

## **Opinion No. 78-18**

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**OPINION OF:** Toney Anaya, Attorney General

**BY:** Anthony P. Marquez, Assistant Attorney General

**TO:** Mr. Robert H. Berntsen Deputy Director Construction Industries Commission P.O. Drawer 5155 Santa Fe, New Mexico 87503

CONDOMINIUMS; CONSTRUCTION INDUSTRIES DIVISION; UNIFORM BUILDING CODE; EXISTING APARTMENT BUILDINGS

The conversion of individual units in an existing apartment building to condominiums does not require the Construction Industries Division to apply new building codes to the same building, if the apartment building met all applicable building codes when constructed.

### **QUESTIONS**

Does the transformation of an existing apartment building to a condominium result in a change in the character of occupancy or use of the building which would then make new building codes applicable to the same building?

### **CONCLUSIONS**

See Analysis.

### **ANALYSIS**

It is now common practice for owners of existing apartment buildings to sell individual apartments as condominiums rather than continuing to lease the units.

### **OPINION**

Generally, a condominium is an estate in real property consisting of an undivided interest in common in a portion of a parcel of real property together with a separate interest in space in a residential, industrial or commercial building on such real property, as an apartment, office or store. 71 A.L.R.3d 866, 856 n.2; Sec. 783, Cal. Cic. C.; 15A Am.Jur. 2d § 1, p. 827; **Gerber v. Town of Clarkstown**, 78 MISC.2d 221, 356 N.Y.S.2d 926 (1974).

In regard to zoning and building regulations the courts have held that such regulations must be construed to treat condominiums in like manner as similar structures, lots or parcels. **White v. Cox**, 17 Cal. App. 3d 824, 45 A.L.R.3d 1161, 1166 (1971), 15A Am.

Jur. 2d § 23, **Zoning and Building Regulations**. Thus, in determining whether zoning or building regulations are applicable generally to condominiums, the courts have held that such regulations are concerned with the type or manner of use, rather than the form of ownership. **Zoning or Building Regulations as Applied to Condominiums**, 71 A.L.R.3d 866, 868, § 2. Consequently, the mere fact that the premises are held as condominiums will not subject them to regulation if the use contemplated is otherwise permissible. **Bridge Park Co. v. Highland Park**, 113 N.J. Super. 219, 273 A.2d 397, 398-399 (1971).

In **Bridge Park Co.**, *supra*, the court reviewed a traditional apartment house converted by the owner to condominiums and concluded that:

". . . [T]he word "use," as contained in the statutes above, does not refer to ownership but to **physical use** of lands and buildings. A building is not "used" as a condominium for purposes of zoning."

Similarly, in **Maplewood Village Tenant's Ass'n. v. Maplewood Village**, 116 N.J. Super. 372, 282 A.2d 428, 431 (1971), the court found that proposed conversion of existing apartments into condominiums would not be a proper concern and focus of zoning and planning regulations. The court also noted that a municipality may impose subdivision controls on a condominium under the Municipal Planning Act only if it imposes the same controls on conventional landlord-owned apartment buildings. Citing **Bridge Park Co.**, *supra*, with approval the court also found that a building is not "used" as a condominium for purposes of zoning. See also **Gerber v. Town of Clarksburg**, *supra*, at 928.

Other courts have found condominium dwellings are not unlike apartment dwellings so far as the actual use of the land is concerned. **Wentworth Hotel Inc. v. Town of New Castle**, 112 N.H. 21, 287 A.2d 615, 618 (1972). In **Wentworth** the court noted that:

". . . [T]he proposed condominiums differ from apartments only in the type of ownership and the ordinance is not concerned with the type of ownership but with the number of families per building, the size of lots, and the character of the use."

The courts have also found that the zoning and building regulations applicable to apartments are also applicable to the proposed condominium development. See, **Erection of Condominium as Violation of Restrictive Covenant Forbidding Erection of Apartment Houses**, 65 A.L.R.3d 1212; **Callahan v. Weiland**, 291 Ala. 183, 279 So.2d 451, 456 (1973). Finally, courts have viewed the erection of a high-rise residential condominium as a violation of restrictive covenants running with the land forbidding the erection of apartment houses. See, **Callahan v. Weiland**, *supra*, at 456.

A review of these cases clearly shows that most courts treat the conversion of an existing apartment building to a condominium development as only a change in ownership. This conversion does not, however, necessarily result in any corresponding change in the use or the character of the occupancy of the building.

Thus, we would conclude that the conversion of individual units in an apartment building to condominiums would not require that new building codes be applied to the same buildings, if the apartment building met all applicable building codes when constructed. In that case, the sale of the building as residential condominium units would not require the Construction Industries Commission to enforce the most current building code which may incorporate more stringent requirements.

**ATTORNEY GENERAL**

Toney Anaya, Attorney General