

2008

## Legislating Affordable Housing in Chicago's Private Real Estate Market

Monica Carranza

Follow this and additional works at: <http://lawcommons.luc.edu/pilr>

 Part of the [Housing Law Commons](#)

---

### Recommended Citation

Monica Carranza, *Legislating Affordable Housing in Chicago's Private Real Estate Market*, 13 Pub. Interest L. Rptr. 16 (2008).  
Available at: <http://lawcommons.luc.edu/pilr/vol13/iss1/3>

This Feature is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Public Interest Law Reporter by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

# LEGISLATING AFFORDABLE HOUSING IN CHICAGO'S PRIVATE REAL ESTATE MARKET

*by* MONICA CARRANZA

As federal subsidies continue to dry up, localities are left scrambling to find solutions to complex national issues.<sup>1</sup> Affordable housing is one issue for which local governments have begun looking for alternative funding sources. One solution that has emerged is to require private real estate developers to create affordable housing in exchange for the right to build new residential developments.<sup>2</sup>

By legislating affordable housing in the private real estate market, local governments are attempting to preserve social and economic diversity among their citizenry. Moreover, cities protect their standing as regional economic engines by providing low and moderate-income families with affordable housing to ensure a diversified labor pool exists within the city.

“We know the linkage between housing and employers and the economic development it brings,” said Brian Bernadoni, Director of Government Affairs for the Chicago Association of Realtors (CAR).<sup>3</sup>

#### CHICAGO’S AFFORDABLE REQUIREMENTS ORDINANCE

In 2007, the City of Chicago expanded their Affordable Requirements Ordinance (ARO), originally passed in 2003.<sup>4</sup> Since its inception, the city’s ARO has produced 857 affordable units.<sup>5</sup> The City of Chicago’s Department of Housing (DOH) estimates, however, that approximately 480,000 households in Chicago are currently living in housing they cannot afford.<sup>6</sup> According to the DOH, the goal of the ARO expansion is to create as many as 1,000 new affordable units a year, almost six times the current level of production.<sup>7</sup>

Alderman Toni Preckwinkle of Chicago’s 4th ward believes the real impetus behind the city’s ARO expansion was to appease the affordable housing lobby, which has been advocating for Preckwinkle’s 15 percent affordable housing set-aside ordinance since 2004.<sup>8</sup>

“The City’s 10 percent ARO ordinance was introduced in 2006 to bolster the Mayor against attacks from the left that he wasn’t doing anything to create affordable housing for Chicago.”<sup>9</sup>

#### WHAT IS “AFFORDABLE”?

The ARO defines affordable housing as, “housing that is affordable to households earning up to 100 percent of the Chicago Primary Metropolitan Statistical Area (PMSA) median income,” also known as Area Median Income (AMI).<sup>10</sup> The Chicago PMSA median income is calculated from the household incomes of a six-county region, which includes Cook County.<sup>11</sup>

Based on the median income of this six-county region, 100 percent of the AMI for a family of four is \$75,400 per year.<sup>12</sup> According to the U.S. Department of Housing and Urban Development (HUD), housing costs should not exceed 30 percent of a family's household income.<sup>13</sup> Therefore, by Chicago's standards, a two-bedroom condo for a family of four earning \$75,400 per year would have to be priced at \$183,000 to be considered affordable.<sup>14</sup>

One issue that housing advocates have asked the city to address is the use of an AMI drawn from a six-county region that includes several affluent suburbs.<sup>15</sup> Whereas 100 percent of the AMI for this six-county region is equivalent to \$75,400 per year for a family of four, 100 percent of the AMI for a family of four in Chicago alone is only \$49,848 per year.<sup>16</sup> By using a six-county AMI the ARO calculates affordability for a family of four using a much higher salary figure than if the ARO used Chicago's AMI alone.

