INTRODUCTION TO AFFORDABLE HOUSING IN COLORADO

As the coordinating editor for real estate articles in *Colorado Lawyer*, I am pleased to announce this series on affordable housing issues in Colorado. While the focus of the series will be of particular interest to real estate lawyers, the issues cut across practice areas, affecting municipal attorneys, tax specialists, land use lawyers, and litigators, among others. The Real Estate Law Section committee that organized and oversaw this special series spent many hours identifying topics of interest, working with authors and contributors, and editing the articles, which we hope you will find edifying and educational. Please send your comments about the series to me at cbryan@garfieldhecht.com.

—Christopher Bryan

Series Overview

by Douglas R. Tueller

Over the past decade of growth in Colorado, communities throughout the state have been focusing increasingly on issues surrounding the need to address shortages of quality affordable, accessible, and safe housing. This is as true in the urban/suburban Front Range as it is in mountain resort communities like Telluride, Aspen, and Vail. It is as pertinent in rural/agricultural communities as it is in college towns. Thus, while each community has its own unique local needs, the various areas of the state also face many common challenges.

This *Colorado Lawyer* series highlights a number of pressing (and vexing) legal and political issues attending the challenges associated with Colorado's affordable housing needs. In approaching this task, we have sought to address issues such as:

- How are communities responding legally to common challenges and unique local needs and demands?
- How do various communities decide who qualifies for housing opportunities and financial assistance, and how do they craft enforcement mechanisms for both initial certification and ongoing compliance?
- Once such decisions are made, what staffing and other systems are put into place to implement these decisions?

We have tried to address these issues while recognizing the context of each community's specific local political climate. For example, Colorado Springs' philosophical approach differs decidedly from that of the Boulder community, and the approaches, needs, and perspectives in Alamosa vary significantly from those in Telluride. To clarify the discussion, we highlight examples of how issues are addressed in various regions of the state and what legal mechanisms and tools are being employed both within Colorado and in other states.

This series focuses on the roles played by a wide array of authorities and "players" in the affordable housing arena, including housing authorities (e.g., municipal, county, regional); housing trusts and other nonprofit entities; federal, state, and local governments; federal and state tax-incentivized ventures (e.g., purely private undertakings and public/private joint ventures); and statutorily mandated housing bodies, such as the U.S. Department of Housing and Urban Development.

That said, this series does not attempt to address every possible legal or other issue related to affordable housing challenges in Colorado or elsewhere. Neither is there any effort to identify "magic solutions" to the multitude of issues that arise in this complex area. Rather, this series points out some of the most current and pressing issues faced in recent years and illustrates how these are being addressed legally and structurally by the various players. The series provides an overview of the approaches employed and the pros and cons of each.

Ultimately, the series strives to supplement and further the evolving public discourse regarding this issue of paramount importance to the continued vitality, health, and "fairness" of our state. We hope our efforts move the discourse forward productively.

"Hang 'em High"

Affordable Housing Covenants in Colorado (Part I)

BY BEN DOYLE

Affordable housing covenants required as a condition of land use approval secure the public interest and define expectations among developers, funders, regulators, and the broader community. This article discusses affordable housing covenants with a focus on Meyerstein v. City of Aspen, *the first reported decision applying the amended rent control statute.*

Imagine you're getting ready to meet with a new client, an out-of-state developer who wants to build apartments in a historic Colorado mining town, now a beautiful but expensive mountain resort area. She anticipates that local land use approval will be conditioned on a commitment to build a certain number and type of affordable units. She is willing to set aside at least some of the units in her building for affordable housing, but she thought rent control was illegal in Colorado. She also might want financial assistance from the town. She needs your advice on negotiating with the town.

As you prepare, questions arise: What are the key terms in the affordable housing covenant the town will require her to record against the property? How long will the affordability restrictions last, and will they run with the land? What if she or her successor wants to terminate the restrictions early; can the covenant be modified or released in the future without incurring penalties? How will successors know whether an agreement entered into with the town as part of a land use approval process was entered into voluntarily? Who may enforce its terms?

More fundamentally, what is the legal nature of an affordability covenant granted to a government as part of land use approval—does it convey a property interest to the government, or does it create contractual rights only? Are these covenants instead one of many tools used by localities in administering land use authority, different in kind than private deed restrictions like homeowner association (HOA) covenants?

