

Accessory Dwelling Unit Ordinance

Background

Many years ago the City amended its zoning ordinance to permit rental of guesthouses. Section 14-6.3(C)(1) SFCC 1987 expressly permits the owner of the property to occupy either the principal dwelling unit or the accessory dwelling unit and to rent the other structure. For many years, because the use was the same, that is, occupancy for residential purposes, many attorneys and realtors interpreted this to mean that the main house and guest house could also be sold under the condominium form of ownership. With a condominium, an owner occupies both the house and guesthouse because the owners own their respective condominium unit.

In recent years the City has attempted to enforce an interpretation that prohibits the conversion of the property to the condominium form of ownership. However a sale of the property under the condominium form of ownership did not change the use, that is, the property is still used for residential purposes by owners instead of owners and tenants. No changed impact, same use. The City's interpretation was contrary to Section 47-7A-6 of the New Mexico Condominium Act which states:

47-7A-6. Applicability of local ordinances, regulations and building codes.

No provision of the Condominium Act [47-7A-1 NMSA 1978] invalidates or modifies any provision of any zoning, subdivision, building code or other real estate use law, ordinance or regulation; provided, however, a zoning, subdivision, building code or other real estate use law, *ordinance or regulation may not prohibit the condominium form of ownership or impose any requirement upon a condominium which it would not impose upon the same development under a different form of ownership.* (Emphasis Added)

Proposed Ordinance

The proposed ordinance intends to prohibit the conversion of the property to a condominium and the sale of an accessory dwelling unit separate from the principal dwelling unit unless the then-current lot area is large enough to accommodate two principal dwelling units. The proposed restriction was never clearly stated until this proposed ordinance.

Prior Conversions Should Be Protected

Because so many owners relied upon the ordinance that permitted rental of units, which implicitly permitted the sale of a unit because the residential use did not change, many owners and their lenders will be adversely affected by the ordinance. The ordinance could make these properties absolutely unmarketable.

The proposed ordinance should include a safe harbor provision for prior condominium conversions. Recognizing these condominiums as nonconforming uses is not enough because the structures cannot be rebuilt if destroyed by fire or other casualty. The provision should recognize that all prior conversions are lawful and that the ordinance is prospective only.

Finally, the proposed ordinance should impose the restrictive covenant, only if the density requirements are not met. If the restrictions are met, the structure is no longer an "accessory use". The requirement of accepting the covenant and then permitting the covenant to be "voided" places an unnecessary burden on a property owner.