"[T]he [ARO] expansion proposal, although well intentioned, does not assist those who need it most: [Chicago's] working families," said Alderman Billy Ocasio of the 26th ward.<sup>17</sup>

Shortly before the expansion to the ARO was approved by the Chicago City Council Alderman Ocasio proposed an amendment that would have adjusted the ordinance's AMI calculation to Chicago's AMI income levels listed above.<sup>18</sup> Ocasio's amendment was rejected and the six-county region AMI remained the standard.<sup>19</sup>

In addition, Alderman Preckwinkle proposed lowering the ARO's standard of affordability from 100 percent of the AMI, or \$75,400 per year to 80 percent, (approximately \$60,000 per year) or even 60 percent (approximately \$45,000 per year).<sup>20</sup> Alderman Preckwinkle's amendment was also rejected.<sup>21</sup>

#### WHAT DOES THE ARO REQUIRE OF DEVELOPERS?

The ARO expansion requires 10 percent of for-sale, residential units to be sold at an affordable rate in developments of 10 units or more where there is either the sale of city-owned land, a zoning change that increases density or allows a residential use not previously allowed, or the building of a planned development.<sup>22</sup>

Alternatively, if a developer prefers not to build on-site affordable units, the developer has the option of making a payment in lieu equal to \$100,000 per affordable unit not built.<sup>23</sup> This payment is made to Chicago's Affordable Housing Opportunity Fund.<sup>24</sup> This means that if a developer buys city-owned land to build 40 new residential units, the developer will be required to provide four affordable units on-site, or pay the city an "in lieu of fee" of \$400,000.

Finally, a developer will be permitted to build less than the required 10 percent of on-site affordable units if the developer makes the affordable units available to individuals making only 80 percent of the AMI.<sup>25</sup>

#### WHO REALLY BENEFITS FROM THE ARO EXPANSION?

Former DOH Commissioner Jack Markowski admits the ARO was geared toward, "moderately priced, owner-occupied affordable housing."<sup>26</sup>

"This expansion was not intended for very low income households earning less than \$20,000 per year. . . ARO affordable housing units are intended for young households or working people who are just starting out," said Markowski.<sup>27</sup>

Yet, where the ARO requires on-site affordable units to be offered at 100 percent of AMI, payments in lieu (of building units on-site) are deposited into Chicago's Affordable Housing Opportunity Fund.<sup>28</sup> Sixty percent of this fund is earmarked for Chicago's Low-Income Housing Trust Fund, which provides rental assistance to individuals making less than \$20,000 per year.<sup>29</sup> The remaining 40 percent subsidizes DOH programs that help create both new affordable for-sale and rental housing.<sup>30</sup>

Consequently, according to Markowski, "the ARO will indirectly benefit low-income households through payments in lieu made to the Affordable Housing Opportunity Fund."<sup>31</sup>

#### WHO IS RESPONSIBLE FOR PROVIDING AFFORDABLE HOUSING IN CHICAGO?

The city contends more affordable housing is needed, but whose responsibility is it to build this housing? And if the city obligates the private sector to construct affordable housing in exchange for building new residential develop-

ments, does that requirement constitute an unwarranted taking of private property under federal and/or Illinois law?

In Illinois, when government takes private property for a public purpose they must meet the constitutional standards laid out by both the United States and Illinois Supreme Courts.<sup>32</sup> According to the U.S. Supreme Court, when reviewing whether a government's taking of property is constitutional, courts must determine whether there is an "essential nexus" and "rough proportionality" between the government taking and the "legitimate state interest" being advanced.<sup>33</sup> According to the landmark Supreme Court case of *Dolan v. Tigard*, "the government may not require a person to give up a constitutional right. . .in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property."<sup>34</sup>

In *Pioneer Trust & Savings Bank v. Village of Mount Prospect*, the Illinois Supreme Court went one step further and adopted the more stringent standard of "specifically and uniquely attributable".<sup>35</sup> The question here is whether Chicago's expanded ARO satisfies Illinois' higher legal standard?

Peter Scozy of the Metropolitan Planning Council (MPC) and Alderman Preckwinkle don't believe the ARO is an illegal taking and feel that real estate developers have a responsibility to provide affordable housing to Chicagoans.<sup>36</sup>

"The city has a right to capitalize on the land value it helped create through smart government leadership," said Scozy.<sup>37</sup> "As the developers benefit from the land value the city has built, they should take part in helping supply the affordable housing Chicago needs."<sup>38</sup>

When asked whether the MPC was concerned that Chicago's ARO may be an illegal taking of property, Scozy said, "the city is asking the private developer to take some of the value of their land and put it toward a public purpose. This is a good long-term policy solution to the affordable housing crisis."<sup>39</sup>

Alderman Preckwinkle believes the expansion of the city's ARO is a step in the right direction, but it does not go far enough.<sup>40</sup>