Answers to these questions depend on the type of affordable covenant at issue, the

town's and the owner's long-term vision for the property, the voluntary or involuntary nature of title transfers, and other factors. This two-part article aims to assist practitioners in negotiating voluntary affordability covenants, with a special focus on those imposed as a condition of land use approval. Part 1 describes how affordable covenants are most commonly created in Colorado, how each type of covenant is affected, if at all, by the rent control statute, and the exception in the rent control statute that allows for "voluntary" agreements. Part 2 will offer a transcript from a hypothetical pre-application meeting between a developer and a town, and each party's counsel, to discuss the terms of a voluntary affordability covenant.

Affordable Housing Covenants

Colorado needs more affordable housing. Statewide, 50% of all Colorado renters are cost-burdened, paying 30% or more of their monthly household income toward rent.[1] Nearly one in four households is extremely cost-burdened, paying 50% or more of its monthly income toward rent.[2] However, the specific affordable housing needs of each local community vary widely across the state. The benefit of using affordable housing covenants to address this need is that they can be tailored to reflect the specific objectives of the property owner, the project funders, and the local community.

Affordable housing covenants take a variety of forms. Three distinct categories of covenants—private, public partner, and regulatory—are discussed below. The two most well understood covenants are those between private parties and those granted to a government by a property owner in exchange for public funding or public land. Regulatory covenants voluntarily granted to a local government to secure land use approval are less well understood and more often the subject of disputes.

Regardless of the type of affordable housing covenant, certain terms are typically included in virtually all such instruments. Depending on the parties' desired level of detail, these include eligibility qualifications to lease or purchase a unit, such as maximum allowable income and assets; the methodology for determining maximum rents or sale prices; minimum size and quality standards; allowable uses; occupancy standards; and violation and enforcement procedures.[3]

> "Statewide, 50% of all Colorado renters are cost-burdened, paying 30% or more of their monthly household income toward rent. Nearly one in four households is extremely cost-burdened, paying 50% or more of its monthly income toward rent."

The Statutory Prohibition on Rent Control

Since its adoption in 1980, Colorado's rent control statute has always included a version of this prohibition: "The general assembly finds and declares that the imposition of rent control on private residential housing units is a matter of statewide concern; therefore, no county or municipality may enact any ordinance or resolution that would control rent on either private residential property or a private residential housing unit."[4] The statute was a response to an effort by the City of Boulder to adopt a rent control scheme. However, the rent control statute does not preclude the provision of affordable housing through certain restrictive covenants entered into voluntarily.

Private Covenants

The rent control statute does not govern restrictive covenants voluntarily granted by one private party to another. For example, a church may sell surplus land to a nonprofit organization on the condition that the nonprofit use the land only to house low-income individuals or households for some period of time. Or a Habitat for Humanity affiliate might sell property to one of its home ownership program participants with certain affordability restrictions added to the deed. Such agreements are voluntary agreements between private parties, which do not implicate the rent control statute.

Perhaps the most familiar private covenants are those governing HOAs. As relevant to affordable housing, in 2009 the legislature amended the Colorado Common Interest Ownership Act (the CCIOA) to prevent common interest communities in "ski lift counties" with populations less than 100,000 from prohibiting the right of a unit owner—public or private—to restrict or to specify by deed, covenant, or other document "[t]he permissible sale price, rental rate, or lease rate of the unit; or . . . [o]ccupancy or other requirements designed to promote affordable or workforce housing as such terms may be defined by the local housing authority."[5]

Public Partner Covenants

With rare exceptions, affordable housing is not financially possible to build or operate in Colorado without public support, particularly in high-cost jurisdictions. As a result, local or state governmental entities may decide to support a project by providing public land or financial assistance, such as grants, below-market loans, income tax credits, or property tax exemptions[6] in exchange for the recipient's execution of a

restrictive covenant running in favor of the government. In this context, the government is not mandating restrictions on private property; rather, the owner is voluntarily agreeing to the restriction in exchange for a readily identifiable benefit. The rent control statute does not govern such "public partner" covenants.

