorado's rent control statute, striking down an ordinance enacted by Telluride that required residential developers to create affordable housing.

Telluride's ordinance imposed an obligation on most new developments in the Town to construct and set aside affordable housing for forty percent of the employees generated by the development. Property owners could satisfy this requirement by

constructing new housing units with fixed rental rates, by imposing deed restrictions on market-rate units in order to fix rental rates, by paying fees in lieu of constructing housing, or by conveying land to the Town for affordable housing. Although it provided developers with a menu of compliance options, the court posited that, because the ordinance even contemplated rent control within the plain meaning of that term (which, notably, is not defined in the statute), it conflicted with the statutory prohibition on local measures controlling rents.

As a result, over the past two decades, local governments have been barred from enacting any sort of mandatory rent control measures, including requiring developers to provide affordable housing. The law does not apply to for-sale projects, and the legislature amended the statute to allow voluntary affordable housing agreements between developers and local governments. Yet these exceptions have largely failed to produce significant numbers of affordable units.

While past legislative attempts to overturn Telluride have been unsuccessful, HB21-1117 would do just that. The current draft of HB21-1117 clarifies that the provisions of the state's rent control provision do not apply to any local land use regulation that restricts rents on newly constructed or redeveloped private residential units, so long as the regulation (i) provides a choice of options to property owners and land developers, similar to the Telluride ordinance, and (ii) creates one or more alternatives to the construction of new affordable housing units on the building site itself.

HB21-1117 is prospective in nature—it would not permit a local government to adopt or enforce any regulation that would have the effect of controlling rent on any existing private residential dwelling unit. However, the bill does not provide any clarification regarding what choice of options or compliance alternatives might be required in order for a local ordinance or resolution to pass muster under the proposed law. Although some flexibility alternatives might include the ability to receive, in exchange for the development of rent-restricted units, density or height bonuses, reductions in parking requirements, expedited permitting, or other benefits, the statute does not make clear which, if any, of these options might be available. Similarly, the bill does not clarify which compliance alternatives, such as making contributions to an affordable housing fund or the construction of off-site affordable units, would suffice.

Unfortunately, HB21-1117 is not crafted in a manner to avoid issues that have long-plagued local attempts at encouraging affordable housing development in Colorado or elsewhere. Inclusionary housing laws have a mixed record of actually resolving housing affordability concerns. When properly implemented, inclusionary zoning regulations can alleviate pressure on public funding sources for the production of low- to moderate-income housing units. Nevertheless, research on the effectiveness of local inclusionary housing laws suggests that their results are often mixed. Well-designed inclusionary housing laws are capable of producing low- to moderate-income housing (but less commonly units with very deep subsidies or which provide supportive

services) while mitigating price increases on market-rate units in the same project, and avoiding suppressing the development of market-rate units. In contrast, programs created without proper economic impact analysis or which do not allow flexibility to adjust to changing market conditions can discourage development of housing altogether and exacerbate the affordability challenges created by inadequate supply.

In our view, HB21-1117 would benefit from amendments—which have been recommended by the [Colorado Housing Affordability Project](#)—requiring local governments, prior to enacting new inclusionary housing regulations, to: (1) study and plan for housing needs, (2) allow for a meaningful notice and comment period to allow housing providers and residents to participate in the process of preparing inclusionary housing ordinances, (3) conduct an economic analysis on prospective developments to ensure that the inclusionary housing ordinance will not hinder residential development, and (4) provide a list of possible compliance alternatives. Further, it should be required that local governments ensure that any inclusionary housing law enacted is reasonably tailored in a manner so as to further the jurisdiction’s goal for addressing that particular community’s need for affordable housing. Any inclusionary housing laws promulgated under HB21-1117 would additionally benefit from a regular review schedule to determine the program’s success in meeting these objectives. While local governments could—and should—implement the above requirements on their own, the inclusion of provisions addressing these matters in HB21-1117 could eliminate future issues and failed regulations upfront.

We recommend that our clients engage with state lawmakers as soon as possible to ensure any and all appropriate feedback and concerns are heard and addressed. If HB21-1117 passes and becomes law—which signs indicate that it will—our clients should additionally engage with local government officials on the preparation of relevant ordinances and resolutions. We would be happy to help with these discussions and with navigating the future legal landscape.

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