On the issue of whether either the city's ARO or Preckwinkle's set-aside ordinances could be considered illegal takings, she said, "if the city can require developers to pay for green roofs in order to mitigate the effects of global

warming, then the city can require developers to create more affordable housing for our lower income citizens.”<sup>41</sup>

Even though the CAR was one of the first supporters of the city’s proposed ARO expansion, Brian Bernadoni believes that market forces and not government intervention should dictate the construction of affordable housing.<sup>42</sup> Bernadoni further maintains that the private sector is constructing affordable housing in Chicago without government interference.<sup>43</sup>

“The listings in the MLS [Multiple Listing Service] suggest that affordable units are attainable in Chicago, but for the issue of the consumers taste,” said Bernadoni. “In May of 2007, of the approximately 27,000 listings in the City of Chicago almost 6,000 were below \$200,000 and close to 3,000 were below \$149,000. There is product in Chicago. Consumers’ choice is just not going to the communities where it exists.”<sup>44</sup>

Of the three ARO triggers to provide affordable housing, buying city-owned land, upzoning or building a planned development, Bernadoni believes “requiring developers to provide affordable housing in exchange for buying market-rate, city-owned land presents the biggest potential takings issue.”<sup>45</sup>

#### WHO REALLY PAYS FOR THE CONSTRUCTION OF AFFORDABLE HOUSING IN CHICAGO?

Markowski maintains the expansion of the ARO is a good compromise because everyone will eventually share the responsibility of creating more affordable housing units throughout Chicago.<sup>46</sup> First, he predicts land values will need to be adjusted in response to the higher development costs imposed by the ARO.<sup>47</sup>

“The cost of building materials and the sale price of condos are fixed by the market, but land values are negotiable,” said Markowski.<sup>48</sup> “The hope is that the ARO will moderate skyrocketing land values by forcing property sellers to lower their asking price in order to accommodate new development.”<sup>49</sup>

Second, Markowski asserts that if a developer is looking to buy city-owned land and can’t make a project work because of the added costs of providing 10

percent affordability, the city can either sell the land at a discount or subsidize another part of the project to help offset the developer's costs.<sup>50</sup>

When asked if by subsidizing increased development costs the city and not the Developer is really footing the bill for the creation of new affordable housing, Markowski responded that the city may be bearing some of the cost to build affordable units, "but new development generates new property taxes, so in the end the city is getting something in return. We may not be getting a whole loaf of bread, but we are getting half a loaf, and half a loaf is better than no loaf at all."<sup>51</sup>

Third, when developers' costs go up, instead of cutting into their own profit margin, many times they find a way to pass additional costs off on buyers by padding residential unit prices.<sup>52</sup> Under Chicago's ARO, if a developer of a 10-unit condo building pays a \$100,000 fee in lieu instead of building an on-site affordable unit, they can spread that cost over the 10 units by inflating each condo unit price by \$10,000.<sup>53</sup>

However, if the market won't bear the extra \$10,000 a developer may have to cut into their profit margin.<sup>54</sup> Bernadoni doubts that would happen.<sup>55</sup> "The city assumes developers will accept lower profit margins and development will continue. But developers are walking away from Chicago and going elsewhere," said Bernadoni.<sup>56</sup>

#### WILL CHICAGO'S ARO SURVIVE?

If ordinances like Chicago's become more popular, does that mean local governments are creating a "pay to play" atmosphere where developers are only permitted to build in exchange for affordable housing units? More specifically, does Chicago's ARO violate local developers' constitutional rights against the unwarranted taking of private property?

Where is the "essential nexus" and "rough proportionality" between the market-rate residential development built in an affluent Chicago neighborhood where a developer opts to pay the \$100,00 fee in lieu and the affordable units built with that money in the less affluent neighborhood? Can Chicago truly claim the affordable units created in the low-income neighborhood are "specif-

ically and uniquely attributable” to the new market-rate, residential development in the affluent community?

We may never know the answer to this question unless the Affordable Requirements Ordinance is challenged, but until that happens Chicago will continue to harness the private real estate market to help supply the overwhelming demand for affordable housing in the city.