Direct public subsidies of affordable housing are justified by the pressing need to maintain a diverse housing stock that offers a range of housing choices and provides affordable housing for all the state's residents, especially those with low to moderate incomes.[7] As the legislature declared when authorizing Affordable Housing Dwelling Unit Advisory Boards, "the inability of [low- and moderate-income persons] to reside near where they work negatively affects the balance between jobs and housing in many regions of the state and has serious detrimental transportation and environmental consequences."[8]

In many public partner covenants tied to funding, the locality acts as a pass-through of funds from the U.S. Department of Housing and Urban Development (HUD) or the state. For example, the City of Boulder (the City) acts as the lead agency for the Boulder-Broomfield Regional Consortium. When the City awards federal HOME funds to an affordable developer on behalf of the Consortium, HUD requires a recorded covenant to ensure compliance with federal regulations governing the HOME program.[9] Requiring recordation of a restrictive covenant is typical when HUD funds are used to build or operate affordable housing.[10] The same is true for projects that benefit from an allocation of federal or state low-income housing tax credits from the Colorado Housing and Finance Authority (the CHFA).[11]

Increasingly, Colorado communities have opted to create purely local sources of funding for affordable housing, which usually means more flexibility, less administrative burden during the compliance period, and more local control over how and where the funds are spent. One example is Boulder County's "Worthy Cause" sales and use tax. Each year, based on a competitive application process, the board of county commissioners allocates Worthy Cause tax revenues to nonprofits and housing authorities to fund the acquisition, rehabilitation, or new construction of eligible capital facilities. Another example is Boulder's use of general fund dollars, property taxes and development excise taxes, and cash-in-lieu payments obtained through the City's inclusionary housing program to create and preserve affordable housing in the City. In both cases, the localities require recorded covenants to secure performance.[12]

In addition to funding from the traditional federal, state, and local government sources, the Colorado legislature has authorized special districts to partner with the private sector to facilitate affordable housing development and operation. For example, state law allows a city or town to form an urban renewal authority (URA). URAs can condemn property to facilitate land assembly and title clearing, as well as offer the redeveloper favorable tax increment financing to make redevelopment economically feasible. URAs are typically only willing to directly subsidize redevelopment if the project promises sufficient public benefit, whether that means additional affordable housing or other community amenities. These promises are typically secured by covenants that run with the land, such that when the private redeveloper itself sells, leases, or otherwise

transfers interests in real property acquired as part of an urban renewal project, successors are bound to the agreement.[13]

Similarly, metropolitan districts may waive all or part of a tap or connection fee or extend the time period for paying such fees "to facilitate the construction, ownership, and operation of affordable housing on such property, as such affordable housing is defined by resolution adopted by the board" in exchange for "the recordation against the property of a deed restriction, lien, or other lawful instrument requiring the payment of such fees in the event that the property's use as affordable housing is discontinued or no longer meets the definition of affordable housing as established by the board."[14]

While governmental agencies often have a standard form of covenant that has been used successfully in many transactions, there is no Colorado statute that clarifies the nature of an affordability covenant, what kind of terms can or must be included, or how the covenant should be interpreted by the courts, in contrast to statutes governing HOA covenants,[15] conservation easements,[16] and environmental covenants required for clean-up of certain contaminated sites.[17]

Regulatory Covenants

The third major category of affordability covenants encompasses use restrictions affecting title to real property imposed on a developer as a condition of land use approval, where the locality has an expressly stated right to enforce the grantor's promises against the current property owner (referred to in this article as regulatory covenants). There is no standard label for these covenants: the instrument may be titled a development agreement, zoning agreement, restrictive covenant, deed restriction, regulatory agreement, or something else.

In contrast to the private party and public partner covenants discussed above, regulatory covenants are directly affected by the Colorado rent control statute, which provides "no county or municipality may enact any ordinance or resolution that would control rent on either private residential property or a private residential housing unit."[18] Years ago, these regulatory restrictions appeared in the form of a short condition written on the face of the land use approval document, such as a city council resolution, an administrative approval by the planning director, or the building permit itself. That is, the use restriction was expressed in writing and made part of the public record, but not necessarily on a document recorded in the county real estate records. Anyone who wanted to know whether a property was burdened by such a restriction was obliged to affirmatively seek out the records by contacting the city or county.

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Today, many localities require that the land use applicant execute and record a separate instrument granting covenants intended to run with the land, with the local government as the named beneficiary.[19]

The distinctions between these two methods of carrying out a land use regulatory regime are important. For example, a condition shown only on the face of a land use approval that expires for lack of activity under an issued permit no longer has any legal effect. By contrast, a properly drafted restrictive covenant recorded against title will run with the land and bind successors if the original parties intended it to, such that a successor must either comply with the terms of the covenant or negotiate with the locality to modify or release the covenant.

Other Factors Affecting Regulatory Covenants

Colorado's Regulatory Impairment of Property Rights Act (RIPRA) also affects the feasibility of local governments using regulatory covenants to secure affordable housing.

