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DENVER CITY COUNCIL IMPLEMENTS LEGISLATION ALLOWING STRUCTURES UP TO 16 STORIES IN RINO

Changes to municipal codes in Denver's RiNo neighborhood could spell opportunity for developers.

By Blair Lichtenfels, Bruce James, and Kate Stevenson of Brownstein Hyatt Farber Schreck

On Feb. 12, 2018, the Denver City Council voted 11-1 to approve changes to the Denver Zoning Code and Municipal Code with the intent of allowing property owners to build structures up to 16 stories tall in the RiNo neighborhood. The newly adopted ordinance creates two new overlay districts—the River North Design Overlay (DO-7) District and the 38th & Blake Station Area Overlay (IO-1) District—and provides height incentives allowing developers who provide affordable housing or community benefits, and implement new design criteria, to build higher than the maximum permitted height in the underlying zone district.

The DO-7 overlay establishes enhanced design review criteria for all structures located within its boundaries. Features include elimination of the minimum parking requirement within one-half mile of the 38th & Blake Light Rail Station, increased requirements for screening/mitigating structured parking and designation of the Platte River for treatment as a "primary" street.

The IO-1 overlay is the first "Incentive Overlay" district in Denver, and developers intending to embark on new projects in any rapidly developing portion of the city should understand the nuances of this new legislation. This is because the city intends to utilize it as a template for providing additional height incentives in exchange for affordable housing in other areas of Denver.

In the IO-1 overlay district, the amount of affordable units and incentive height linkage fee required for those portions of any building constructed above the base height permitted by the underlying zone district is four times the required units and amount of the city-wide linkage fee under the city's current affordable housing linkage fee ordinance, which was adopted in fall 2016 ("Linkage Fee Ordinance").


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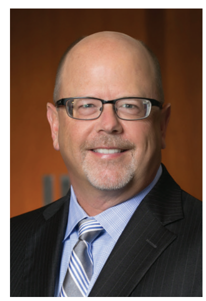
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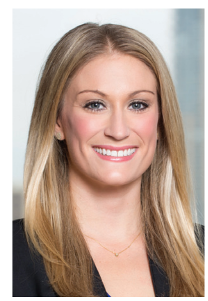
Stevenson

Complying with the Off-Site Build Requirement

Unlike the Linkage Fee Ordinance, residential and mixed-use residential in the IO-1 overlay must construct affordable on-site or off-site residential units of "similar tender" and are not permitted to pay a fee in lieu of building units. In other words, a market rate for-sale project must build (either on- or off-site) affordable for-sale units, and a market rate for-rent project must build (either on- or off-site) affordable for-rent units. Any off-site units must be within ¼ mile of the market-rate development. These requirements are challenging for market-rate for-sale developers, as inventory for affordable for-sale units in RiNo is de minimis.

Developers seeking to utilize the off-site build alternative must enter into a three-party escrow agreement with Denver's Office of Economic Development (OED) and the affordable developer. OED must sign off for the release of draws by the affordable developer based on satisfaction of construction milestones. Additionally, off-site units be constructed within 24 months of building permit issuance, or the escrowed funds will be released to OED. Further, temporary and permanent certificates of occupancy will not be issued to the market-rate development unless the affordable off-site units are marketed concurrently with, or prior to, the associated market-rate units. Compliance with these requirements complicates a market-rate developer's ability to secure customary equity and debt financing for a project, because completion and stabilization of the market-rate project is dependent upon completion of the affordable project, and the market-rate developer likely won't have control over completion of the affordable project.

Adoption of New Rules and Regulations to Implement New Legislation

The new legislation also authorizes the city to revise the initial rules and regulations adopted in July 2017 for the Linkage Fee Ordinance to address both the Linkage Fee Ordinance and the 38th & Blake Station Area Overlay, but until such new rules are adopted, the initial rules apply to both sets of legislation. No public draft of the new rules was available at the time of writing this article, so it is difficult to predict the impact of the new rules on developer requirements associated with increased building heights.

Although the impact of the new rules are unknown, they may extend the current required 20-year period of affordability—potentially to require a permanent affordability period. The new rules will also likely address the definition, and process for approval, of a "Community Benefits Agreement." In the IO-1 overlay, market-rate developers of "mixed-use non-residential" projects may construct projects at incentive heights without paying incentive height fees or building affordable units by entering into a Community Benefits Agreement providing community-serving uses within a development, but at the time of writing this article, little is known about the requirements or approval process for a Community Benefits Agreement.

Right of First Refusal

Moving forward, OED may take the position in the new rules that any new development utilizing the height incentives in the IO-1 overlay is receiving a "city subsidy" as defined in Denver's municipal code. This interpretation could result in imposition of a right of first refusal ("ROFR") on a project in favor of the city. Such ROFR would render any third-party agreements for purchase and sale of the project contingent upon providing a copy of the executed purchase agreement to the city, thus beginning a 120-day period during which the city must exercise the ROFR by delivering notice to the seller of its intent to purchase the property on economically similar terms to that of the contingent purchase agreement. After exercising the ROFR, the city must purchase the property within 120 days after signing a separate purchase agreement with the seller. This ROFR could make it difficult for market-rate developers to procure construction and permanent financing and impair the long-term marketability of a property.

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