---

## NOTES

1 <http://www.csac.counties.org/images/public/Advocacy/naco%2008%20election%20project/cm—CDBG%20HOME.pdf>, *Community Development Block Grant Program and HOME Investment Partnerships Program Fact Sheet*, National Association of Counties; [http://www.nlada.org/Training/Train\\_Civil/Equal\\_Justice/2005\\_Materials/98\\_2005\\_Lang\\_Handout](http://www.nlada.org/Training/Train_Civil/Equal_Justice/2005_Materials/98_2005_Lang_Handout); Sadia Latifi, *Federal Cuts to Effect Low-Income Housing*, Columbia Spectator, November 10, 2006

2 See Fair Housing Act, N.J. STAT. ANN. § 52:27D (1985); Exec. Order of Mayor Thomas M. Merino, An Order Relative to the Provision of Mitigation by Dev. Projects In Boston (2000); Inclusionary Affordable Hous. Regulations, San Diego Mun. Code Ch. 14, Art. 2, Div. 13 (2003).

3 Interview with Brian Bernardoni, Dir. of Gov't Affairs, Chicago Ass'n of Realtors, in Chicago, IL (Sept. 20, 2007).

4 Affordable Requirements Ordinance, Mun. Code of Chicago, Title 2, Chapter 44-090; Title 4, Chapter 40-065 & 070; Title 17, Chapter 4-1004, Chapter 13-302 and Chapter 13-0613.

5 Memorandum from the City of Chicago's Department of Housing, Affordable Requirements Ordinance (ARO) Expansion (2007) (on file with author).

6 Memorandum from the City of Chicago's Dept. of Hous., Leveraging the Private Market: Proposed Changes to the Affordable Requirements Ordinance (2007) (on file with author).

7 Memorandum from the City of Chicago's Dept. of Hous., *supra* note 5.

8 Interview with Toni Preckwinkle, Alderman, 4th Ward, in Chicago, IL (Sept. 20, 2007).

9 *Id.*

10 Affordable Requirements Ordinance, *supra* note 4.

11 Ald. Billy Ocasio, *Help working families*, Chi. Sun-Times, May 9, 2007 at 44.

12 *Id.*

13 See <http://www.hud.gov/>.

14 Fran Spielman, *Affordable housing plan wins*, Chicago Sun-Times, May 15, 2007 at 47.

15 Ald. Billy Ocasio, *Help working families*, *supra* note 11.

16 *Id.*

17 *Id.*

18 Dan Mihalopoulos, *Daley affordable-housing plan backed*, Chi. Trib., May 2, 2007 at 7.

19 *Id.*

20 Fran Spielman, *Affordable housing plan wins*, *supra* note 14.

21 *Id.*

22 Affordable Requirements Ordinance, *supra* note 4.

23 *Id.*

24 *Id.*

- 25 *Id.*
- 26 Telephone interview with Jack Markowski, former Comm. of the City of Chicago's Dep't of Hous., in Chicago, IL (Sept. 21, 2007).
- 27 *Id.*
- 28 *Id.*
- 29 *Id.*
- 30 *Id.*
- 31 *Id.*
- 32 See *Nollan v. Cal. Coastal Comm'n*, 107 S. Ct. 3141 (1987); *Dolan v. Tigard*, 114 S. Ct. 2309 (1994).
- 33 *Nollan v. Cal. Coastal Comm'n*, 107 S. Ct. at 3149; *Dolan v. Tigard*, 114 S. Ct. at 2319.
- 34 *Dolan v. Tigard*, 114 S. Ct. at 2311-12.
- 35 *Pioneer Tr. and Sav. Bank v. Vill. of Mount Prospect*, 176 N.E.2d 799, 802 (1961); *Bd. of Educ. v. Surety Dev.*, 347 N.E.2d 149, 154 (1975).
- 36 Interview with Peter Scozy, Vice President of External Relations, Metropolitan Planning Council, in Chicago, IL (Sept. 19, 2007); Interview with Toni Preckwinkle, *supra* note 8.
- 37 Interview with Peter Scozy, Vice President of External Relations, Metropolitan Planning Council, in Chicago, IL (Sept. 19, 2007).
- 38 *Id.*
- 39 *Id.*
- 40 Interview with Toni Preckwinkle, *supra* note 8.
- 41 *Id.*
- 42 Interview with Brian Bernardoni, *supra* note 3.
- 43 *Id.*
- 44 *Id.*
- 45 *Id.*
- 46 Telephone interview with Jack Markowski, *supra* note 26.
- 47 *Id.*
- 48 *Id.*
- 49 *Id.*
- 50 *Id.*
- 51 *Id.*
- 52 *Id.*
- 53 *Id.*
- 54 *Id.*
- 55 Interview with Brian Bernardoni, *supra* note 3.
- 56 *Id.*