Ad hoc Regulatory Covenants and RIPRA

Suppose a property owner approaches a town with a proposal to add an accessory dwelling unit (ADU) on a large lot currently used for a single-family home. Faced with a sustained campaign by locals over the past few years for more senior housing, the town decides on the spur of the moment to condition approval on a requirement that the owner deed restrict the property such that the ADU can only be rented to low-income seniors. Such a requirement is almost certainly prohibited by the rent control statute.

But assume a slightly modified fact pattern where the same property owner wishes to redevelop her lot from a single-family detached home into a duplex, and the town conditions approval on a requirement that one of the new units be deed restricted as for-sale affordable housing. This condition would not be prohibited by the rent control statute, which doesn't govern restrictions on sale. It could, however, face other hurdles, such as a challenge based on RIPRA, which dictates that "[n]o local government shall impose any discretionary condition upon a land-use approval unless the condition is based upon duly adopted standards that are sufficiently specific to ensure that the condition is imposed

in a rational and consistent manner."[20] Without language in the town code authorizing such a condition, adopted after sufficient public input, due process, and compliance with the law governing adoption of local regulations, it may be difficult for the town to prove that requiring this covenant meets this test.

RIPRA also provides:

> In imposing conditions upon the granting of land-use approvals, no local government shall require an owner of private property to dedicate real property to the public, or pay money or provide services to a public entity in an amount that is determined on an individual and discretionary basis, unless there is an essential nexus between the dedication or payment and a legitimate local government interest, and the dedication or payment is roughly proportional both in nature and extent to the impact of the proposed use or development of such property.[21]

If a court treats the covenant as a real property interest, here again it may be difficult for the town to prove that this condition complies with RIPRA.

Regulatory Covenants Negotiated in a PUD Agreement

Assume a town has adopted regulations allowing planned unit developments (PUD), and the regulations encourage the creation of more workforce housing by allowing developers who choose to build affordable housing more density than is typically permitted in the zone. Town regulations contemplate execution of a development agreement tailored to the specifics of the project.[22] A developer approaches the town with a request for increased density in exchange for providing a significant number of affordable rental units on site, as the code allows. The town likes the project and adopts a resolution approving a PUD development agreement that includes detailed rental housing restrictions, which per standard town practice will be recorded and run with the land. Is this a defensible approach?

In this instance, RIPRA is less likely to pose a problem, as it does not apply to legislatively adopted regulations.[23] While at first blush this appears to be a municipal resolution mandating rent control, the rent control statute was amended in 2010 to clarify that it does not prohibit "voluntary agreements" to limit rent on a property.[24]

If a developer is willing to enter into such a voluntary agreement, the statute states that the agreement may specify how long private residential property is subject to its terms, whether a subsequent owner is subject to the agreement, and remedies for early termination.[25]

In contrast, where a developer declines to enter into an affordable housing agreement, the locality cannot deny an application on that basis alone.[26] Localities do, however, retain their ability to deny or condition discretionary development permits where other unrelated code criteria are not met.

When is a Regulatory Covenant Voluntary?

The rent control statute does not prescribe a method for determining voluntariness. The statute makes clear that it "is not intended to impair the right of any state agency, county, or municipality to manage and control any property in which it has an interest through a housing authority or similar agency."[27] Housing authorities, which are entities with a statutory charter to create housing options for low-income residents, are a good example of developers willing to voluntarily deed restrict property. But how does a private developer, who doesn't have a statutory mission to own and operate affordable housing, know whether its agreement with a local jurisdiction to deed restrict property for affordable rental housing is truly "voluntary"?

Meyerstein v. City of Aspen

A recent dispute illustrates the intricacies of determining whether affordable housing covenants were voluntarily entered into. Arnold Meyerstein, successor owner of an apartment building, sued the City of Aspen, the Aspen/Pitkin County Housing Authority, and Music Associates of Aspen, claiming that an affordable housing deed restriction recorded against his property constituted illegal rent control under CRS § 38-12-301.[28] The district court issued summary judgment for the City of Aspen, and the Colorado Court of Appeals reversed in part, holding that the need for further factual development precluded summary judgment. Specifically, the Court declared that it was unclear whether CRS § 38-12-301(2), which provides an exception from the rent control ban for voluntary agreements between counties or municipalities and permit applicants or property owners, applied without evidence that Meyerstein's predecessor "voluntarily" entered into an agreement with the city.[29]

