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FISCAL IMPACT REPORT

SPONSOR Lord LAST UPDATED _____
ORIGINAL DATE 2/13/23
BILL
SHORT TITLE Construction of Certain Dwelling Units NUMBER House Bill 241
ANALYST Daley

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
	No fiscal impact	No fiscal impact	No fiscal impact			

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent version of this legislation.

Sources of Information

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)

New Mexico Board of Architects (BOA)

New Mexico Mortgage Finance Authority (MFA)

Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of House Bill 241

House Bill 241 prohibits municipal, county, or state building departments from issuing building permits for multifamily housing construction containing 12 or more units unless by covenant at least 55 percent of the units are to be owner-occupied.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

No fiscal impact to the state is anticipated.

SIGNIFICANT ISSUES

MFA, the governmental instrumentality created by the state Legislature to provide residential housing products, education, and services to New Mexico families and communities of low to moderate income, advises:

Local zoning, land use regulations, and building codes present a variety of challenges to

getting rental units built¹. By 2035, the state is projected to reach nearly 900 thousand households, 65 thousand more than in 2020. Based on this projection, between now and 2025, an average of 5,100 housing units per year are needed to accommodate growth; and between 2025 and 2030, an average of 5,140 housing units per year are needed to accommodate growth. This compares to a 10-year average of annual permits issued of 4,107 housing units in growth counties and 4,771 housing units statewide. Rental unit production is a crucial component for reaching these housing targets.

MFA believes that the 55 percent owner-occupied requirement will stop development of affordable rental units which are greatly needed.

Similarly, LFC staff in its January 2023 Evaluation Unit Report (LFC Staff Report) on housing and homelessness supports recommends the Legislature consider land use and zoning laws to promote increasing affordable units. It reported that between 2000 and 2019, the supply of affordable units in New Mexico declined by 50 percent. Housing units are in short supply across the state, with a 4.6 percent rental vacancy rate and 0.8 percent of owner housing that is vacant for sale. The 2022 New Mexico Strategy report, commissioned by MFA, indicates that the costs of housing of all types continue to rise for renters and homeowners, largely due to inflation and production challenges. However, incomes have not risen accordingly, which increases cost burden and housing insecurity. According to MFA and National Low Income Housing Coalition (NLIHC) estimates, there is a shortage of 32 thousand to 40 thousand affordable rental units available for extremely low-income renters. See full LFC Staff Report at [https://www.nmlegis.gov/Entity/LFC/Program Evaluation Unit Reports](https://www.nmlegis.gov/Entity/LFC/Program%20Evaluation%20Unit%20Reports)

The intent of HB241 may be contrary to the demonstrated need for affordable housing rental units.

As to specific language used in the bill, RLD's Construction Industries Division notes that it is the planning and zoning departments that determine land use and restrictions. See Section 3-21-1, NMSA 1978. It reports:

Construction building permits are not based on restriction of use or occupancy, but rather, construction building permits approve building plans for erecting, constructing, enlarging, altering, repairing, moving, improving, removing, converting or demolishing of buildings and the installation, repair or maintenance of electrical wiring, plumbing, mechanical work or liquefied petroleum gas. [See NMAC 14.5.2.8]

HB241 may also raise constitutional issues, NMAG advises:

Both the New Mexico Constitution and the U.S. Constitution prohibit the state from governmental taking of property without due process of law. See N.M. Const. art. II, § 18; U.S. Const. amend. XIV, Sec. 1. It is a long held construction of the constitutional prohibition against taking without due process that regulation may result in an unconstitutional taking. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322 (1922).

Further:

¹ New Mexico Statewide Housing Strategy.

In New Mexico, restrictive covenants are equitable easements in the lots burdened by the covenant. *See Leigh v. Vill. of Los Lunas*, 2005-NMCA-025, ¶ 13, 137 N.M. 119, 124, 108 P.3d 525, 530. And an easement constitutes a valuable property right and their taking requires just compensation. *See id.* at ¶ 8. As such, HB241 conditions the transfer of a valuable property right, a restrictive covenant, from property owners to the state, which may be viewed as suspect and may necessitate more justification provided in order to defend the legislation as part of any judicial review.

TECHNICAL ISSUES

NMAG suggests that if the intent is for HB241 to apply prospectively, the bill should set a date after which property acquired would be subject to its limitations.

OTHER SUBSTANTIVE ISSUES

LFC's staff report indicates there are 948 thousand houses, apartments, and other housing units in New Mexico. Almost 90 percent are occupied year-round by most of the state's 2.1 million residents. Thirty percent of homes are rentals, housing about 527 thousand people. About 253 thousand homes and apartments spend over 30 percent of their income on their rent. Additionally, the 2022 New Mexico Housing Profile prepared by the NLIHC reports a 39,999 unit shortage of rental homes affordable and available for extremely low income renters.

MD/al/ne/mg