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5 Things To Know About Chicago's Affordable Housing Regs

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Pending litigation and recent amendments have shifted the calculus for multifamily developers in Chicago who need zoning changes to accomplish development projects. Recent amendments to Chicago's Affordable Requirements Ordinance (ARO) — Chicago Municipal Code 2-45-110 — effective October 2015, and additional provisions that take full effect in July 2016, are causing the change. Pending litigation about the constitutionality of the ARO, which should be decided soon, could also bring additional changes to this market sector.

Here are five things every multifamily developer in Chicago should know about the ARO as it exists today:

1. When Does the ARO Apply to a Particular Project?

The ARO — originally enacted in 2003, updated in 2007 and recently updated again in 2015 — applies to residential developments of 10 or more units when the property requires a zoning change that increases its density, allows a new residential use, involves city-owned land, receives financial assistance from the city or is rezoned to a planned development in a downtown zoning district. The updated ARO now also applies to existing planned developments with increased density zoning and residential projects that include transit-served location floor area premiums. The ARO applies to projects that are both rental and for-sale, but in varying ways. However, projects that were submitted prior to Oct. 13, 2015, and that obtain city council approval prior to July 13, 2016, are not bound by the recent amendments to the ARO.

2. What Does Compliance With the ARO Look Like?

Developers of properties subject to the ARO must dedicate 10 percent of the project's total units as "affordable" (or 20 percent if the project receives TIF or other city financing) for a period of 30 years. Developers can satisfy this requirement by either making the required number of units available for sale (on-site, or off-site under certain conditions) at "affordable" prices (capped at levels deemed affordable to households earning less than 60 percent, 80 percent or 100 percent of the Area Medium Income (AMI)) or by paying a fee in-lieu of construction of those units. No building permits will issue until the developer pays the required fee or records an encumbrance (an "affordable housing agreement") against the designated units binding them to the affordability requirements for 30 years. If a developer is providing rental units, the rental rates must also meet the city's definition of "affordable" (for households earning less than 60 percent of AMI; 50 percent if TIF assistance is provided), and the

developer must meet annual reporting requirements. If a project is converted from rental to "for-sale" (i.e., a condominium conversion), the 30-year affordability term will restart on the date of the initial condo unit sale and the required number of affordable units must be sold to income-qualified buyers. Buyers and tenants of affordable units must be approved by the Department of Planning and Development (DPD), and the developer must develop specialized marketing plans for those units.

However, the updated ARO no longer allows developers to completely satisfy the affordable requirements by paying a $100,000 in-lieu fee per unit (unless the project is a downtown rental development). The amended ARO now requires at least 1/4 of the required affordable units to be actually constructed (on or off-site), subject to approval by DPD. Once this obligation is met, developers may elect to meet the remainder of their ARO obligation by either constructing the balance of affordable units or paying the in-lieu fee ranging from $50,000 to $225,000 per required unit (depending on the location of the project in a specific development zone).

3. What are the Minimum Design and Construction Requirements?

Affordable units must meet a number of minimum design and construction requirements, all of which must be maintained for the 30-year affordability period. For instance, affordable units must be sufficiently mixed with market rate units, meet square footage minimums, comply with minimum amenities and finishes standards (which are not necessarily equivalent to those offered in market-rate units), fulfill parking rate requirements and abide by specific pricing formulas. The construction budget for an affordable unit must also meet or exceed the minimum in-lieu fee per unit. View a comprehensive list of these requirements.

4. What are the Penalties for Noncompliance?

The city may seek significant fines, injunctions or equitable relief to stop the violation. The city may also recover improperly obtained (or withheld) funds, and may pursue any other potential remedy against developers who fail to meet their ARO obligations. Further, developers who submit piecemeal applications to avoid meeting the ARO requirements, and are later determined to be subject to the ARO, will become subject to the above penalties.

5. The Constitutionality of Chicago's ARO is Under Scrutiny

In August 2015, a developer and trade association sued the city of Chicago on the basis that the ARO is unconstitutional on its face and as applied to the developer on a project located at the corner of Irving Park and Hoyne (Home Builders Association of Greater Chicago and Hoyne Development LLC v. City of Chicago, 1:15-cv-08268, Judge Rebecca R. Pallmeyer presiding). The project in question involved three buildings that that city construed as one larger project subject to the ARO — even though separately the buildings did not individually exceed 10 units. The plaintiffs contend the ARO is effectively a taking of private property without just compensation that violates the takings clauses of both the Illinois and U.S. Constitutions, divesting the developer of the difference between the market value of the units and the affordable price limit on those same units, or forcing rental of those units. The city has moved for dismissal of the lawsuit, arguing that the ARO is constitutional because it reflects a bargained-for exchange of zoning benefits provided to developers. Judge Pallmeyer's decision on the motion remains pending, but if the city's motion is denied, portions of the ARO may be invalidated.

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