In addition to his claims of rent control statutory violations, Meyerstein asserted that he was denied due process because "(1) the board as a whole was biased, given that its mission is to promote low income housing, and (2) an individual board member was biased, as evidenced by certain public statements that he had made."[30] On its way to rejecting Meyerstein's claims, the Court of Appeals quoted the board member: "I am a firm believer in people living up to their contractual obligations and if they don't, since we live in the West, hang 'em high . . .Whoever developed this property received benefits and they should uphold the deed restrictions on it."[31]

The lack of clarity in the *Meyerstein* administrative record on voluntariness was the primary reason the Court of Appeals remanded, although it did not specify how the district court was to make this determination. On remand, the Pitkin County District Court construed the term "voluntary agreement" to mean a voluntary contract and reasoned that "a contract is not voluntary if it is the result of duress."[32] Because the administrative record contained no evidence that Meyerstein's predecessor assented to the city's deed restrictions because he was threatened and had no reasonable alternative, the court concluded that the agreement was in fact voluntary. When Meyerstein again appealed, the Court affirmed the district court in an unpublished decision *Meyerstein v. City of Aspen* (*Meyerstein II*).[33]

Beyond *Meyerstein II*, Colorado case law on voluntariness is sparse.[34] Some states statutorily authorize voluntary agreements with localities as part of the land use review process.[35] Cases interpreting those statutes, and other relevant case law, reveal facts and circumstances where

courts are more likely to find that an agreement with a locality was entered into voluntarily.

Obviously, it helps if such agreements are expressly authorized by state law and reflected in local code.[36] In the absence of express authorization, agreements are more likely to be seen as voluntary where the developer sought approval for a project the locality had the discretion to deny.[37]

Courts also examine the administrative record for evidence of the developer's willingness to consent to the agreement requested by the government. Telling the developer to "take it or leave it" will not further the government's cause.[38]

Courts tend to uphold covenants as voluntary where the evidence indicates that they have a reasonable relationship to public health, safety, and welfare and are intended to mitigate the development's impact.[39] Conversely, courts are more likely to invalidate agreements that appear intended to improperly influence the local body to act on behalf of the developer rather than in the best interest of the community.[40]

Courts are also more likely to find that an agreement was voluntary where there is evidence of the negotiated exchange of benefits and obligations incurred by all parties.[41] As the U.S. Court of Appeals for the Ninth Circuit put it, "a contractual promise which operates to restrict a property owner's use of land cannot result in a 'taking' because the promise is entered into voluntarily, in good faith and is supported by consideration."[42] Courts do recognize that "in some cases, the process by which proffers become incorporated into the zoning system may involve a degree of negotiation," but this practical reality "does not convert an exercise of the police power into an exercise in contract."[43] Courts will look behind the labels, whether titles of documents or statements made on the record.[44]

The *Meyerstein* dispute reinforces that those drafting affordability covenants must consider how the instrument will operate many years after its execution, when the parties to the agreement, the economic and political environment, and the community's vision for the highest and best use of its finite land supply have all changed.

> "However, both the 2010 legislative clarification of the rent control statute and the *Meyerstein* decisions indicate that regulatory affordability covenants that are supported by sufficient record evidence of voluntariness are enforceable."

Covenants Required by Inclusionary Housing

Before the 2010 rent control statute amendments and the *Meyerstein* opinions, the key decision interpreting the effect of the rent control statute on deed restrictions imposed at the local level was *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*[45] In that case, Telluride, a home rule municipality, was faced with a shortage of available housing for its working citizens. It passed a comprehensive ordinance requiring developers of projects such as malls and hotels to generate affordable housing for 40% of the new employees created by development. Given multiple legislative declarations over the past few decades, it's widely accepted that creation and preservation of affordable housing furthers a public purpose.[46] But no statute expressly authorizes local adoption of "inclusionary" housing or zoning ordinances such as the one at issue in *Telluride*. Rather, local governments rely on their authority to impose reasonable conditions on zoning and building permits in the exercise of the police power[47] and, in municipalities like Telluride, home rule powers.

