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Is Telluride, the case, dead?

Have no fear: Telluride continues to exist as a glorious and awe-inspiring mountain town. However, recently, the real estate community watched anxiously as Colorado legislators contemplated whether to legislatively reverse a long-standing decision by the Colorado Supreme Court in *Town of Telluride v. Lot Thirty-Four Venture*, 3 P.3d 30 (Colo. 2000), regarding whether rent control could be mandated via local ordinance. This article discusses the status of the current real estate community in the wake of the Telluride case and the recent legislative initiative, House Bill 10-1017, concerning authorization for certain public entities to enter into voluntary agreements affecting rent on private residential property (HB 10-1017).

■ **The background.** To begin, Colorado's statute banning rent control, CRS 38-12-301, came as a result of a 1980 citizen initiative in the city of Boulder, which imposed rent control on existing buildings. At that time, the state Legislature decided to institute a statewide rent control ban to ensure that, notwithstanding home rule authority, no city or county in Colorado would, as a matter of law, be able to institute a rent control measure.

In June 2000, the Colorado Supreme Court in the Telluride case addressed the following question: Can rent control be mandated via local ordinance? The case resulted from the town of Telluride enacting a local ordinance that imposed a mandatory affordable housing requirement on the majority of new developments in the town. The ordinance required property owners to create affordable housing units in an amount equal to 40 percent of the jobs generated by the new development. Owners could satisfy the obligation by: 1) constructing new housing units



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with fixed rental rates; 2) imposing deed restrictions on free-market units in order to fix rental rates; 3) paying fees in lieu of housing; or 4) conveying land to the town for affordable housing.

The Supreme Court held that the Telluride ordinance was in direct conflict with CRS 38-12-301, which strictly prohibits rent-control ordinances by counties and municipalities. After the Telluride case, not only were municipalities put on notice that the aforementioned affordable housing requirements ran afoul of state law, but also the opinion effectively prohibited municipalities from using land use approvals as leverage to require rent-controlled housing.

During the last 10 years, the Telluride case has remained the governing law in Colorado. In fact, throughout the multi-year review and discussion of Denver's proposed Inclusionary Zoning Ordinance, all parties understood that the requirement of affordable housing set-asides could not extend to rental properties. As a result, Denver's City Council adopted an ordinance that included a *voluntary* component for rental properties, which provide incentives to developers to the extent they agreed to provide rent-controlled housing units in their developments. The incentives may include cash reimbursements, density bonuses, parking reductions and/or expedited processing of plans. Denver's ordinance makes a clear distinction between the

mandates imposed and the voluntary compliance opportunities for rental units.

■ **The legislative contemplation: HB 10-1017.** The Telluride case has recently come under attack by proposed HB 10-1017. As its chief legislative sponsor, state Rep. Daniel Kagan, articulated, the purpose of the legislation would "take us back to the '80s and the booming '90s, when rent control ordinances were banned, but developers and local governments could agree that new developments would include an affordable housing component."

In essence, HB 10-1017 sought to identify a distinction between rent control mandates *imposed* via local ordinances and rent control limitations that were *negotiated* in good faith between municipalities and developers. The legislation sought to "bring clarity back to the law" as it related to voluntary or negotiated agreements. The law allegedly requiring clarity was Colorado's ban on rent-control statute, CRS 38-12-301, as it stood following the Telluride case.

According to the proponents of the bill, the purpose of HB 10-1017 was to ensure that voluntary rent-control agreements were enforceable so that the developers who voluntarily entered into such agreements, and their successors in interest, would be required to abide by those agreements. However, the types of "voluntary" agreements that were addressed by the legislation's proponents during the weeks of legislative debate told a different story. These "voluntary agreements" were entered into as a result of existing municipal ordinances mandating rent control. Proponents had two arguments for why these agreements constituted "voluntary" agreements: 1) the developers were not *required* to develop their property; or, alternatively,

2) the agreements allowed the developers to build to their full densities allowed by code.

On the other side, opponents of the legislation asked the question: Does the right of a developer to build to the full density allowed by code, or even just to build, in exchange for including rent-controlled units within the development constitute a "voluntary agreement?" In other words, does a developer's existing right enable a municipality to mandate certain rent controls?

The Supreme Court recognized in the Telluride case that, "Once owners decided to develop their property, they must engage in a program that effectively redistributes the value of the rental property from landlord to tenant, a hallmark of rent control." *Telluride*, 3 P.3d 30 at 36. According to the court, the "voluntary act" was not the decision to develop property, but rather, the decision of whether or not to engage in a rent-control program. Therefore, the agreements that the proponents sought to enforce were not voluntary, but instead were those mandated by ordinance.

Thus, the question of "voluntary" in the context of rent-control agreements was not fully resolved throughout the legislative process. However, for the development community, ensuring that the local municipalities did not tacitly include rent-controlled property throughout land use negotiations was of paramount concern. As such, HB 10-1017 seeks to provide clarity to the current law, while also striking a balance between banning mandated rent control, encouraging incentives for voluntary agreements, and also promoting development.

So it is the case, that as a result of HB 10-1017, both the town of Telluride and the Telluride case are still alive and well.▲