In *Telluride*, the respondent-developer challenged the ordinance as violating CRS § 38-12-301. The Court of Appeals reversed the grant of summary judgment in favor of the town and invalidated the ordinance, and the Colorado Supreme Court affirmed. The Court found that rent control implicates mixed state and local concerns, the ordinance conflicted with the statute, and the state statute superseded the authority of a home rule municipality. The Court held that though the town's ordinance included several options for satisfying an affordable housing requirement, its options for constructing new housing or imposing deed restrictions on existing housing constituted rent control.[48]

The practical result of the *Telluride* decision has been twofold. First, while a number of jurisdictions retain some form of inclusionary housing, these regulations are drafted or implemented to avoid the mandatory imposition of rent control on rental housing units on the permit applicant's site. Instead, the regulations typically give the applicant a variety of ways to satisfy the requirement for contributing to the generation of more affordable units, for example, through creation of off-site units, cash-in-lieu payments, or off-site land dedication. To the extent affordable rental units are generated by the inclusionary ordinance, localities may require that the applicant affirm that a housing authority is a part owner of the project, thereby avoiding the need to prove the agreement was sufficiently "voluntary" under the rent control statute.[49]

Second, some property owners mistook the decision overturning Telluride's inclusionary

program as a declaration of open season on regulatory affordability covenants, with *Meyerstein* as one prominent example. However, both the 2010 legislative clarification of the rent control statute and the *Meyerstein* decisions indicate that regulatory affordability covenants that are supported by sufficient record evidence of voluntariness are enforceable. Based on the *Telluride* Court's interpretation of the rent control statue, it's clear that a local government cannot, strictly speaking, require that a developer create affordable rental housing on its property as a condition of land use approval. The CRS § 38-12-301 language underpinning this holding remained unchanged in the 2010 amendments. What is less clear from the statute, as amended in 2010, is what makes an agreement between a private developer and a locality "voluntary," as seen in the *Meyerstein* dispute. Unless a housing authority has an ownership interest in the property in question, without a clear record it can be difficult for a Colorado locality to prove that a requirement for on-site affordable rental housing was truly "voluntary" as opposed to impermissible rent control. The best guidance available for the time being is *Meyerstein II*, affirming the district court's decision that, for purposes of complying with the rent control statute, inclusionary housing deed restrictions are entered into voluntarily absent evidence of duress.

Conclusion

Colorado's rent control statute affects affordable housing covenants imposed by virtue of a local government's land use authority or police power. We don't actually "hang people high" for covenant violations in Colorado, as the Aspen housing authority board member memorably demanded in the *Meyerstein* hearing. But state law requires developers who benefit from discretionary approval of developments to respect the conditions on that public support. While covenants are flexible tools that can be calibrated to deal with individual circumstances unique to a property, a development proposal, and a specific community, they must be drafted with care and a long-term view, as they typically restrict what can be done with property for decades. CL

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NOTES

1. CHFA, The Housing Affordability Gap at 4 (Oct. 2018), www.chfainfo.com/news/ResourceLibrary/wp/WP_HousingAffordabilityGap.pdf.

2. *Id.*

3. *See Centennial-Aspen II Ltd. P'ship v. City of Aspen*, 852 F.Supp. 1486, 1490 (D.Colo. 1994).

4. CRS § 38-12-301(1).

5. CRS § 38-33.3-106.5(1)(h)(I).

6. For more examples, *see* Colorado Department of Local Affairs (DOLA), Affordable Housing Guide for Local Officials, https://drive.google.com/file/d/0B-vz6H4k4SESOFN0LUNhVFd1c2s/view.

7. *See* CRS § 29-26-101 (affordable housing dwelling unit advisory boards); CRS § 29-4-202(1)(a) (city housing authorities needed to remedy unsanitary or unsafe dwelling accommodations in various cities due to "overcrowding and concentration of population, the obsolete and poor condition of buildings, improper planning, excessive land coverage, lack of proper light, air, and space, unsanitary design and arrangement, lack of proper sanitary facilities, and the existence of conditions which endanger life or property by fire and other causes"); CRS § 29-4-501(1)(a) (county housing authorities needed to address "housing shortage for agricultural workers, their families, and other families of low income in the state . . . with the result that many agricultural and other low income workers and their families are unable to find decent, safe, and sanitary housing"); CRS § 29-4-702 (citing shortage of decent, safe, sanitary, and energy efficient housing that is within the financial capabilities of low- and moderate-income families, and the need for tools to alleviate the high cost of construction loans and home mortgage interest costs).

8. CRS § 29-26-101(1)(b).

9. 24 CFR § 92.504(c)(1)(x). The means of enforcement of the HOME program may include liens on real property, deed restrictions, or covenants running with land.

10. *See, e.g.*, HUD regulations at 24 CFR §§ 1.5(a)(2), 8.50(c)(3), 100.306(a)(4), 578.81(a), 891.863, and 906.39(n).

11. 26 USC § 42(h)(6)(A) to (B) (buildings are eligible for the federal low-income housing tax credit only if the minimum long-term commitment to low-income housing is in effect through an agreement between the taxpayer and the housing credit agency that is binding on all successors of the taxpayer, and the agreement is recorded pursuant to state law as a restrictive covenant); CRS § 39-22-2102(4) (no state low-income housing tax credit may be allocated unless the property is the subject of a recorded restrictive covenant requiring the development to be maintained and operated as a qualified development).

12. Both jurisdictions have included covenants within a recorded performance deed of trust.

13. CRS § 31-25-106(1) (URAs "may sell, lease, or otherwise transfer real property or any interest therein acquired by it as a part of an urban renewal project for residential, recreational, commercial, industrial, or other uses or for public use in accordance with the urban renewal plan, subject to such covenants, conditions, and restrictions, including covenants running with the land . . . as it deems to be in the public interest or necessary to carry out [its] purposes").

14. CRS § 32-1-1001(1)(j)(II).

15. CRS §§ 38-33.3-101 to -222 (common interest communities).

16. CRS §§ 38-30.5-101 to -111 (conservation easements).

17. CRS §§ 25-15-317 to -327 (environmental covenants and restrictive notices).

18. CRS § 38-12-301(1). Unlike private party and public partner affordability covenants, where disputes that lead to reported cases are rare, two significant cases have arisen from regulatory covenants, *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000); and *Meyerstein v. City of Aspen*, 282 P.3d 456 (Colo.App. 2011), *cert. denied*, 2012 Colo. LEXIS 335 (Colo. May 14, 2010).

19. Unlike other states, Colorado appellate courts have not had occasion to analyze when it is appropriate for a locality to extract a land use condition and a separate accompanying restrictive covenant. *See, e.g.*, *City of New York v. Delafield 246 Corp.*, 236 A.D.2d 11 (N.Y.App. Div. 1997) ("process of 'conditional zoning' may be accomplished by a municipality's conditioning the zoning amendment on execution of a declaration restricting the use of the property by private parties interested in rezoning the property . . . once the conditions are incorporated into the amending ordinance, the conditions effectively become part of the zoning law").

20. CRS § 29-20-203(2). *See Quaker Court LLC v. Bd. of Cty. Comm'rs*, 109 P.3d 1027, 1032 (Colo.App. 2004) (citing *Bd. of Cty. Comm'rs v. Conder*, 927 P.2d 1339, 1348 (Colo. 1996), and *Beaver Meadows v. Bd. of Cty. Comm'rs*, 709 P.2d 928 (Colo. 1985)).

21. CRS § 29-20-203(1).

22. CRS § 24-67-106 (enforcement of PUD Plan); CRS § 24-68-104 (authorizing development agreements).

23. CRS § 29-20-203(1).

24. CRS § 38-12-301(2).

25. CRS § 38-12-301(3).

26. CRS § 38-12-301(4).

27. CRS § 38-12-301(5).

28. *Meyerstein*, 282 P.3d 456.

29. *Id.* at 466.

30. *Id.* at 467.

31. *Id.* At 468.

32. *Meyerstein v. City of Aspen*, Colo. Court of Appeals No. 13CA0330, 5–6 (Jan. 30, 2014) (unpublished).

33. *Id.*

34. *See, e.g.*, *Skyland Metro. Dist. v. Mt. West Enter., LLC*, 184 P.3d 106 (Colo.App. 2007). In this case, two special districts in Gunnison County sought to foreclose statutory liens as a result of the developer's failure to pay certain fees. The developers asserted counterclaims based on alleged overpayments of the fees. The Court of Appeals affirmed the lower court's finding that the developer's payments were voluntary, given the absence of a showing that they were made under written protest or duress, or that there was a mistake as to all relevant facts.

35. *See, e.g.*, Va. Code Ann. § 15.2-2303 (conditional zoning in certain localities; proffers of conditions offered in writing).

36. *See, e.g.*, *Bd. of Cty. Supervisors v. United States*, 48 F.3d 520, 524 (Fed.Cir. 1995) ("the Virginia legislature expressly authorized counties such as Prince William to engage in the process of conditional zoning; that is what the County did here in the exercise of its delegated police power to control land use through zoning. There is no need, or justification, to overlay this exercise with a contract veneer. The County was not engaged in the business of contracting when it dealt with this developer, and the United States did not take from it any rights based on contract."); *Dawson v. Loudoun Cty. Bd. of Supervisors*, 59 Va. Cir. 517, 524–525 (Va.Cir.Ct. 2001) (exactions claim failed given proof of voluntary proffer). *See also Nunziato v. Planning Bd.*, 541 A.2d 1105, 1110 (App.Div. 1988) ("if the agreement to pay $203,000 to the borough for its affordable housing fund was entered into by the applicant to induce the Planning Board to grant approval and was a consideration in the mind of the Board members when they voted approval [and where that condition was not set forth with particularity in a zoning ordinance], such action could not be other than arbitrary and capricious.").

37. "[T]he word 'voluntary' means precisely that the developer has the choice of either (1) paying for those reasonably necessary costs which are directly attributable to the developer's project or (2) losing preliminary plat approval. The fact that the developer's choices may not be between perfect options does not render the agreement 'involuntary' under the statute." *Cobb v. Snohomish Cty.*, 829 P.2d 169, 173 (Wash.Ct.App. 1991) (noting that in this instance, developer had no absolute right to receive plat approval: "The county is authorized to withhold approval if appropriate provisions have not been made for the public health, safety, and general welfare.").

38. *Henderson Homes, Inc. v. City of Bothell*, 877 P.2d 176, 179 (Wash. 1994) (superseded by statute on other grounds) (finding agreements not voluntary, given lack of record evidence to that effect during proceeding from staff, applicant, or Council, as well as evidence that "When the applicant asked what would be the consequences if they did not sign the agreement, he was told 'it would probably be the eventual disapproval of my project.'"); *Humbert Birch Creek Constr. v. Walla Walla Cty.*,

185 P.3d 660, 663–64 (Wash.Ct.App. 2008) (noting unequal balance of power where the permit granting authority is the same entity negotiating a "voluntary" agreement; hence the legislature's limitations on the locality's power to enter into such agreements).

39. *Rando v. Town of N. Attleborough*, 692 N.E.2d 544 (Mass.App.Ct. 1998) (rezoning that had a reasonable relationship to public welfare and safety was valid exercise of town's zoning power; the voluntary offer of a mitigation payment and a deed restriction was not an extraneous influence that caused the town to act improperly because the payment and covenant were intended to mitigate the development's impact).

40. *West Park Ave., Inc. v. Ocean Tp.*, 224 A.2d 1, 4 (N.J. 1966) ("We have no doubt the municipality was conscious of the illegality of what it did and for that reason refrained from adopting an ordinance, seeking instead to achieve its ends through the guise of 'voluntary' contributions with spurious 'agreements' to make them stick.").

41. *Leroy Land Dev. v. Tahoe Reg'l Planning Agency*, 939 F.2d 696, 698 (9th Cir. 1991); *McClung v. City of Sumner*, 548 F.3d 1219, 1230 (9th Cir. 2008).

42. *Leroy Land Dev.*, 939 F.2d at 698.

43. *Board of Cty. Supervisors*, 48 F.3d at 524.

44. *Nunziato*, 541 A.2d at 1110 (overturning land use approval in light of "illegal extortion" from applicant of money for the affordable housing fund, notwithstanding applicant's insistence that the funds were a gift); *Pollard v. Comm'r*, T.C. Memo 2013-38, P18 (T.C. 2013) (despite documents containing "gift" and "voluntary offer" language, taxpayer's grant of conservation easement to county did not qualify as a charitable contribution, since it was a quid pro quo exchange for county's approving land use application, a personal benefit to the taxpayer).

45. *Town of Telluride*, 3 P.3d 30.

46. *See supra* note 8.

47. *See, e.g.*, *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668 (Colo. 1981); *King's Mill Homeowners Ass'n v. City of Westminster*, 557 P.2d 1186 (Colo. 1976).

48. *Telluride*, 3 P.3d at 32–33.

49. *See* CRS § 38-12-301(5). Other communities have elected to use alternative regulatory approaches to increase their affordable housing stock, such as those listed in DOLA's Affordable Housing Guide for Local Officials, *supra* note 6. Some believe that repeal of the rent control statute would be an effective method of increasing affordable housing in the state, but recent attempts to repeal the rent control statute have failed. *See, e.g.*, Perry, "What Would Rent Control Mean for Colorado?" *5280* (Apr. 16, 2019), www.5280.com/2019/04/what-would-rent-control-mean-for-colorado (referencing Colorado SB 19-225).